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1881-1885

Editor
G. F. L. BRIDGMAN, ESQ., O.B.E.
of the Middle Temple, Barrister-at-Law

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Assistant Editors

R. D. H. OSBORNE, ESQ.
of Gray's Inn, Barrister-at-Law

MISS WENDY SHOCKETT
of Gray's Inn, Barrister-at-Law

G. A. KIDNER, ESQ.
of the Middle Temple, Barrister-at-Law

MISS M. G. THOMAS
of Gray's Inn, Barrister-at-Law

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N. STEWART-PEARSON, ESQ.
of Gray's Inn, Barrister-at-Law

ANTHONY SCRIVENER, ESQ.
of Gray's Inn, Barrister-at-Law

MRS. ELIZABETH IWI
of Gray's Inn, Barrister-at-Law

DAVID IWI, ESQ.
of Gray's Inn, Barrister-at-Law

CASES REPORTED IN THIS VOLUME

	PAGE		PAGE
ABOULOFF <i>v.</i> OPPENHEIMER & Co. (1882) [C.A.] ..	307	EDGINGTON <i>v.</i> FITZMAURICE AND OTHERS (1885) [C.A.] ..	856
ABRATH <i>v.</i> NORTH EASTERN RAIL. CO. (1883) [C.A., H.L.] ..	614	ERRINGTON <i>v.</i> METROPOLITAN DISTRICT RAIL. Co. (1882) [C.A.] ..	528
AGNEW <i>v.</i> MURRAY (1884) [H.L.] ..	328	EXMOUTH, VISCOUNT, <i>Re</i> VISCOUNT EX- MOUTH <i>v.</i> PRAED (1883) [Ch.D.] ..	647
ALHAMBRA, THE (1881) [C.A.] ..	707	FEARON <i>v.</i> EARL OF AYLESFORD (1884) [C.A.] ..	778
ALLOWAY <i>v.</i> STEERE (1882) [Q.B.D.] ..	164	FERNIS <i>v.</i> CARR (1885) [Ch.D.] ..	1033
ANDERSON, TRITTON & Co. <i>v.</i> OCEAN STEAM- SHIP Co. (1884) [H.L.] ..	663	FLAVELL, <i>Re</i> MURRAY <i>v.</i> FLAVELL (1883) [C.A.] ..	267
ANDROS, <i>Re</i> ANDROS <i>v.</i> ANDROS (1883) [Ch.D.] ..	467	FOAKES <i>v.</i> BEER (1884) [H.L.] ..	106
ANGUS <i>v.</i> McLACHLAN (1883) [Ch.D.] ..	845	FORBES <i>v.</i> JACKSON (1882) [Ch.D.] ..	863
APPLEBY <i>v.</i> FRANKLIN (1885) [Q.B.D. DIVL. CT.] ..	1169	FOWLER <i>v.</i> BARSTOW (1881) [C.A.] ..	300
ATTORNEY-GENERAL (ON THE RELATIONS OF DEVERILL) <i>v.</i> DORKING UNION GUARDIAN (1882) [C.A.] ..	320	FRESTON, <i>Re</i> (1883) [C.A.] ..	889
ATTORNEY-GENERAL <i>v.</i> SHREWSBURY (KINGS- LAND) BRIDGE Co. (1882) [Ch.D.] ..	157	G. <i>v.</i> M. (1885) [H.L.] ..	397
BAILEY <i>v.</i> BAILEY (1884) [C.A.] ..	1167	GANDY <i>v.</i> GANDY (1882) [C.A.] ..	376
BALLARD <i>v.</i> TOMLINSON AND ANOTHER (1885) [C.A.] ..	688	GARRUD, <i>Re</i> , <i>Ex p.</i> NEWITT (1881) [C.A.] ..	1039
BARNES <i>v.</i> DOWLING (1881) [Q.B.D.] ..	522	GERMAN DATE COFFEE Co., LTD., <i>Re</i> , (1882) [C.A.] ..	372
BEATTY AND OTHERS <i>v.</i> GILLBANKS (1882) [Q.B.D. DIVL. CT.] ..	559	GILLINGHAM <i>v.</i> WALKER (1881) [Q.B.D. DIVL. CT.] ..	710
BLAKE <i>v.</i> BLAKE. IN THE GOODS OF GUNSTON (1882) [C.A.] ..	870	GLEADOW <i>v.</i> LEETHAM (1882) [Ch.D.] ..	472
BLIGHT <i>v.</i> HARTNOLL (1883) [C.A.] ..	660	GLENAVON (OWNERS) <i>v.</i> THE GLENFRUIN (OWNERS). THE GLENFRUIN (1885) [ADM.] ..	461
BRIDGE <i>v.</i> SAVAGE (1885) [C.A.] ..	1065	GLYN, MILLS & Co. <i>v.</i> EAST AND WEST INDIA DOCK Co. (1882) [H.L.] ..	674
BRIMELOW <i>v.</i> MURRAY (1884) [H.L.] ..	328	GOODMAN'S TRUSTS, <i>Re</i> , (1881) [C.A.] ..	1138
BRUNSDEN <i>v.</i> HUMPHREY (1884) [C.A.] ..	357	GOODMAN AND ANOTHER <i>v.</i> SALTASH COR- PORATION (1882) [H.L.] ..	1076
BUCKINGHAM <i>v.</i> SURREY AND HANTS CANAL Co. (1882) [Q.B.D.] ..	393	GRAFF <i>v.</i> EVANS (1884) [Q.B.D. DIVL. CT.] ..	211
CALEDONIAN RAIL. Co. <i>v.</i> WALKER'S TRUSTEES (1882) [H.L.] ..	592	GREER <i>v.</i> YOUNG (1883) [C.A.] ..	513
CAPITAL AND COUNTIES BANK, LTD. <i>v.</i> HENTY & SON (1882) [H.L.] ..	86	GRIFFITHS <i>v.</i> EARL OF DUDLEY (1882) [Q.B.D. DIVL. CT.] ..	450
CARNAC, <i>Re</i> , <i>Ex p.</i> SIMMONDS (1885) [C.A.] ..	895	GUNSTON, IN THE GOODS OF. BLAKE <i>v.</i> BLAKE (1882) [C.A.] ..	870
CARTER <i>v.</i> WHITE (1883) [C.A.] ..	921	HAIGH AND OTHERS <i>v.</i> ROYAL MAIL STEAM PACKET Co., LTD. (1883) [C.A.] ..	177
CASTELLAIN <i>v.</i> PRESTON AND OTHERS (1883) [C.A.] ..	493	HARDY <i>v.</i> ATHERTON (1881) [Q.B.D. DIVL. CT.] ..	695
CASTRO <i>v.</i> REGINAM (1881) [H.L.] ..	429	HARVEY <i>v.</i> CROYDON UNION RURAL SANITARY AUTHORITY (1884) [C.A.] ..	1031
CHANDLER <i>v.</i> POCOCK (1881) [C.A.] ..	296	HARVEY <i>v.</i> FARNIE (1882) [H.L.] ..	52
CHESTERFIELD'S TRUSTS, <i>Re</i> (1883) [Ch.D.] ..	737	HARVEY <i>v.</i> HARVEY (1884) [Ch.D.] ..	1129
CITIZENS INSURANCE Co. OF CANADA <i>v.</i> PAR- SONS (1881) [P.C.] ..	1179	HARVEY <i>v.</i> PRINCIPAL AND ANTIENTS OF BARNARD'S INN (1881) [Ch.D.] ..	1061
CLARK <i>v.</i> REGINAM (1884) [Q.B.D. DIVL. CT.] ..	766	HAVEN GOLD MINING Co., <i>Re</i> , (1882) [C.A.] ..	585
CLARK & SON <i>v.</i> CULLEN AND ANOTHER (1882) [Q.B.D.] ..	1008	HEAVEN <i>v.</i> PENDER (1883) [C.A.] ..	85
CLARKE <i>v.</i> BRADLAUGH (1881) [C.A.] ..	1002	HICKS <i>v.</i> FAULKNER (1881) [Q.B.D. DIVL. CT.] ..	187
COLLINS <i>v.</i> STIMSON (1883) [Q.B.D.] ..	382	HODGSON, <i>Re</i> BECKETT <i>v.</i> RAMSDALE (1885) [C.A.] ..	931
COLLYER <i>v.</i> ISAACS (1881) [C.A.] ..	828	HOWE AND ANOTHER <i>v.</i> SMITH (1884) [C.A.] ..	201
COOPER <i>v.</i> CRABTREE (1882) [C.A.] ..	1057	HUGHES <i>v.</i> PERCIVAL (1883) [H.L.] ..	44
CORY & SONS <i>v.</i> BURR (1883) [H.L.] ..	414	HURST <i>v.</i> HURST AND OTHERS (1882) [C.A.] ..	903
COTTON'S TRUSTEES AND LONDON SCHOOL BOARD, <i>Re</i> (1882) [Ch.D.] ..	926	HUTTON, <i>Re</i> , <i>Ex p.</i> BENWELL (1884) [C.A.] ..	394
COWBURN, <i>Re</i> , <i>Ex p.</i> FIRTH (1882) [C.A.] ..	987	HYMAN <i>v.</i> NYE (1881) [Q.B.D. DIVL. CT.] ..	183
CRABTREE <i>v.</i> ROBINSON (1885) [Q.B.D. DIVL. CT.] ..	1109	INGLIS <i>v.</i> STOOK (1885) [H.L.] ..	668
CUNDY <i>v.</i> LE COCQ (1884) [Q.B.D. DIVL. CT.] ..	412	INMAN STEAMSHIP Co. <i>v.</i> BISCHOFF (1882) [H.L.] ..	440
CURTOYS, <i>Re</i> , <i>Ex p.</i> PILLERS (1881) [C.A.] ..	723	JACKSON <i>v.</i> SMITH (1884) [Ch.D.] ..	1114
DAHL <i>v.</i> NELSON, DONKIN & Co. (1881) [H.L.] ..	572	JACOBS, MARCUS & Co. <i>v.</i> CREDIT LYONNAIS (1884) [C.A.] ..	151
DALLOW <i>v.</i> GARROLD, <i>Ex p.</i> ADAMS (1884) [C.A.] ..	458	JENNINGS <i>v.</i> JORDAN AND ANOTHER (1881) [H.L.] ..	475
DALTON <i>v.</i> ANGUS & Co. (1881) [H.L.] ..	1	JONES, <i>Re</i> , <i>Ex p.</i> JONES (1881) [C.A.] ..	881
DAVIS <i>v.</i> HARFORD (1882) [Ch.D.] ..	930	JONES AND ANOTHER, <i>Re</i> , <i>Ex p.</i> NICHOLS (1883) [C.A.] ..	170
DAWKINS <i>v.</i> ANTROBUS AND OTHERS (1881) [C.A.] ..	126	JUDKIN'S TRUSTS, <i>Re</i> (1884) [Ch.D.] ..	979
DE LA WARR (EARL) <i>v.</i> MILES AND ANOTHER (1881) [C.A.] ..	252	KEARSELY <i>v.</i> PHILIPS AND ANOTHER (1883) [C.A.] ..	727
DUDLEY CORPORATION AND EARL OF DUD- LEY'S TRUSTEES, <i>Re</i> (1881) [C.A.] ..	565	KLOEBE, <i>Re</i> KANNREUTHER <i>v.</i> GEISELBRECHT (1884) [Ch.D.] ..	1120
EDGE <i>v.</i> BOILEAU AND OTHERS (1885) [Q.B.D.] ..	510	KNIGHT, <i>Re</i> , <i>Ex p.</i> ISHERWOOD (1882) [C.A.] ..	120
		LAMB <i>v.</i> MUNSTER (1882) [Q.B.D.] ..	465

	PAGE		PAGE
LANGRISH <i>v.</i> ARCHER (1882) [Q.B.D.]	913	R. <i>v.</i> DUDLEY & STEPHENS (1884) [Q.B.D. DIVL. CT.]	61
LEIGH AND ANOTHER <i>v.</i> DICKSON (1884) [C.A.]	1099	R. <i>v.</i> GANZ (1882) [Q.B.D. DIVL. CT.]	621
LENNOX, <i>Re, Ex p.</i> LENNOX (1885) [C.A.]	1025	R. <i>v.</i> LABOUCHERE (1884) [Q.B.D.]	959
LESLIE, <i>Re, LESLIE v.</i> FRENCH (1883) [CH.D.]	274	R. <i>v.</i> McDONALD (1885) [C.C.R.]	1063
LETTERSTEDT <i>v.</i> BROERS AND ANOTHER (1884) [P.C.]	882	R. <i>v.</i> MANNING (1883) [Q.B.D. DIVL. CT.]	852
LEVY, <i>Re, Ex p.</i> WALTON (1881) [C.A.]	548	R. <i>v.</i> MARTIN (1881) [C.C.R.]	699
LILLEY <i>v.</i> DOUBLEDAY (1881) [Q.B.D. DIVL. CT.]	406	R. <i>v.</i> NASH, <i>Re, CAREY</i> (1883) [C.A.]	174
LINTON, <i>Re, Ex p.</i> LINTON (1885) [C.A.]	867	R. <i>v.</i> WELLARD (1884) [C.C.R.]	1018
LONDON AND COUNTY BANKING CO. <i>v.</i> GROOMER (1881) [Q.B.D.]	787	READ <i>v.</i> ANDERSON (1884) [C.A.]	1104
LONDON AND COUNTY BANKING CO. <i>v.</i> RATCLIFFE (1881) [H.L.]	486	REDGRAVE <i>v.</i> HURD (1881) [C.A.]	77
LONDON AND SOUTH-WESTERN RAIL. CO. <i>v.</i> GOMM (1882) [C.A.]	1190	REYNOLDS, <i>Re, Ex p.</i> REYNOLDS (1882) [C.A.]	997
LONDON, BRIGHTON AND SOUTH COAST RAIL. CO. <i>v.</i> TRUMAN AND OTHERS (1885) [H.L.]	134	ROBERTS <i>v.</i> DEATH (1881) [C.A.]	849
LONDON SCOTCH BENEFIT SOCIETY <i>v.</i> CHORLEY AND OTHERS (1884) [C.A.]	1111	ROBERTS AND OTHERS <i>v.</i> ROBERTS AND ANOTHER (1884) [C.A.]	1163
LUDGATER <i>v.</i> LOVE (1881) [C.A.]	270	ROBERTSON <i>v.</i> ROBERTSON AND FAVAGROSSA (1881) [C.A.]	318
LYELL <i>v.</i> KENNEDY (No. 1) (1883) [H.L.]	798	ROBINSON <i>v.</i> OMMANNEY (1883) [C.A.]	265
LYELL <i>v.</i> KENNEDY (No. 2) (1883) [H.L.]	807	ROLLS <i>v.</i> MILLER (1884) [C.A.]	915
LYELL <i>v.</i> KENNEDY (No. 3) (1884) [C.A.]	814	ROSE <i>v.</i> ROSE (1883) [C.A.]	194
LYTTON, EARL OF <i>v.</i> DEVEY (1884) [CH.D.]	1135	RUDOW <i>v.</i> GREAT BRITAIN MUTUAL LIFE ASSURANCE SOCIETY (1881) [C.A.]	1124
MADDISON <i>v.</i> ALDERSON (1883) [H.L.]	742	SANDERS <i>v.</i> TEAPE AND ANOTHER (1884) [Q.B.D.]	1016
MANCHESTER CORPORATION <i>v.</i> LYONS BROTHERS (1882) [C.A.]	1090	SANDERS AND ANOTHER <i>v.</i> SANDERS (1881) [C.A.]	197
MARSDEN, <i>Re, BOWDEN v.</i> LAYLAND. GIBBS <i>v.</i> LAYLAND (1884) [CH.D.]	993	SAYERS <i>v.</i> COLLYER (1884) [C.A.]	385
MARSHALL <i>v.</i> BERRIDGE (1881) [C.A.]	908	SCARF <i>v.</i> JARDINE (1882) [H.L.]	651
MAUDE AND OTHERS <i>v.</i> BAILDON LOCAL BOARD (1883) [Q.B.D.]	1036	SCOTT <i>v.</i> SAMPSON (1882) [Q.B.D. DIVL. CT.]	628
MERSEY STEEL AND IRON CO., LTD. <i>v.</i> NAYLOR, BENSON & CO. (1884) [H.L.]	365	SCOTT AND ANOTHER <i>v.</i> MATTHEW BROWN & CO., LTD. (1884) [CH.D.]	1043
METROPOLITAN ASYLUM DISTRICT MANAGERS <i>v.</i> HILL AND OTHERS (1881) [H.L.]	536	SEWARD <i>v.</i> THE VERA CRUZ (OWNER), THE VERA CRUZ (1884) [H.L.]	216
METROPOLITAN BANK, LTD. AND ANOTHER <i>v.</i> POOLEY (1885) [H.L.]	949	SEWELL & NEPHEW <i>v.</i> BURDICK (1884) [H.L.]	223
MILLEN <i>v.</i> BRASCH & CO. (1882) [C.A.]	967	SHEPARD AND ANOTHER <i>v.</i> JONES (1882) [C.A.]	608
MILLER <i>v.</i> HUDDLESTONE (1882) [CH.D.]	894	SHUBROOK AND ANOTHER <i>v.</i> TUFFNELL (1882) [Q.B.D. DIVL. CT.]	180
MORRELL AND OTHERS <i>v.</i> MORRELL AND OTHERS (1882) [DIV.]	642	SINCLAIR, <i>Re, Ex p.</i> PAYNE (1885) [Q.B.D.]	173
MUNSTER <i>v.</i> LAMB (1883) [C.A.]	791	SKINNER <i>v.</i> CITY OF LONDON MARINE INSURANCE CORPORATION (1885) [C.A.]	167
MURRAY <i>v.</i> SCOTT (1884) [H.L.]	328	SMALLEY AND ANOTHER <i>v.</i> HARDINGE (1881) [C.A.]	734
NICOLL <i>v.</i> FENNING AND ANOTHER (1881) [CH.D.]	161	SMITH <i>v.</i> CHADWICK AND OTHERS (1884) [H.L.]	242
NICHOLSON, <i>Re, Ex p.</i> QUINN (1883) [Q.B.D.]	294	SOUTHAM, <i>Re, Ex p.</i> LAMB (1881) [C.A.]	391
NIELSEN & CO. <i>v.</i> WAIT, JAMES & CO. (1885) [C.A.]	144	STANDING <i>v.</i> BOWRING (1885) [C.A.]	702
NORMANTON GAS CO. <i>v.</i> POPE AND PEARSON, LTD. (1883) [C.A.]	503	STEDHAM, IN THE GOODS OF (1881) [PROB.]	410
NORTHERN COUNTIES OF ENGLAND FIRE INSURANCE CO. <i>v.</i> WHIPP (1884) [C.A.]	941	STEEL AND ANOTHER <i>v.</i> DIXON AND OTHERS (1881) [CH.D.]	729
OAK PITTS COLLIERY CO., <i>Re</i> , (1882) [C.A.]	1157	STOOMVAART MAATSCHAPPIJ NEDERLAND <i>v.</i> PENINSULAR AND ORIENTAL STEAM NAVIGATION CO. (1882) [H.L.]	342
PADSTOW TOTAL LOSS AND COLLISION ASSURANCE ASSOCIATION, <i>Re</i> , (1882) [C.A.]	422	STUDDS <i>v.</i> WATSON (1883) [CH.D.]	977
PAGET <i>v.</i> MARSHALL (1884) [CH.D.]	290	SUNDERLAND CORPORATION <i>v.</i> ALCOCK (1882) [CH.D.]	1002
PALMER <i>v.</i> JOHNSON (1884) [C.A.]	719	TATE & SONS <i>v.</i> HYSLOP (1885) [C.A.]	875
PATMAN <i>v.</i> HARLAND (1881) [CH.D.]	637	TAURINE CO. LTD., <i>Re, BECKWITH AND ROBINSON'S CASE</i> (1883) [C.A.]	772
PEARSON <i>v.</i> HEYS (1881) [Q.B.D. DIVL. CT.]	554	TEMPEST <i>v.</i> LORD CAMOYS (1882) [C.A.]	836
PERUVIAN GUANO CO. <i>v.</i> BOCKWOLDT AND OTHERS (1883) [C.A.]	715	THOMPSON, <i>Re</i> , (1885) [C.A.]	898
PINK, <i>Re</i> , (1883) [C.A.]	984	TILLET AND ANOTHER <i>v.</i> NIXON AND ANOTHER (1883) [CH.D.]	427
PLATING CO. <i>v.</i> FARQUHARSON (1881) [C.A.]	303	TITTERTON <i>v.</i> COOPER (1882) [C.A.]	757
PONSONBY <i>v.</i> PONSONBY (1884) [C.A.]	1118	TOLLEMACHE, <i>Re, Ex p.</i> ANDERSON (1885) [C.A.]	1048
POUNTNEY <i>v.</i> CLAYTON (1883) [C.A.]	280	TRENCH, <i>Re, Ex p.</i> BRANDON (1884) [C.A.]	525
POWERS, <i>Re, LINDSELL v.</i> PHILLIPS (1885) [C.A.]	971	VALLANCE <i>v.</i> FALLE (1884) [Q.B.D.]	519
POYSER <i>v.</i> MINORS (1881) [C.A.]	1173	VON BROCKDORFF <i>v.</i> MALCOLM (1885) [CH.D.]	1068
PRIESTMAN <i>v.</i> THOMAS AND ANOTHER (1884) [C.A.]	287	WALLACE, <i>Re, Ex p.</i> WALLACE (1884) [C.A.]	1047
PUBLIC WORKS LOANS COMMISSIONERS <i>v.</i> ANGUS & CO. (1881) [H.L.]	1	WALTON <i>v.</i> EDGE (1884) [H.L.]	1051
QUEEN INSURANCE CO. <i>v.</i> PARSONS (1881) [P.C.]	1179	WEBB <i>v.</i> STENTON AND OTHERS (1883) [C.A.]	312
R. <i>v.</i> COX AND ANOTHER (1884) [C.C.R.]	68	WHITMORE <i>v.</i> FARLEY (1881) [C.A.]	711
		WILLIAMS, <i>Re, ANDREW v.</i> WILLIAMS (1885) [C.A.]	1009
		WILLIAMS <i>v.</i> WILLIAMS (1882) [CH.D.]	840
		WITTON, <i>Re, Ex p.</i> ARNAL (1883) [C.A.]	975

THE
ALL ENGLAND
LAW REPORTS
REPRINT

PUBLIC WORKS COMMISSIONERS *v.* ANGUS & CO.
DALTON *v.* ANGUS & CO.

[HOUSE OF LORDS (Lord Selborne, L.C., Lord Penzance, Lord Coleridge, Lord Blackburn and Lord Watson), November 13, 14, 17, 1879, November 18, 19, 22, 23, 1880, March 17, June 14, 1881]

[Reported 6 App. Cas. 740; 50 L.J.Q.B. 689; 44 L.T. 844;
46 J.P. 132; 30 W.R. 191]

Easement—Support—Adjoining land—Right to support for building—Twenty years' enjoyment of support.

A right to lateral support from adjoining land is properly called an easement and can be acquired by twenty or more years' uninterrupted enjoyment, *nec vi, nec clam*, nor by consent or agreement, for a building proved to have been erected at the commencement of that time. It is an easement, not purely negative, capable of being granted and also of being interrupted, and so it falls within s. 2 of the Prescription Act, 1832.

Per LORD BLACKBURN: The right is, I think, more properly described as a right of property, which the owner of the adjoining land is bound to respect, than as an easement, or a servitude *ne facias*, putting a restriction on the mode in which the neighbour is to use his land, but whether it is to be called by one name or the other is, I think, more a question as to words than as to things.

Negligence—Contractor—Liability of employer for contractor's negligence—Duty of employer to see work properly done—Work contracted for necessarily attended with risk.

Per LORD WATSON: When an employer contracts for the performance of work which, properly conducted, can occasion no risk to his neighbour's house which he is under obligation to support, he is not liable for damage arising from the negligence of the contractor. But in cases where the work is necessarily attended with risk he cannot free himself from liability by binding the contractor to take effectual precautions. He is bound, as in a question with the party injured, to see that the contract is performed, and is, therefore, liable as well as the contractor, to repair any damage which may be done.

Notes. Applied: *Lemaitre v. Davis* (1881), 19 Ch.D. 281. Considered: *Tone v. Preston* (1883), 24 Ch.D. 739; *Simpson v. Godmanchester Corpn.*, [1895-9] All E.R.Rep. 630; *Gardner v. Hodgson's Kingston Breweries Co.*, [1900] 1 Ch. 592; *Union Lighterage Co. v. London Graving Dock Co.*, [1900-3] All E.R.Rep. 234; *Kine v. Jolly*, [1905] 1 Ch. 480. Referred to: *Goodman v. Saltash Corpn.* (1882),

7 App. Cas. 633; *Bell v. Love* (1883), 10 Q.B.D. 547; *Hughes v. Percival* A (1883), post; *Russell v. Watts* (1885), 55 L.J.Ch. 158; *Harris v. De Pinna* (1886), 33 Ch.D. 238; *Bass v. Gregory* (1890), 25 Q.B.D. 481; *Perry v. Eames*, *Salaman v. Eames*, *Mercer's Co. v. Eames*, [1891-4] All E.R.Rep. 1100; *Corbett v. Jonas*, [1892] 3 Ch. 137; *Haig v. West* (1893), 62 L.J.Q.B. 532; *Wheaton v. Maple*, [1893] 3 Ch. 48; *Chastey v. Ackland* (1895), 72 L.T. 845; *Hardaker v. Idle District Council*, [1895-9] All E.R.Rep. 311; *Greenwell v. Low Beechburn Coal Co.*, [1897] B 2 Q.B. 165; *Southwark and Vauxhall Water Co. v. Wandsworth District Board of Works*, [1895-9] All E.R.Rep. 422; *Blake v. Woolf*, [1895-9] All E.R.Rep. 185; *Jordeson v. Sutton*, *Southcoates and Drypool Gas Co.*, [1899] 2 Ch. 217; *Penny v. Wimbledon Urban Council*, [1895-9] All E.R.Rep. 204; *Great Northern Rail. Co. v. I.R.Comrs.*, [1901] 1 K.B. 416; *Edinburgh and District Water Trustees v. Clippens Oil Co.* (1902), 87 L.T. 275; *A.-G. v. C Antrobus* (1905), 74 L.J.Ch. 599; *Cable v. Bryant*, [1904-7] All E.R.Rep. 937; *Hyman v. Van Den Bergh*, [1908] 1 Ch. 167; *Robinson v. Beaconsfield U.D.C.*, [1911-13] All E.R.Rep. 997; *Padbury v. Holliday and Greenwood* (1912), 28 T.L.R. 494; *Howley Park Coal and Cannel Co. v. London and North Western Rail. Co.*, [1911-13] All E.R.Rep. 432; *Hurlstone v. London Electric Rail. Co.* (1914), 30 T.L.R. 398; *Pwllbach Colliery Co., Ltd. v. Woodman*, [1914-15] All E.R.Rep. 124; D *Schwann v. Cotton*, [1916-17] All E.R.Rep. 368; *Selby v. Whitbread*, [1917] 1 K.B. 736; *Sack v. Jones*, [1925] All E.R.Rep. 514; *Wolstanton, Ltd. and Duchy of Lancaster v. Newcastle-under-Lyme Borough Council*, [1940] 3 All E.R. 101; *Pass of Ballater Steamship Owners v. Cardiff Channel Dry Docks and Pontoon Co., Ltd.*, [1942] 2 All E.R. 79; *Lloyds Bank, Ltd. v. Dalton*, [1942] 2 All E.R. 352; *London and North Eastern Rail. Co. v. B.A. Collieries, Ltd.*, [1945] 1 All E.R. 51; E *Spicer v. Snee*, [1946] 1 All E.R. 489; *Newcastle-under-Lyme Corp'n. v. Wolstanton, Ltd.*, [1946] 2 All E.R. 447; *Ilkeston Collieries, Ltd. v. Grand Union Canal Co.* (1946), 175 J.T. 12; *Darling v. A.-G.*, [1950] 2 All E.R. 793; *Cassidy v. Ministry of Health*, [1951] 1 All E.R. 574; *Jones v. Manchester Corp'n.*, [1952] 2 All E.R. 125; *Davies v. Du Paver*, [1952] 2 All E.R. 991; *Mulready v. J. H. and W. Bell, Ltd.*, [1953] 2 All E.R. 215; *Thomson v. Cremin*, [1953] 2 All E.R. 1185; *Balfour v. F Barty-King* (*Hyder & Sons (Builders), Ltd.*), [1957] 1 All E.R. 156; *Davie v. New Merton Board Mills*, [1958] 1 All E.R. 67; *Green v. Fibreglass, Ltd.*, [1958] 2 All E.R. 521; *Davie v. New Merton Board Mills*, [1959] 1 All E.R. 346; *Norton v. Canadian Pacific Steamships, Ltd.*, [1961] 2 All E.R. 785.

As to the easement of support, see 12 HALSBURY'S LAWS (3rd Edn.) 606 et seq.; and for cases see 19 DIGEST (Repl.) 178 et seq. For the Prescription Act, 1832, G see 6 HALSBURY'S STATUTES (2nd Edn.) 669.

Cases referred to:

- (1) *Bower v. Peate* (1876), 1 Q.B.D. 321; 45 L.J.Q.B. 446; 35 L.T. 321; 40 J.P. 789; 19 Digest (Repl.) 188, 1289.
- (2) *Humfries v. Brogden* (1850), 12 Q.B. 739; 20 L.J.Q.B. 10; 16 L.T.O.S. 457; H 116 E.R. 1048; sub nom. *Humfries v. Brogden*, 15 Jur. 124; 19 Digest (Repl.) 180, 1207.
- (3) *Rowbotham v. Wilson* (1857), 8 E. & B. 123; 27 L.J.Q.B. 61; 29 L.T.O.S. 357; 3 Jur.N.S. 1297; 5 W.R. 820; 120 E.R. 45, Ex. Ch.; affirmed (1860), 8 H.L.Cas. 348; 30 L.J.Q.B. 49; 2 L.T. 642; 24 J.P. 579; 6 Jur.N.S. 965; 11 E.R. 463, H.L.; 19 Digest (Repl.) 8, 8.
- (4) *Bonomi v. Backhouse* (1858), E.B. & E. 622; 27 L.J.Q.B. 378; 32 L.T.O.S. 156; 4 Jur.N.S. 1182; reversed (1859), E.B. & E. 646; 28 L.J.Q.B. 378; 33 L.T.O.S. 331; 5 Jur.N.S. 1345; 7 W.R. 667; 120 E.R. 652, Ex. Ch.; on appeal sub nom. *Backhouse v. Bonomi* (1861), 9 H.L.Cas. 503; 34 L.J.Q.B. 181; 4 L.T. 754; 7 Jur.N.S. 809; 9 W.R. 769; 11 E.R. 825, H.L.; 19 Digest (Repl.) 178, 1197.
- (5) *Caledonian Rail. Co. v. Sprot* (1856), 27 L.T.O.S. 264; 2 Jur.N.S. 623; 4 W.R. 659; 2 Macq. 449, H.L.; 19 Digest (Repl.) 49, 272.

- A (6) *Moore v. Rawson* (1824), 3 B. & C. 332; 5 Dow. & Ry.K.B. 234; 8 L.J.O.S.K.B. 32; 107 E.R. 756; 19 Digest (Repl.) 93, 538.
- (7) *Potter v. North* (1669), 1 Lev. 268; 2 Keb. 513, 517; 1 Saund. 346; 1 Vent. 883; 83 E.R. 400; 11 Digest (Repl.) 14, 146.
- (8) *Lord Pelham v. Pickersgill* (1787), 1 Term Rep. 660; 99 E.R. 1806; 11 Digest (Repl.) 658, 816.
- B (9) *Webb v. Bird* (1861), 10 C.B.N.S. 268; 30 L.J.C.P. 384; affirmed (1862). 13 C.B.N.S. 841; 31 L.J.C.P. 335; 8 Jur.N.S. 621; 143 E.R. 332, Ex. Ch.; 19 Digest (Repl.) 69, 384.
- (10) *Chasemore v. Richards* (1859), 7 H.L.Cas. 349; 29 L.J.Ex. 81; 33 L.T.O.S. 350; 5 Jur.N.S. 873; 23 J.P. 596; 7 W.R. 685; 11 E.R. 140, H.L.; 44 Digest 34, 252.
- C (11) *Sturges v. Bridgman* (1879), 11 Ch.D. 852; 48 L.J.Ch. 785; 41 L.T. 219; 43 J.P. 716; 28 W.R. 200, C.A.; 19 Digest (Repl.) 18, 57.
- (12) *Smith v. Darby* (1872), L.R. 7 Q.B. 716; 42 L.J.Q.B. 140; 26 L.T. 762; 37 J.P. 4; 20 W.R. 982; 33 Digest (Repl.) 851, 1036.
- (13) *Eadon v. Jeffcock* (1872), L.R. 7 Exch. 379; 42 L.J.Ex. 36; 28 L.T. 273; 20 W.R. 1033; 33 Digest (Repl.) 844, 1006.
- D (14) *Aspden v. Seddon* (1875), 10 Ch. App. 394; 44 L.J.Ch. 359; 32 L.T. 415; 39 J.P. 597; 23 W.R. 580, L.J.J.; 33 Digest (Repl.) 851, 1035.
- (15) *Gayford v. Nicholls* (1854), 9 Exch. 702; 2 C.L.R. 1066; 23 L.J.Ex. 205; 18 J.P. 441; 156 E.R. 301; sub nom. *Nicholls v. Gayford*, Saund. & M. 30; 23 L.T.O.S. 96; 2 W.R. 453; 19 Digest (Repl.) 183, 1235.
- (16) *Bedle v. Beard and Wingfield* (1607), 12 Co. Rep. 4; 77 E.R. 1288; 19 Digest (Repl.) 392, 1927.
- E (17) *Lewis v. Price* (1761), 2 Wms. Saund. 175a; 85 E.R. 926; 19 Digest (Repl.) 71, 393.
- (18) *Darwin v. Upton* (1786), 2 Wms. Saund. 175c; 85 E.R. 927; 19 Digest (Repl.) 63, 351.
- (19) *Cross v. Lewis* (1824), 2 B. & C. 686; 4 Dow. & Ry.K.B. 234; 2 L.J.O.S.K.B. 136; 107 E.R. 538; 19 Digest (Repl.) 72, 406.
- F (20) *Hendy v. Stephenson* (1808), 10 East, 55; 103 E.R. 696; 11 Digest (Repl.) 35, 456.
- (21) *Campbell v. Wilson* (1803), 3 East, 294; 102 F.R. 610; 19 Digest (Repl.) 70, 388.
- (22) *Penwarden v. Ching* (1829), Mood. & M. 400; 173 E.R. 1203, N.P.; 19 Digest (Repl.) 199, 1398.
- G (23) *Aynsley v. Glover* (1875), 10 Ch. App. 283; 44 L.J.Ch. 523; 32 L.T. 345; 39 J.P. 484; 23 W.R. 457, L.J.J.; 19 Digest (Repl.) 73, 409.
- (24) *Bryant v. Lefever* (1879), 4 C.P.D. 172; 48 L.J.Q.B. 380; 40 L.T. 579; 43 J.P. 478; 27 W.R. 612, C.A.; 19 Digest (Repl.) 67, 368.
- (25) *Hughes v. Keme* (1613), Yelv. 215.
- H (26) *Bowry and Pope's Case* (1587), 1 Leon. 168; 74 F.R. 155; sub nom. *Bury v. Pope*, Cro. Eliz. 118; 19 Digest (Repl.) 65, 359.
- (27) *Bland v. Moseley* (1587), cited in 9 Co. Rep. at p. 58a; 1 Bulst. at pp. 115, 116; Hut. at p. 136; 77 E.R. 817; sub nom. *Mosley v. Ball*, Yelv. at p. 216; 19 Digest (Repl.) 190, 1299.
- (28) *A.-G. v. Doughty* (1752), 2 Ves. Sen. 453; 28 E.R. 290, L.C.; 19 Digest (Repl.) 196, 1369.
- I (29) *Shury v. Piggot* (1625), 3 Bulst. 339; 81 E.R. 280; sub nom. *Shewry v. Piggot*, W.Jo. 145; sub nom. *Sury v. Piggot*, Benl. 188; Palm. 444; Poph. 166; sub nom. *Surrey v. Piggot*, Lat. 153; Noy. 84; 19 Digest (Repl.) 99, 589.
- (30) *Palmer v. Fleshees* (1663), 1 Sid. 167; 1 Keb. 625; 82 E.R. 1035; sub nom. *Palmer v. Fletcher*, 1 Lev. 122; 19 Digest (Repl.) 183, 1231.
- (31) *Birmingham Corp'n. v. Allen* (1877), 6 Ch.D. 284; 46 L.J.Ch. 673; 37 L.T. 207; 42 J.P. 184; 25 W.R. 810, C.A.; 19 Digest (Repl.) 179, 1205.

- (32) *Solomon v. Vintners' Co.* (1859), 4 H. & N. 585; 28 L.J.Ex. 370; 33 L.T.O.S. A
224; 23 J.P. 424; 5 Jur.N.S. 1177; 7 W.R. 613; 157 E.R. 970; 19 Digest
(Repl.) 62, 345.
- (33) *Quarman v. Burnett* (1840), 6 M. & W. 499; 9 L.J.Ex. 308; 4 Jur. 969; 151
E.R. 509; 34 Digest (Repl.) 20, 31.
- (34) *Hole v. Sittingbourne and Sheerness Rail. Co.* (1861), 6 H. & N. 488; 30
L.J.Ex. 81; 3 L.T. 750; 9 W.R. 274; 158 E.R. 201; 34 Digest (Repl.) 202, B
1424.
- (35) *Pickard v. Smith* (1861), 10 C.B.N.S. 470; 4 L.T. 470; 142 E.R. 535; 34
Digest (Repl.) 203, 1425.
- (36) *Tarry v. Ashton* (1876), 1 Q.B.D. 314; 45 L.J.Q.B. 260; 34 L.T. 97; 40 J.P.
439; sub nom. *Terry v. Ashton*, 24 W.R. 581; 34 Digest (Repl.) 205, 1437.
- (37) *Butler v. Hunter* (1862), 7 H. & N. 826; 31 L.J.Ex. 214; 10 W.R. 214; 158 C
E.R. 702; 34 Digest (Repl.) 197, 1386.
- (38) *Partridge v. Scott* (1838), 3 M. & W. 220; 1 Horn & H. 31; 7 L.J.Ex. 101;
150 E.R. 1124; 19 Digest (Repl.) 74, 420.
- (39) *Wilde v. Minsterley* (1639), 1 Sid. 167; 1 Keb. 625; 82 E.R. 1035; sub nom.
Palmer v. Fletcher, 1 Lev. 122; 19 Digest (Repl.) 183, 1231.
- (40) *Gray v. Bond* (1821), 2 Brod. & Bing. 667; 5 Moore, C.P. 527; 129 E.R. 1123; D
19 Digest (Repl.) 71, 389.
- (41) *Stansell v. Jollard* (1803), Selwyn's N.P., 11th Edn., vol. I, p. 457; 19
Digest (Repl.) 63, 353.
- (42) *Dodd v. Holme* (1834), 1 Ad. & El. 493; 3 Nev. & M.K.B. 739; 110 E.R.
1296; 19 Digest (Repl.) 183, 1234.

Also referred to:

- Wyatt v. Harrison* (1832), 3 B. & Ad. 871; 1 L.J.K.B. 237; 110 E.R. 320; 19
Digest (Repl.) 178, 1200.
- Hide v. Thornborough* (1846), 2 Car. & Kir. 250, N.P.; 19 Digest (Repl.) 211,
1544.
- Rogers v. Taylor* (1858), 2 H. & N. 828; 27 L.J.Ex. 173; 30 L.T.O.S. 321; 6 W.R. F
249; 157 E.R. 341; 19 Digest (Repl.) 180, 1208.
- Morgan v. Thomas* (1853), 8 Exch. 302; 22 L.J.Ex. 152; 20 L.T.O.S. 225; 17
Jur. 283; 155 E.R. 1362; 23 Digest (Repl.) 61, 523.
- Earl of Lonsdale v. Littledale* (1793), 2 Anst. 356; 2 Hy. Bl. 267; 145 E.R. 901;
affirmed, 5 Bro. Parl. Cas. 519, H.L.; 36 Digest (Repl.) 396, 440.
- Hall v. Lichfield Brewery Co.* (1880), 49 L.J.Ch. 655; 43 L.T. 380; 45 J.P. 53; G
19 Digest (Repl.) 64, 358.
- Richards v. Rose* (1853), 9 Exch. 218; 2 C.L.R. 311; 23 L.J.Ex. 3; 22 L.T.O.S.
104; 18 J.P. 56; 17 Jur. 1036; 156 E.R. 93; 19 Digest (Repl.) 44, 235.
- Roberts v. Macord* (1832), 1 Mood. & R. 230, N.P.; 19 Digest (Repl.) 136, 877.
- Stroyan v. Knowles, Hamer v. Same* (1861), 6 H. & N. 454; 30 L.J.Ex. 102; 3
L.T. 746; 9 W.R. 615; 158 E.R. 186; 19 Digest (Repl.) 184, 1244.
- Hilton v. Earl Granville* (1844), 5 Q.B. 701; 1 Dav. & Mer. 614; 13 L.J.Q.B. 193;
2 L.T.O.S. 419; 8 Jur. 311; 114 E.R. 1414; 17 Digest (Repl.) 17, 190.
- Taplin v. Jones* (1865), 20 C.B.N.S. 166; 11 H.L.Cas. 290; 5 New Rep. 493; 34
L.J.C.P. 342; 12 L.T. 555; 29 J.P. 611; 11 Jur.N.S. 309; 13 W.R. 617;
144 E.R. 1067, H.L.; 19 Digest (Repl.) 137, 886.
- Baten's Case* (1610), 9 Co. Rep. 53 b.; 77 E.R. 810; 36 Digest (Repl.) 302, 482. I
- Penruddock's Case* (1598), 5 Co. Rep. 100 b.; Jenk. 260; 77 E.R. 210; 36 Digest
(Repl.) 303, 488.
- Brown v. Robins* (1859), 4 H. & N. 186; 28 L.J.Ex. 250; 157 E.R. 809; 19 Digest
(Repl.) 184, 1237.
- Hurdman v. North Eastern Rail. Co.* (1878), 3 C.P.D. 168; 47 L.J.Q.B. 368; 38
L.T. 339; 26 W.R. 489, C.A.; 36 Digest (Repl.) 289, 365.
- Bealey v. Shaw* (1805), 6 East, 208; 2 Smith, K.B. 321; 102 E.R. 1266; 19 Digest
(Repl.) 63, 354.

- A *Balston v. Bensted* (1808), 1 Camp. 463; 170 E.R. 462, N.P.; 44 Digest 35, 261.
Livett v. Wilson (1825), 3 Bing. 115; 10 Moore, C.P. 489; 3 L.J.O.S.C.P. 186;
 180 E.R. 457; 19 Digest (Repl.) 71, 398.
Wright v. Howard (1823), 1 Sim. & St. 190; 57 E.R. 76; sub nom. *Wright v. Howard*, *Howard v. Wright*, 1 L.J.O.S.Ch. 94; 19 Digest (Repl.) 161, 1057.
Holmes v. Powell (1856), 8 De G.M. & G. 572; 44 E.R. 510, L.JJ.; 20 Digest (Repl.) 348, 763.
- B *Mitchell v. Mayor of Rome*, 49 Georgia Rep. 19.
Thurston v. Hancock, 12 Mass. 226.
Foley v. Wyeth, 2 Allen (Mass.) 131.
Gilmore v. Driscoll, 23 Amer. Rep. 312.
Butler v. Hunter (1862), 7 H. & N. 826; 31 L.J.Ex. 214; 10 W.R. 214; 158 E.R. 702; 34 Digest (Repl.) 197, 1386.
- C *Read v. Brookman* (1789), 3 Term Rep. 151; 100 E.R. 504; 22 Digest (Repl.) 214, 2022.
Doe d. Fenwick v. Reed (1821), 5 B. & Ald. 232; 106 E.R. 1177; 38 Digest (Repl.) 870, 831.
Eldridge v. Knott (1774), 1 Cowp. 214; 98 E.R. 1050; 20 Digest (Repl.) 564, 2659.
- D *Vaughan v. Watt* (1840), 6 M. & W. 492; 9 L.J.Ex. 272; 151 E.R. 506; 43 Digest 492, 312.
Oxford University (Chancellor, Masters and Scholars) Case (1613), 10 Co. Rep. 53b; 77 E.R. 1006; 19 Digest (Repl.) 569, 4085.
Eaton v. Swansea Waterworks Co. (1851), 17 Q.B. 267; 20 L.J.Q.B. 482; 17 L.T.O.S. 154; 15 Jur. 675; 117 E.R. 1282; 19 Digest (Repl.) 77, 435.
- E *Tyler v. Wilkinson*, 4 Mason, U.S.Rep. 402.
Dougal v. Wilson (1769), 2 Wms. Saund. 175a; 85 E.R. 926; 19 Digest (Repl.) 71, 394.
The Wells Harbour Case, 2 Wms. Saund. 175c.
Alfred's Case (1610), 9 Co. Rep. 57b; 77 E.R. 816; 19 Digest (Repl.) 146, 952.
- F *Hunt v. Peake* (1860), John 705; 29 L.J.Ch. 785; 25 J.P. 5; 6 Jur.N.S. 1071; 70 E.R. 603; 19 Digest (Repl.) 179, 1201.

Appeals by the defendants in the actions from a decision of the Court of Appeal (COTTON and THESIGER, L.JJ., BRETT, L.J., dissenting), reported 4 Q.B.D. 162, reversing a decision of the Queen's Bench Division (COCKBURN, C.J., and MELLOR, J., LUSH, J., dissenting), reported 3 Q.B.D. 85.

G Two dwelling-houses had stood for many years side by side at Newcastle, each having lateral support from the soil on which the other rested. One of these was the property of the respondents, Angus & Co., and, in 1849, they converted it into a coach factory. The effect of these alterations was to throw more lateral pressure on the soil under the adjoining house. In 1876 the appellant commissioners became possessed of the adjoining house, and proceeded to pull it down and make excavations on the site, preparatory to erecting a new building. The appellant Dalton was the contractor employed by them in the work, and he employed a sub-contractor for the excavations. Sufficient support was not left for the respondents' building, and it fell. There was no evidence of negligence in the excavations.

H Actions were then brought by the respondents, Angus & Co., against the appellant commissioners and the appellant Dalton, to recover damages for the injury done to the coach factory. The actions were tried before LUSH, J., at the Newcastle Summer Assizes in 1876, when the learned judge directed a verdict to be entered for the respondents for the damages claimed, subject to a reference as to the amount, without leaving any question to the jury, and extended the time for the respondents to move for judgment. The respondents moved accordingly, but the Queen's Bench Division directed judgment to be entered for the appellants. This decision was reversed by the Court of Appeal, and the appellants appealed to the House of Lords.

Nov. 13, 14, 17, 1879.—The appeal came on for hearing in the House of Lords, A but after hearing arguments their Lordships directed that it should stand over until the judges could be present. The judges were accordingly summoned, and POLLOCK, B., FIELD, LINDLEY, MANISTY, LOPES, FRY and BOWEN, JJ., attended.

Sir John Holker, Q.C., Shield and A. E. Galhorne Hardy for the appellants commissioners.

Sir Farrer Herschell, Q.C., and Wheeler for the appellant Dalton. B

Littler, Q.C., Gainsford Bruce and E. Ridley for the respondents, plaintiffs in the actions.

LORD SELBORNE, L.C., put the following questions of law to the learned judges: (i) Has the owner of an ancient building a right of action C against the owner of land adjoining if the latter disturbs his land so as to take away the lateral support previously afforded by such land?; (ii) Is the period during which the plaintiffs' house has stood under the circumstances stated in the case sufficient to give them the same right as if their house was ancient?; (iii) If the act done by the defendants would have caused no damage to the plaintiffs' building as it stood before the alterations made in 1849, is it necessary to prove that the defendants or their predecessors in title had knowledge or notice of these D alterations in order to make the damage done by their agent in removing the lateral support after the lapse of twenty-seven years an actionable wrong?; (iv) If so, is it sufficient to prove knowledge or notice of the fact that such alterations were made, or is it necessary also to prove knowledge of their effect in causing the buildings so altered to require a degree of lateral support from the adjoining land which was not before needed?; (v) Was the course taken by the learned judge at the trial E of directing a verdict for the plaintiffs correct, or ought he to have left any question to the jury?

Mar. 17, 1881.—The judges delivered their opinions on the questions of law propounded to them.

Their Lordships took time for consideration.

June 14, 1881.—The following opinions were read. F

LORD SELBORNE, L.C.—The questions upon these appeals may be reduced to two—the first, whether a right to lateral support from adjoining land can be acquired by twenty-seven years' uninterrupted enjoyment for a building proved to have been newly erected at the commencement of that time; the second, whether, if so, there was anything in the circumstances of this case sufficient either to disprove the acquisition of such right or to make it dependent upon some question of G fact which ought to have been submitted to the jury. There was another point, made by both the petitions of appeal, which I only mention lest it should appear to have been overlooked. The action was brought by reason of the falling of the plaintiffs' house through the excavation of the adjoining land of the commissioners in the course of certain works executed for them by the appellant Dalton under a contract, and for Dalton by sub-contractors. The commissioners disputed their liability H for the acts of Dalton, and Dalton disputed his liability for the acts of his sub-contractors. The same point arose under very similar circumstances in *Bower v. Peate* (1), and was decided adversely to the contention of the appellants. It follows from that decision (as to the correctness of which I agree with both the courts below), that, if the plaintiffs are entitled to recover at all they are entitled to recover I against both the commissioners and Dalton.

I proceed to consider the principal question in the case. In the natural state of land, one part of it receives support from another—upper from lower strata, and soil from adjacent soil. This support is natural and is necessary as long as the status quo of the land is maintained; and, therefore, if one parcel of land be conveyed so as to be divided in point of title from another contiguous to it or (as in the case of mines) below it, the status quo of support passes with the property in the land, not as an easement held by a distinct title, but as an incident to the

A land itself sine quo res ipsa haberi non debet. All existing divisions of property in land must have been attended with this incident when not excluded by contract; and it is for that reason often spoken of as a right by law; a right of the owner to the enjoyment of his own property, as distinguished from an easement supposed to be gained by grant; a right for injury to which an adjoining proprietor is responsible, upon the principle sic utere tuo, ut alienum non lædas. This is all that I understand to be meant by those passages of the judgments in *Humphries v. Brogden* (2), *Rowbotham v. Wilson* (3), and *Bonomi v. Backhouse* (4), to which some of the learned judges referred. In these cases, or in some of them, there were buildings upon the land; but no separate question was raised as to the support necessary for the buildings, as distinguished from that necessary for the land; and the doctrine laid down must, in my opinion, be understood of land without reference to buildings.

C Support to that which is artificially imposed upon land cannot exist ex jure naturæ, because the thing supported itself does not so exist; it must in each particular case be acquired by grant, or by some means equivalent in law to grant, in order to make it a burden upon the neighbour's land, which, naturally, would be free from it. This distinction (and at the same time, its proper limit) was pointed out by WILLES, J., in *Bonomi v. Backhouse* (4) (E.B. & E. at p. 655). Land which affords support to land is affected by the superincumbent or lateral weight, as by an easement or servitude; the owner is restricted in the use of his own property in precisely the same way as when he has granted a right of support to buildings. The right, therefore, in my opinion, is properly called an easement, as it was by LORD CAMPBELL in *Humphries v. Brogden* (2); though when the land is in its natural state the easement is natural, and not conventional. The same distinction exists as to rights in respect of running water—the easement of the riparian land-owner is natural; that of the millowner on the stream, so far as it exceeds that of an ordinary riparian proprietor, is conventional—i.e., it must be established by prescription or grant.

F If at the time of the severance of the land from that of the adjoining proprietor it was not in its original state, but had buildings standing on it up to the dividing line, or if it were conveyed expressly with a view to the erection of such buildings, or to any other use of it which might render increased support necessary, there would then be an implied grant of such support as the actual state, or the contemplated use of the land would require, and the artificial would be inseparable from, and (as between the parties to the contract) would be a mere enlargement of, the natural. If a building is divided into floors or "flats," separately owned, the owner of each upper floor or "flat" is entitled, upon the same principle, to vertical support from the lower part of the building, and to the benefit of such lateral support as may be of right enjoyed by the building itself: *Caledonian Rail. Co. v. Sprot* (5). I think it clear that any such right of support to a building, or part of a building, is an easement; and I agree with LINDLEY and BOWEN, JJ., that it is both scientifically and practically inaccurate to describe it as one of a merely negative kind.

H What is support? The force of gravity causes the superincumbent land or building to press downward upon what is below it, whether artificial or natural; and it has also a tendency to thrust upwards, laterally, any loose or yielding substance, such as earth or clay, until it meets with adequate resistance. Using the language of the law of easements, I say that, in case alike of vertical and of lateral support, both to land and to buildings, the dominant tenement imposes upon the servient a positive and a constant burden, the sustenance of which by the servient tenement is necessary for the safety and stability of the dominant. It is true that the benefit to the dominant tenement arises, not from its own pressure upon the servient tenement, but from the power of the servient tenement to resist that pressure and from its actual sustenance of the burden so imposed. But the burden and its sustenance are reciprocal and inseparable from each other, and it can make no difference whether the dominant tenement is said to impose, or the servient to sustain, the weight.

LORD CAMPBELL, in *Humphries v. Brogden* (2), referred to the servitude *oneris A*
ferendi applied in the law of Scotland to a house divided into "flats" belonging to
 different owners, as apt to illustrate the general law of vertical support. The
 servitude, so denominated (ut vicinus onera vicini sustineat), in the Roman law,
 was exclusively "urban," that is, relative to buildings, whether in town or country;
 and the instances of it given in the *DIGEST* refer to rights of support acquired by
 one proprietor for his building, or part of it, upon walls belonging to an adjoining
 proprietor: *Inst. lib. 2, tit. 3; Dig. lib. 8, tit. 2, ss. 24, 25, 33 and tit. 5, ss. 6, 8.* B
 But, in principle, the nature of such a servitude must be the same, whether it is
 claimed against a building on which another structure may wholly or partly rest,
 or against land from which lateral or vertical support is necessary for the safety
 and stability of that structure.

These principles go far, in my opinion, to establish, as a necessary consequence, C
 that such a right of support may be gained by prescription. Some of the learned
 judges appear to think otherwise, and to doubt whether it could be the subject of
 grant. For that doubt I am unable to perceive any sufficient foundation. LITTLE-
 DALE, J., in *Moore v. Rawson* (6), spoke of the right to light as being properly the
 subject, not of grant, but of covenant. If he had said that a right to light could
 not be granted, in the sense of the word "grant" necessary for prescription, I D
 should have doubted the correctness of the opinion, notwithstanding the great
 learning of that eminent judge. Although the general access of light from the
 heavens to the earth is indefinite, the light which enters a building by particular
 apertures does and must pass over the adjoining land in a course which, though
 not visibly defined, is really certain and, in that sense, definite. Why should it be
 impossible for the owner of the adjoining land to grant a right of unobstructed E
 passage over it for that light in that course? The term "ancient" light seems to
 me itself to imply that such a right might be acquired by prescription. But, how-
 ever this may be, the opinion of LITTLEDALE, J., is stated by him in words which
 (unless I misunderstand the true nature of support) do not apply to that easement.
 The pressure of the dominant tenement, in the case of support, is upon the soil of
 another man's land, and I can see no material difference between this and "some- F
 thing positive done or used in the soil of another man's land."

WILES, J., in *Bonomi v. Backhouse* (4), when delivering the unanimous judg-
 ment of the Court of Exchequer Chamber, said that "the right to support of
 buildings," not only might, but "must be founded upon prescription or grant,
 expressed or implied." BRAMWELL, B., in *Rowbotham v. Wilson* (3), said (8
 E. & B. at p. 147): G

"I am of opinion that it is competent to the owner of land, on or after the
 severance of the mines, to grant to the grantee of the mines the right to
 damage the surface. I cannot see how, if there may be a grant of mines and
 of the right to enter, sink shafts, and work, there may not be such a grant as
 that contended for here [i.e., the right to take away support from the surface].
 Nor can I see how, if a grant of unobstructed light and air, or of support of the
 soil, to an adjoining owner, would be good, a grant of such a right as claimed
 here would not be. My brother HAYES said presumed grants of windows and
 support were idle fictions, and ought never to have been invented; perhaps so,
 but the fact that they were shows that the inventors and everybody else sup-
 posed that real grants of such a nature would be good."

The rule as to prescription is thus stated in SIR FRANCIS NORTH's argument in
Potter v. North (7) (1 Vent. at p. 387): I

"The law allows prescription, but in supply of the loss of a grant. Ancient
 grants happen to be lost many times, and it would be hard that no title could
 be made to things that lie in grant but by showing of a grant: therefore, upon
 usage temps dont, etc., the law presumes a grant and a lawful beginning, and
 allows such usage for a good title; but still it is but in supply of the loss of a
 grant, and, therefore, for such things as can have no lawful beginning nor be

A created at this day by any manner of grant, or reservation, or deed that can be supposed, no prescription is good."

ASHHURST, J., in *Lord Pelham v. Pickersgill* (8) (1 Term Rep. at p. 667), laid it down as the general rule that

B "every prescription is good, if by any possibility it can be supposed to have had a legal commencement."

Be the theory what it may, its true foundation, in point of fact, is that which the Romans called *usucapio*, under the conditions defined by SIR EDWARD COKE (1 Inst. 1136):

C "Both to customs and prescriptions these two things are incidents inseparable—viz., possession or usage, and time. Possession must have three qualities—it must be long, continual, and peaceable, for it is said, *transferuntur dominia, sine titulo et traditione, per usucapionem, scilicet per longam, continuam, et pacificam possessionem. Longa*—i.e., *per spatium temporis per legem definitum*. . . . *Continuam dico, ita quod not sit legitime interrupta. Pacificam dico, quia si contentiosa fuerit, idem erit quod prius, si contentio fuerit justa*. . . .
D *Longus usus, nec per vim, nec clam, nec precario*."

All these conditions are capable, in my judgment, of being fulfilled as to the right of support to buildings, and, when they are fulfilled, I am unable to understand why the right should not be held to be prescriptively established. The policy and purpose of the law on which both prescription and the presumptions which
E have supplied its place when length of possession has been less than immemorial rest would be defeated, or rendered very insecure, if exceptions to it were admitted on such grounds as that a particular servitude (capable of a lawful origin) is negative rather than positive, or that the inchoate enjoyment of it, before it has matured into a right, is not an actionable wrong, or that resistance to or interruption of it may not be conveniently practicable. I assume, for the present
F purpose, that a man who places on his own land, where it adjoins that of his neighbour, a weight which increases its pressure upon his neighbour's land, is not thereby guilty of an actionable wrong. If this be so, the reason probably is that the act is lawfully done upon his own land, and that the owner of the adjoining land suffers no actual or appreciable damage from the increased amount of pressure which it has to bear, except so far as the continuance of that pressure, if uninterrupted, may tend to ripen into a right, and so to enlarge the servitude to which
G his land was previously subject.

But against this he has his own remedy, if he chooses to prevent and interrupt it. That power of resistance by interruption does, and must in all such cases, exist, otherwise no question like the present would arise. It is true that in some cases (of which the present is an example), a man acting with a reasonable regard
H to his own interest would never exercise it for the mere purpose of preventing his neighbour from enlarging or extending such a servitude. But, on the other hand, it would not be reasonably consistent with the policy of the law in favour of possessory titles that they should depend in each particular case upon the greater or less facility or difficulty, convenience or inconvenience, of practically interrupting them. They can always be interrupted (and that without difficulty or inconvenience)
I when a man wishes and finds it for his interest to make such a use of his own land as will have that effect. So long as it does not suit his purpose or his interest to do this, the law which allows a servitude to be established or enlarged by long and open enjoyment, against one whose preponderating interest it has been to be passive during the whole time necessary for its acquisition, seems more reasonable and more consistent with public convenience and natural equity, than one which would enable him, at any distance of time (whenever his views of his own interest may have undergone a change), to destroy the fruits of his neighbour's diligence, industry, and expenditure.

The law of ancient lights, as it stood before the Prescription Act, 1832, was a stronger example of the application of these principles, the easement in that case being more purely negative. I cannot agree with those who think that law too exceptional and anomalous to furnish an analogy, or exemplify a principle, applicable to any other case. The servitude non altius tollendi, ne luminibus officiat, was as well known to the Roman jurisprudence as the servitude oneris ferendi, or any other; and, if natural, and not only technical, reasons are to be regarded, it is difficult to conceive anything more needful for the comfort of life and enjoyment of house property than the unobstructed enjoyment of light. There is no actionable wrong done by opening new lights which overlook a neighbour's land; and to obstruct them, by building or erecting hoards on that land, when there is no other motive for doing so than to prevent them from ripening into an easement, is as seldom likely to be conveniently practicable as the obstruction of the vertical or lateral support of buildings by excavation or otherwise. But these have not been regarded as sufficient reasons why the right to lights should not be gained by an enjoyment and user for more than twenty years.

From the view which I take of the nature of the right of support, that it is an easement, not purely negative, capable of being granted, and also capable of being interrupted, it seems to me to follow that it must be within s. 2 of the Prescription Act, 1832, unless that section is confined (as *ERLE, C.J.*, in *Webb v. Bird* (9) appears to have thought) to rights of way and rights of water. The opinion to that effect, expressed by that eminent judge, was not necessary for the decision of *Webb v. Bird* (9), nor can I perceive that any concurrence in it was expressed by *WILLES* and *BYLES, JJ.*, who agreed in the decision. The point then determined was that a claim to have free access for all the winds of heaven to the sails of a windmill was too large and indefinite in its nature to be acquired by use or to be capable of interruption, within the meaning of s. 2 of the Prescription Act. That determination I assume to have been correct. But I do not think it possible, without a degree of violence to the express terms of the Act for which neither its context nor its policy (as expressed in the preamble) affords any justification, to restrict the operation of the second section to "the two descriptions of easements therein specified—viz., the right to a way or watercourse." The expressed policy of the Act is large and general; it is to prevent claims of prescription from being defeated by showing a commencement within time of legal memory. Why should not this extend to other easements besides ways and water-rights, and lights, which (by s. 3) are specially provided for, and exceptionally favoured? In terms, s. 2 extends to every claim which could be

"lawfully made at the common law, by custom, prescription, or grant, to any way or other easement, or to any watercourse, or the use of any water, to be enjoyed or derived upon, over or from any land or water."

The interjection of the words, "or other easement," between ways and water-courses may seem singular, but I cannot think that they ought, therefore, to be reduced to silence or arbitrarily limited. If any explanation of the place in which they occur is necessary, it may (I think) be found in the separate mention, which follows, of "land" and "water." *Reddendo singula singulis*, the words (as it seems to me) may be read thus: "any way or other easement to be enjoyed or derived upon, over, or from any land, or any watercourse, or use of water to be enjoyed or derived upon, over, or from any water." So reading them, they would include (unless there is something else in the statute to exclude it, and I find nothing) the easement of support. I am not insensible to the probability that there may be some error in an opinion which seems to be opposed to that of all the learned judges in both the courts below, and of most of those by whom your Lordships have been assisted on this occasion. They did not all advert to the Prescription Act, 1832, but, of those who did, *LINDLEY, J.*, was, I think, the only one who expressed any doubt. The opinion of those learned judges may possibly have been, in some degree, influenced by what was said by so distinguished a judge

- A as ERLE, C.J., in *Webb v. Bird* (9), which was cited for this purpose by LUSH, J. To those who consider that the right of support was not an easement, or that it was of so purely negative a character as to be incapable of being granted, or of being interrupted within the meaning of the statute, the conclusion that the statute did not apply to it would naturally follow. I have already stated my reasons for not assenting to those premises. The point may, probably, not now require decision;
- B because the same practical conclusion may be reached by your Lordships (as it has been by all the learned judges, except COCKBURN, C.J., MELLOR, J., and BRETT, L.J., by a different road. But, having regard to its possible importance in other cases, I have not thought it right to withhold the expression of the opinion which, after much consideration, I have myself formed upon it.

- C Assuming the statute to apply, what would be its effect? COCKBURN, C.J., thought it would be nugatory. It is undoubtedly true that under s. 2 there is an important difference between a forty years' and a twenty years' user. Forty years' user has the same effect which, under s. 3, twenty years' user has as to light. It makes the right absolute and indefeasible, unless it is shown to have been enjoyed by consent or agreement in writing. But twenty years' user under s. 2 may be defeated "in any other way" in which it was previously—i.e., before
- D Aug. 1, 1832 [the date of the passing of the Prescription Act]—"liable to be defeated," except that it can no longer be defeated or destroyed "by showing only that it was first enjoyed at any time prior to such period of twenty years." The effect of this, as I understand it, is to apply the law of prescription, properly so called, to an easement enjoyed as of right for twenty years, subject to all defences to which a claim by prescription would previously have been open, except that of
- E showing a commencement within time of legal memory. To allege that there was no evidence from which a grant could be presumed, or that there was evidence from which it ought to be inferred that there was, in fact, no grant, would not, as I understand the law, have been, before Aug. 1, 1832, a competent mode of defeating or destroying any claim to an easement by prescription, and no jury would have been directed to find a grant in any such case, when there was no
- F proof of a commencement within time of legal memory. The section, therefore, assuming it to apply, would, in the present case, be sufficient to establish a title by prescription to the right claimed by the plaintiffs, unless it had been enjoyed vi, or clam, or precario. Of vi, or precario, there is here no question.

- Supposing, however, that s. 2 of the Prescription Act ought not to be held to apply to the easement of support, the same result would practically be reached
- G by the doctrine that a grant, or some lawful title equivalent to it, ought to be presumed after twenty years' user. As to this, I think it unnecessary to say more than that I agree with the view of the authorities taken by LUSH, J., by the majority of the judges in the Court of Appeal, and by all the learned judges who attended this House (unless BOWEN, J., who preferred to rely upon the equitable doctrine of acquiescence, is an exception), in their answers to the first two questions proposed to them by your Lordships.
- H

- Upon the other three questions proposed to the learned judges, which involve the doctrine of clam, as applied to the easement of support, there has been much difference of opinion; four of the learned judges being in the plaintiffs' favour, and the other three thinking that the jury were not properly directed on that point. The inquiry on this part of the case is as to the nature and extent of the know-
- I ledge or means of knowledge which a man ought to be shown to possess, against whom a right of support for another man's building is claimed. He cannot resist or interrupt that of which he is wholly ignorant. But there are some things of which all men ought to be presumed to have knowledge, and among them, I think, is the fact that, according to the laws of nature, a building cannot stand without vertical or (ordinarily) without lateral support. When a new building is openly erected on one side of the dividing line between two properties, its general nature and character, its exterior and much of its interior structure, must be visible and ascertainable by the adjoining proprietor during the course of its erection. When,

as in the present case, the interior of a private dwelling-house is entirely altered, and a building of an entirely different character, such as a coach or carriage factory, with a large and massive brick pillar and chimney stack, is erected instead of it, the adjoining proprietor must have imputed to him knowledge that a new and enlarged easement of support (whatever may be its extent) is going to be acquired against him, unless he interrupts or prevents it. The case is, in my opinion, substantially the same as if a new factory had been erected where no building stood before. A
B

Having this knowledge, it is, in my judgment, by no means necessary that he should have particular information as to those details of the internal structure of the building on which the amount or incidence of its weight may more or less depend. If he thought it material he might inquire into those particulars, and then, if information were improperly withheld from him, or if he received false or misleading information, or if anything could be shown to have been done secretly or surreptitiously, in order to keep material facts from his knowledge, the case would be different. But here there was no evidence from which a jury could have been entitled to infer any of these things. Everything was honestly and (as far as it could be) openly done, without any deception or concealment. The interior construction of the building was, indeed, such as to require lateral support beyond what might have been necessary if it had been otherwise constructed. But this must always be liable to happen whenever a building has to be adapted to a particular use. The knowledge that it may or may not happen is, in my opinion, enough, if the adjoining proprietor makes no inquiry. I think, therefore, that in this case the kind and degree of knowledge which the adjoining proprietor must necessarily have had was sufficient; that nothing was done clam, and that the evidence did not raise any question on this point which ought to have been submitted to the jury. My opinion, therefore, upon the whole case is in favour of the respondents, the plaintiffs in the action, and against the appellants; and the motion which I have to make to your Lordships is that the judgment of the court below be affirmed, and the appeal dismissed with costs. C
D
E

LORD PENZANCE.—In dealing with the questions of law to which the present case gives rise, it is material to bear in mind that the exact proposition which the appellants call upon your Lordships to repudiate, or affirm, is to be found in the ruling at the trial given by the learned judge. It is in these words: F

“The authorities oblige me to hold, that when a building has stood for twenty years it has acquired a right to the support of the adjacent land, and I do not think that it all depends upon whether the opposite or adjacent neighbour had notice, or not, of what was done, or what weight was put upon it, nor does it rest on the fact of there being an implied grant. I think it has become absolute law, that when a building has stood for twenty years, supported by the adjacent soil, it has acquired a right to the support of the soil; and no one has a right to take all that soil without putting an equivalent to sustain the building. That is the ruling which I must lay down here, because that is upheld by many authorities.” G
H

Your Lordships have now to say whether this view of the authorities is a correct one; and, with some reluctance, I feel constrained to say that, in my opinion, it is so. I say with some reluctance, not because I think that the support which the plaintiffs claim for their house is unreasonable, or inequitable, but because the circumstances under which the claim is held to arise, are, so far as I am able to discover, incapable of giving rise to it in accordance with any known principle of law. I

It must be borne in mind both what the claim is, and what it is not. It is not a claim asserted for the support of a house by the adjacent soil as soon as that house is built; but a claim that when the house has stood “for twenty years supported by the adjacent soil it has by absolute law acquired a right to the support

A of the soil"; and this not by reason of any implied grant, and quite independently of whether "the opposite or adjacent neighbour had notice or not of what was done or what weight was put upon" the ground to which the lateral support was required.

B It is this sudden starting into existence of a right which did not exist the day before the twenty years expired, without reference to any presumption of acquiescence by the neighbour (to which the lapse of that period of time without interruption on his part might naturally give rise) which I find it impossible to reconcile with legal principles. I find myself, therefore, in entire accord with the opinion which FRY, J., has offered to the House;* and he has so fully and ably illustrated his views on the subject, which are also mine, that I have little to add.

C If this matter were *res integra*, I think it would not be inconsistent with legal principles to hold that where an owner of land has used his land for an ordinary and reasonable purpose, such as placing a house upon it, the owner of the adjacent soil could not be allowed so to deal with his own soil by excavation as to bring his neighbour's house to the ground. It would be, I think, no unreasonable application of the principle "*sic utere tuo ut alienum non lædas*" to hold, that the owner of the adjacent soil, if desirous of excavating it, should take reasonable precautions by way of shoring, or otherwise, to prevent the excavation from disastrously affecting his neighbour. A burden would, no doubt, be thus cast on one man by the act of another done without his consent. But the advantages of such a rule would be reciprocal, and, regard being had to the practicability of shoring up during excavation, the restriction thus placed on excavation would not seriously impair the rights of ownership.

E But the matter is not *res integra*. It has been the subject of legal decisions, and those decisions leave it beyond doubt that such is not the law of England. On the contrary it is the law, I believe I may say without question, that at any time within twenty years after the house is built the owner of the adjacent soil may with perfect legality dig that soil away, and allow his neighbour's house, if supported by it, to fall in ruins to the ground. This being so, and these being his legal rights (the rights incident to his ownership), it seems to me that these rights must remain to him, or those who come after him, for all time, unless he, or they, have done something by which these rights have been divested, restricted, or impaired. I find it impossible to conceive, within the application of any legal principles, that mere lapse of time can divest him or them of the rights they once had. Legal rights do not perish by lapse of time, but rather grow confirmed. What I mean to express is that the right to excavate the neighbouring soil not being impaired or restricted by the house being built, anything which afterwards impairs or restricts it must proceed from those who possess that right, and cannot come about, all things remaining unchanged, by the mere efflux of time.

G In all the cases in which lapse of time is held to stand in the way of the assertion of rights attaching to the ownership of property, it is not the lapse of time itself which so operates but the inferences which are reasonably drawn from the continuous existence of a given state of things during that period of time. These inferences are inferences of acquiescence or consent, and they are drawn from the fact that the person against whom the right is claimed has for a length of time failed to interrupt or prevent an enjoyment by his neighbour which he might have interrupted had he so pleased. In *Chasemore v. Richards* (10) the language held I puts this beyond doubt. WIGHTMAN, J., said that no presumption could be raised from non-interruption unless the person against whom the right is claimed might have prevented it, and LORD WENSLEYDALE, in addressing your Lordships, distinctly relied upon the fact that the defendant was not able to prevent the enjoyment which after a lapse of years had been claimed as a right against him. In the more modern case of *Sturges v. Bridgman* (11) it was distinctly determined that no easement could be created by lapse of time unless the defendant might have inter-

* See Appendix, post p. 29.

rupted it. "Qui non prohibet quod prohibere potest assentire videtur" is the legal maxim upon which, in my opinion, all the cases of easements of whatever kind acquired by length of time substantially rest. A

The question, therefore, in each particular case must be: Could the defendant have interrupted the enjoyment in question? If these words are taken literally, all cases are alike, and the question is no question at all. For an action for the disturbance of the enjoyment claimed involves the possibility of its being disturbed, and the fact that the defendant has at last interrupted the plaintiff's enjoyment (say of support to his house) which constitutes his cause of action, is a very simple proof, except under special circumstances, that the enjoyment was capable of interruption at an earlier period. The defendant's power of interruption, therefore, in my opinion, means something very different from the mere physical possibility of interrupting. It involves knowledge that the necessity for support existed, and the possibility of withdrawing that support without the expenditure of so much labour or money, or the incurring of so much loss or damage, as a man could not reasonably be expected to incur. B C

There is direct authority for this proposition to be found in *Webb v. Bird* (9) in which WILLES, J., states the principle which is to be extracted from the previous cases, in the following language (10 C.B.N.S. at p. 285): D

"In general a man cannot establish a right by lapse of time and acquiescence against his neighbour, unless he shows that the party against whom the right is acquired might have brought an action, or done some act, to put a stop to the claim, *without an unreasonable waste of labour and expense.*"

Nor is any other view of this matter, as it seems to me, consistent with the terms in which a right to be gained by prescription or lapse of time is defined. A claim by prescription to a right of this character is said only to arise when a right, or benefit, enjoyed over a length of time has been enjoyed "*nec vi, nec clam.*" What is the meaning and bearing of these qualifications? or what place could they have in such a definition, unless they point to the fact that the benefit claimed after a lapse of years as a right is one, the existence of which the person against whom it is claimed had the means of knowing, and the enjoyment of which he had the power to stop? And of what importance are these matters, except that they lay the foundation, where the right or benefit has not been interfered with, for presuming that he who might have interfered with them, has granted or consented that they should be undisturbed in future? E F

Continuous enjoyment without interruption is surely insisted upon as the basis of the right for some reason, and for what reason except that it is the evidence of assent? The physical power to interrupt, if accompanied, as I have above suggested, by a knowledge that the enjoyment of support existed, and by the means of exercising that power of interruption without extravagant and unreasonable loss or expense, may well give ground for an implied assent if it be not exercised for so long a period as twenty years. But if unaccompanied by these qualifications. H the fact of non-interruption appears to lead to no conclusion whatever, and the restrictions insisted upon, that the enjoyment must be "open" and not sustained by "force," cease to have an intelligent place in the definition. In the present case it is obvious that a power to interrupt is one which, although it has existed, and been physically possible ever since the plaintiffs' house was built, could only be exercised by measures which no man in his senses would take. It would indeed I be an unreasonable state of the law which should enforce upon the defendant, if he wished to retain his original right to excavate his own soil at such time as his interests might require him to do so, that he should pull his own house down, and drag his neighbour's to the ground with it at a time when his interest did not require it, and when it could be nothing but a grievous loss and injury to all parties concerned.

For these reasons I am unable to support the conclusion that a right such as that here in question could be gained by the plaintiffs by anything in the shape of pre-

A scription or lost grant; but, if I am mistaken in this, I think it is clear that in the present case the question should have been submitted to the jury whether the enjoyment of the support to the house was an "open" enjoyment at all. The house was built in an exceptional manner, and that which, seen from the outside, would appear to be nothing more than an ordinary chimney stack carrying nothing but its own weight, was in truth a pier of brickwork, intended to carry, and in fact carrying, one end of an iron girder, upon which girder the whole upper floor of the house rested. If the plaintiffs' right, therefore, was to be established by prescription, I think it inevitable that the matter should have been dealt with by the learned judge in the manner clearly described by LINDLEY, J., in his answer to your Lordships' fifth question.* And I daresay it would have been so dealt with if the learned judge had not considered the plaintiffs' right to stand on a different ground altogether, and asserted it to be an absolute right acquired by twenty years' enjoyment, quite independent of grant, acquiescence, or consent. In so doing he relied, he said, upon the existing authorities. I will not recapitulate them or criticise them individually, as they have been carefully reviewed by others. They constitute the existing law on the subject; and I think the learned judge has drawn what is upon the whole the correct inference from them, though they are by no means uniform, and although, for the reasons I have given, and for those more fully expanded in the opinion of FRY, J.,† I am unable to find a satisfactory legal ground upon which these authorities may be justified. I feel the less difficulty in acquiescing in them, inasmuch as they affirm a right to exist after twenty years, which, in my opinion, should have been held to exist as soon as the plaintiffs' house was built. The learned judge's direction at the trial was, therefore, in my opinion, correct, and this appeal should be dismissed with costs. If I have ventured to question the legal principles upon which the authorities which guided him are founded, I have only done so lest this case should be thought an authority for the establishment of other rights more or less similar to the right here in question. So far as my opinion goes this right, to the lateral support of the soil for an ancient house, stands upon the positive authority of a series of cases and a long acceptance in the courts of law, and the ratification of it by your Lordships ought not to be considered as the adoption of principles which might have a wide application in analogous cases.

* LINDLEY, J.: What is proof of open enjoyment will appear from my answer to the next question. In answer to your Lordships' fifth question, for the reasons stated, I am of opinion that the course taken by the learned judge at the trial in directing a verdict for the plaintiffs was not correct. He ought to have left the jury to decide the question of open enjoyment by the plaintiffs of the right they claimed. In order to make this question intelligible to a jury they should be told that they ought to consider that the plaintiffs had openly enjoyed all that support which any reasonably competent person, seeing the ground and the plaintiffs' building (but knowing of its peculiarities), would infer that it required when used for the purposes for which it was apparently constructed and adapted; but any support which in fact the building might require beyond this ought not to be considered as openly enjoyed, unless the necessity for such additional support was in fact known to the defendants or their predecessors in title. In the great majority of cases the existence and nature of the building will render it unnecessary to investigate such a question as this; for it is only in cases of an unusual character that a building requires more support than any competent person seeing it would suppose. But, in my opinion, the plaintiffs' building in this case was so peculiarly constructed as to render it quite possible for the defendants to prove, first, that the plaintiffs had enjoyed more support than any one would infer from the nature and character of their building; and, secondly, that the building fell by reason of the withdrawal of such extra support, which, although enjoyed in fact, had not been enjoyed openly or to the knowledge of the defendants or their predecessors in title. If the defendants had succeeded in proving these points they would in my judgment have been entitled to a verdict; and it is because they had no opportunity of giving such proof that I think there ought to be a new trial. A direction to the jury to the effect above mentioned would not only be in accordance with law as I understand it, but would also, I think, be free from practical difficulties or objections; for it comes to this, that speaking generally, and excluding cases of settled estates and other anomalous cases, the owner of a house which has existed for twenty years is entitled to such support as any one acquainted with building can see the house requires, but not to more unless he can show actual notice of enjoyment of more.

† See Appendix, post p. 29.

LORD BLACKBURN.—The first of the defences raised by the pleadings is a denial that the plaintiffs were entitled to have their buildings supported by the land adjacent thereto. It is on this defence that the most difficult questions arise, and I shall consider it first. A

It is, I think, conclusively settled by the decision in this House in *Backhouse v. Bonomi* (4) that the owner of land has a right to support from the adjoining soil; not a right to have the adjoining soil remain in its natural state (which right, if it existed, would be infringed as soon as any excavation was made in it), but a right to have the benefit of support, which is infringed as soon as, and not till, damage is sustained in consequence of the withdrawal of that support. B

This right is, I think more properly described as a right of property, which the owner of the adjoining land is bound to respect, than as an easement, or a servitude *ne facias*, putting a restriction on the mode in which the neighbour is to use his land, but whether it is to be called by one name or the other is, I think, more a question as to words than as to things. And this is a right which, in the case of land, is given as of common right; it is not necessary either in pleading to allege, or in evidence to prove, any special origin for it; the burden, both in pleading and in proof, is on those who deny its existence in the particular case. No doubt the right is suspended, or, rather perhaps, cannot be infringed, while the adjoining properties are in the hands of the same owner. He may dig pits on his own land, and suffer his own adjoining land to fall into those pits just as he pleases. When he severs the ownership and conveys a part of the land to another, he gives the person to whom it is conveyed (unless the contrary is expressed) not a right to complain of what has been already done, but a right to have the support in future. It is, I think, now settled that the conveyance may be on such terms as to prevent any such right arising: see *Rowbotham v. Wilson* (3); *Smith v. Darby* (12); *Eadon v. Jeffcock* (13); *Aspden v. Seddon* (14). But the burden both of pleading and proving such a case lies on those setting it up. And I think that the decision of this House in *Backhouse v. Bonomi* (4) also conclusively settles that, though the right of support to a building is not of common right and must be acquired, yet, when it is acquired, the right of the owner of the building to support for it is precisely the same as that of the owner of land to support for it. Both LORD CRANWORTH and LORD WENSLEYDALE say that this right also is more properly to be called a right of property to be respected by the owner of the adjoining land than a negative easement or servitude *ne facias*. LORD WENSLEYDALE could not mean to say that the right of support to a house was of common right, and so overrule several authorities, including *Gayford v. Nicholls* (15), where he himself had delivered judgment. E F G

In the case now before your Lordships, nothing was proved which could have given rise to this right unless it arose from enjoyment in the manner and subject to the conditions and for the time required by law to give a title by prescription. And inasmuch as it was clearly proved that, though there had been more ancient buildings on the spot, they were removed, and buildings of a different structure and requiring a different degree of support were erected in their place only twenty-seven years before the excavations complained of, it seems to me clear that the buildings are not ancient buildings in the sense that they or similar buildings, for which in the course of repair they were substituted, had stood there from time beyond memory. The plaintiffs must (unless the construction of the Prescription Act, 1832, is such as to embrace such a case as this) rely on the comparatively modern doctrine by which enjoyment of a right appurtenant to land for twenty years or more, under such circumstances as are required by law, is given the effect of prescription, though it is proved that the enjoyment began within living memory. H I

I do not understand COCKBURN, C.J., to doubt that such a right as that now in question might be acquired, according to English law, where the building had stood from time immemorial, by enjoyment open and peaceable from time immemorial. It was questioned on the argument at the Bar of this House, whether a right of support for a building could be acquired by any length of enjoyment, even

A from time immemorial, and I shall consider that later. But the Lord Chief Justice, I think, denied that this right could be acquired by enjoyment for a less time than time immemorial. He said that such enjoyment might give rise to a presumption that there was originally a grant, or at least an assent in point of fact to the enjoyment, but said that when it was proved, or what comes to the same thing, admitted, that the assent of the defendants' predecessors was not asked for, or

B obtained by grant or in any other way, the presumption was at an end. This is expressed in terms confined to this particular right, but I think his position is general, and applies to every easement, unless it is claimed under the Prescription Act, 1832. This requires examination.

The English common law is stated by LORD COKE (Co. Lit. 113b, 114a). He says, to make prescription, two things are incidents inseparable, possession or

C usage, and time. Possession must be long, continual, and peaceable. As to "long," LORD COKE says: "It is the time given by law, which in England is the time whereof there is no memory of man to the contrary." But though living memory might not be to the contrary, yet if written evidence showed that the possession had a beginning, it was defeated. By what COCKBURN, C.J., seems to think a judicial usurpation of legislative power, the time of legal memory was fixed

D to be the same as the limitation of real actions by the Statute of Westminster (1275), viz., the time of Richard I, 1189. This, when first introduced, gave a prescription of about eighty-six years, but being a fixed date, it became longer and longer, and already when LITTLETON wrote, in the reign of Edward IV, he observes on the inconvenience felt, because the time of limitation of a writ of right is of so long time past.

E This inconvenience must have been particularly felt with regard to any rights attached to buildings. For though a few buildings which existed in 1189 still exist, and there are some old cities and towns (not of very great extent) which then existed, and in which it is possible that the ancient buildings have been from time to time repaired without altering their structure, yet far the greater part of the buildings in England stand on land which can be shown to have been first built

F upon at a much later date.

In *Bedle v. Beard and Wingfield* (16), in 1607, it was held that, though it was proved that there was a time within legal memory when the right claimed had not existed, and, consequently, the right could not have its origin in prescription, long possession was a sufficient ground for presuming what was necessary to make that possession lawful, and, consequently, in that case, where there had been possession for 303 years, for presuming a grant from the Crown, though none was shown.

G LORD COKE said:

"This was resolved by LORD ELLESMERE, with the principal judges, and on consideration of precedents."

So that the doctrine was not then introduced for the first time. But the length of

H time necessary to give rise to such a prescription was left indefinite, and though I think no one, in that case, could have really believed that there actually had been a grant from the Crown which was lost, that is not said, and it may have been thought that long user was evidence by which the fact might be proved, but that it should not be found unless believed. The modern doctrine that a jury ought to be directed that if they believed that there had been what was equivalent to

I adverse possession as of right for more than twenty years, they ought to presume that it originated lawfully, that is, in most cases, by a grant, must certainly have been introduced after the passing of the Limitation Act, 1623, and as the earliest reported decision is that of *Lewis v. Price* (17), in 1761, the doctrine is probably not much more than a century old. I quite agree with what is said by COCKBURN, C.J. (3 Q.B.D. at p. 105), that where the evidence proved an adverse enjoyment as of right for twenty years, or little more, and nothing else, "no one had the faintest belief that any grant had ever existed, and the presumption was known to be a mere fiction." He thinks that thus to shorten the period of prescription

without the authority of the legislature was a great judicial usurpation. Perhaps it was. The same thing may be said of all legal fictions, and was often said (with, I think, more reason) of recoveries. But I take it that when a long series of cases have settled the law, it would produce intolerable confusion if it were to be reversed because the mode in which it was introduced was not approved of: even where it was originally a blunder, and inconvenient, *communis error facit jus*. But to refuse to administer a long-established law because it was based on a fiction of law, admitted to be for a purpose and producing a result very beneficial, is, as it seems to me, at least as great a usurpation of what is properly the function of the legislature as it was at first to introduce that fiction. A B

It is difficult to reconcile all the dicta and decisions on the subject. There is language used in *Darwin v. Upton* (18), as to the difference between an absolute bar and a presumptive bar which I have never been able to understand. I quite agree that where the evidence is such as to leave it a question whether the enjoyment has been such—open, peaceable, and continual—as to raise a presumption of the right, the jury must be asked to find as a fact whether the enjoyment was of that kind; but COCKBURN, C.J., seems (3 Q.B.D. at p. 107) to understand *Darwin v. Upton* (18) as amounting to this, that the jury should be told that, if the enjoyment has been such as to raise a presumption of a right, they may find a grant whether they believe in its existence or not, but that, if they choose to be scrupulous, they need not so find. I cannot believe that the judges meant that, and, if they did, I think the subsequent cases are inconsistent with that ruling. I would more particularly rely on what is said by BAYLEY, J., in *Cross v. Lewis* (19). The judges never altered the form of pleading, and it was still necessary for a defendant setting up a right as a defence, to plead it with particularity: see *Hendy v. Stephen-son* (20). C D E

In *Campbell v. Wilson* (21) the defendant pleaded, first, a way by prescription, which was traversed; and, secondly, that Bryan Grey was seised in fee of the locus in quo, and that Joseph Wilson (under whom the defendant made title by devise) was at the same time seised in fee of an adjoining moss dale, and that by deed, lost by time and accident, Bryan Grey granted a right of way over the locus in quo to Joseph Wilson and his heirs. The replication traversed the grant. At the trial in 1803, before CHAMBRE, J., it appeared that in 1778, by an award made under an Inclosure Act, all ways not set out in the award were extinguished. And this way was not set out in the award. This put an end to the plea of prescription, and it would also have put an end to the second plea, unless the alleged grant by Bryan Grey was made subsequent to the award, that is, within twenty-five years next before the trial, and, of course, within less than that time before the plea was pleaded, in which it was alleged that the deed was lost by time and accident. But evidence was given that there had been, for more than twenty years, an adverse enjoyment of the right of way. If the issue joined was to be understood in its literal and natural sense, it could hardly have been suggested that this was evidence to justify the judge in leaving it to the jury whether, in fact, in the short interval between the making of the award and the commencement of the twenty years' enjoyment, not more than two or at most four years, there actually had been a grant since lost. But so to construe the issue would have made the question whether there was a right to depend on the accident whether the right was set up by a plaintiff complaining of an obstruction to it, or a defendant justifying under it. CHAMBRE, J., who was a very learned pleader, does not seem to have had the least doubt of the meaning of the issue. He never said one word to the jury as to the reality of the grant, but left it to them to presume it, if satisfied that the enjoyment was adverse, and had continued twenty years before the action. This direction was approved of by LORD ELLENBOROUGH and the whole Court of King's Bench, the only question on which they seem to have had any difficulty being whether there was a proper direction given as to the nature of the enjoyment which would give rise to the presumption that the defendant acted by right. And in *Penwarden v. Ching* (22), where issue was taken on a plea justifying a F G H I

A trespass in defence of an ancient window, and on the trial in 1829 it was proved before TINDAL, C.J., that the window was first erected in 1807, that learned judge said that

B “the question is not whether the window is what is strictly called ancient, but whether it is such as the law, in indulgence to rights, has in modern times so called, and to which the defendant has a right, for this is the substance of the plea.”

The verdict was for the plaintiff, so that this ruling could not be reviewed, but it was the ruling of a judge who was a very learned pleader.

C In both these cases, and in many more, if the question had been whether there really in fact had been a grant or really in fact the window was ancient, there could have been no possible question. It was, no doubt, desirable that such artificial doctrines should be dispensed with. The Prescription Act, 1832, so far as it went, made that a direct bar which was before only a bar by the intervention of a jury and the use of an artificial fiction of law. But it did not abolish the old doctrine; if it had, old rights even from time immemorial would have been put an end to by unity of occupation for the space of a year. But this was not done: D see *Aynsley v. Glover* (23). I think the law, as far as regards this subject, is the same as it was before that Act was passed. Neither can I agree with what seems thrown out by LUSH, J., rather as a makeweight than as a substantial ground of decision, that the more recent Real Property Limitation Act, 1833, which put an end to the doctrine of adverse possession, has made any difference in the law. This view of the matter renders it unnecessary to decide anything as to the construction E of the Prescription Act, 1832, and I wish to say nothing that may prejudice the decision of that question if hereafter it becomes material.

I scarcely think that, if this had been the only point argued at your Lordships' Bar on the first occasion it would have been thought of sufficient difficulty to ask the opinions of the learned judges. But it is satisfactory to find that they all agree that a building, which has de facto enjoyed (under the circumstances and F conditions required by the law of prescription) support for more than twenty years, has the same right as an ancient house would have had.

I am glad that the recent alterations in the law have obviated the necessity of putting such very artificial constructions on issues as I have mentioned. But I am not able to agree with BOWEN, J., in thinking that the alterations in the modes G of procedure and the fusion of law and equity have made any alteration in the substance of the law. I quite agree with him in thinking that circumstances might, and often did, give rise to an equity to protect a house which would not have given rise to a legal claim to maintain an action at law. But those circumstances must always have existed in fact, and generally there must have been notice of them. I cannot think the alterations in procedure have altered the law.

H On the first argument at the Bar of this House in November, 1879, when the Lords present were the then Lord Chancellor (EARL CAIRNS), LORD PENZANCE, and myself, a very able argument was addressed to this House by the then Attorney-General [SIR JOHN HOLKER], and the present Solicitor-General [SIR FARRER HERSCHELL], and at the close of it the Lord Chancellor summarised the argument, and asked if this was a correct statement of their proposition:

I “In order to gain for the owner of land, by enjoyment, a title to some advantage from or upon his neighbour's adjacent close, greater than would naturally belong to him, the advantage must be one the enjoyment of which is or ought to be known to the neighbour, and could, without destruction or serious injury to his own close, be interrupted by him.”

This was accepted by the Attorney-General as truly representing the argument. As the Prescription Act, 1832, was couched in terms which, as it has been held, prevented its applying to this case, it might be necessary in considering this proposition to decide questions of great importance, which had never yet been finally

decided, and, therefore, it was deemed advisable to have the assistance of the learned judges, and a further argument was ordered. A

I do not think anything was said at the second argument that was not involved in the summary of the first argument which I have above quoted. It was admitted that if the proposition was correct, no lapse of time, not even from time immemorial, could give a right of support to a building, such as to oblige the owners of adjoining land to respect it, and that the same would have been before the Prescription Act, 1832, and still was in cases not within its provisions, the law as to the acquisition by enjoyment of the right to require the neighbours to respect the access of light and air to a window, unless it made a difference that the enjoyment in this latter case could be easily interrupted. Reference was made to cases which were said to be analogous, such as that of keeping land undrained, so as to act as a reservoir for springs: *Chasemore v. Richards* (10); or that of claiming to have uninterrupted the access for the wind to a windmill: *Webb v. Bird* (9); and it was said that the principle on which those cases were decided was one which showed that there was no right of support acquired by the common law prescription for a building, though it had stood for time immemorial, and, if that was so, there could be none by the prescription for a shorter period created by the modern decisions; for I agree with BRAMWELL, L.J., where, in *Bryant v. Lefever* (24), he says that what he calls the expedient, introduced by these decisions, is ancillary to the doctrine of prescription at common law, and applicable in cases where something prevents the operation of the common law prescription from time immemorial, and is, therefore, only applicable where the right claimed is such as, if immemorial, might have been the subject of prescription. C D

During the very considerable interval that elapsed between the first argument in November, 1879, and the time when the opinions of the learned judges were delivered, Mar. 15, 1881, I have at intervals bestowed consideration on this proposition, and though I refrained from finally coming to a decision till I had the advantage of considering their opinions, I was strongly impressed with the conviction that such a right as is here claimed, was, according to the established law of England, one which might be acquired by prescription. And I find that all the judges agree in that result, though not entirely for the same reasons, and I am not sure that any of them would have quite assented to the train of reasoning which has led me to that same result. E F

On a minor point—whether there should be a new trial because the judge at the trial left no question to the jury when, as it was said, there was or might have been evidence produced which would raise a question of fact which might have been a defence—the learned judges are divided in opinion; LINDLEY, LOPES, and BOWEN, JJ., agreeing with the majority of the Court of Appeal that there should be a new trial, and POLLOCK, B., FIELD, MANISTY, and FRY, JJ., thinking that there should not. It is not necessary to choose between the divers reasons which led them to the same result on the first point. It may be necessary to do so on this minor point, where their reasons led to different results. I have come to the conclusion that there should not be a new trial. I will state the reasoning which has led me to these conclusions. G H

I cannot agree that the only principle on which enjoyment could give the owner of property a prescriptive right over a neighbour's land exceeding what would, of common right, belong to the owner of that property, was acquiescence on the part of the neighbour. Nor even that it is the chief principle. In general such enlarged rights are of such a nature that those over whose property they are enjoyed could in the beginning have stopped them; and a failure to stop them is evidence of acquiescence, and may afford a ground for finding that there was an actual assent, but that is, in many if not in all cases, a fiction. There is seldom a real assent. But no doubt a failure to interrupt, when there is power to do so, may well be called laches, and it seems far less hard to say that for the public good and for the quieting of titles enjoyment for a prescribed time shall bar the true owner when the true owner has been guilty of laches, than to say that for the public I

A good the true owner shall lose his rights, if he has not exercised them during the prescribed period, whether there has been laches or not; but there is not much hardship. Presumably such rights if not exercised are not of much value, and though sometimes they are "*ad ea quæ frequentius accidunt jura adaptantur.*" This ground of acquiescence or laches is often spoken of as if it were the only ground on which prescription was or could be founded. But I think the weight of authority, both in this country and in other systems of jurisprudence, shows that the principle on which prescription is founded is more extensive.

B Prescription is not one of those laws which are derived from natural justice. LORD STAIR, in his INSTITUTIONS, treating of the law of Scotland, in the old customs of which country he tells us prescription had no place (book 2, tit. 2, s. 9), says, I think truly:

C "Prescription, although it be by positive law, founded upon utility more than upon equity, the introduction whereof the Romans ascribed to themselves, yet hath it been since received by most nations, but not so as to be counted amongst the laws of nations, because it is not the same, but different in diverse nations as to the matter, manner, and time of it."

D It was called by the old Roman lawyers *usucapio*, which is defined (Dig. lib. 41, tit. 3, *De usurpationibus et usucapionibus*, art. 3) to be "*adjectio domini per continuationem possessionis temporis lege definiti.*" In the same book and title, art. 1, the reason is given:

E "*Bono publico usucapio introducta est ne scilicet quarundam rerum diu et fere semper incerta dominia essent, quum sufficeret dominis ad inquirendas res suas statuti temporis spatium.*"

F This is precisely the object with which modern statutes of limitations are established, and it would be baffled if there was to be a further inquiry whether there had been acquiescence on the part of the true owner. It is both fair and expedient that there should be provisions to enlarge the time when the true owners are under disabilities or for any other reason are not to be considered guilty of laches in not using their right within the specified period, and such provisions there were in the Roman law, and commonly are in modern statutes of limitations, but I take it that these are positive laws, founded on expedience, and varying in different countries and at different times.

G The minor question whether there should be a new trial, in my mind, depends on the question what positive laws have been adopted by the English courts. To return to the Roman law, *usucapio*, it will be noticed, was confined to the dominium, nearly equivalent to the modern phrase of the legal estate. It was enunciated in the laws of the Twelve Tables, in terms brief, to the extent of being obscure, and simple to the extent of being rude—"Usus auctoritas fundi biennium, cæterarum omnium annuus est usus." This for centuries, down to the time of Justinian, continued to be the law, as far as regarded the dominium, within the old territory of the republic, but side by side with it, the Prætors introduced, by their edicts, a *jus prætorium*, nearly equivalent to the modern phrase of equity, which practically superseded the old law, and in the provinces was the only law. No one who has ever looked at the DIGEST will complain of this Prætorian law as brief; nor will anyone who has read any portion of it fail to admire the skill with which legal principles are worked out. Some of the edicts of the Prætors are so obviously just and expedient, and are so tersely expressed, that they have been generally adopted, and are quoted as legal maxims by those who often do not know whence they came. Two edicts were restitutory: "*Prætor ait, Quod vi aut clam factum est qua de re agitur id cum experiendi potestas est, restituas*" (DIGEST, lib. 43, tit. 24, art. 1). This relieved the true owner from the *usucapio* which transferred the dominium in consequence of a possession of two years if the possession was not peaceable, or not open.

"Ait Prætor, Quod precario ab illo habes aut dolo malo fecisti ut desineres habere qua de re agitur, id illi restituas" (DIGEST, lib. 43, tit. 26, art. 2). This relieved him from the effect of a possession of two years if it was not adverse, or if it was fraudulent. By a prohibitory edict, "Uti possidetis" (DIGEST lib. 43, tit. 17), the Prætor forbid any one to disturb, by force, any possession which had been obtained "nec vi, nec clam, nec precario." And on the basis principally, but not exclusively, of those three edicts, the Prætors established what was called the "præscriptio longi temporis." I will read what POTHIER says in his treatise "De la Prescription, Article Préliminaire, Article 3." I quote from the eighth volume of POTHIER's works by M. DUPIN, p. 390:

"Suivant ce droit du prêteur le possesseur de bonne foi, qui avait eu une possession paisible et non interrompue, soit d'un droit incorporel, soit d'un héritage qui n'était pas du nombre de ceux qui étaient res mancipi, pendant le temps de dix ans inter présentes et de vingt ans inter absentes, acquerrait après l'accomplissement du temps de sa possession, non le domaine de la chose, mais une prescription ou fin de non recevoir, à l'effet d'exclure la demande en revendication du propriétaire de la chose, qui n'aurait été intentée qu'après l'accomplissement de ce temps. Depuis, on avait aussi accordé une action utile à ce possesseur pour revendiquer la chose, lorsqu'il en avait perdu la possession après l'accomplissement du temps de la prescription."

Thus the Prætors, while professing to leave the Law of the Tables in force, at least within the old territory of the Republic, practically deprived it of all force. JUSTINIAN by two laws (CODEX, lib. 7, tit. 25), "De nudo jure Quiritium tollendo," and tit. 31, "De usucapione transformanda," changed all this. The two laws are couched in terms that show that those who framed them had very little respect for antiquity, and were intolerant of legal fictions. JUSTINIAN, says POTHIER, by these enactments has changed the prescription of ten and twenty years into a true "usucapio," for they have caused the "dominium" to pass to the possessor of the heritage, or the incorporeal right of which he has had during that time a possession or quasi-possession peaceable and not interrupted.

The name of prescription has, however, survived the thing. And in the numerous provinces into which France was before the Revolution divided, many of which were governed by their own customs, the laws of prescription varied. DOMAT in his treatise on the CIVIL LAW (I quote from the translation by Doctor STRAHAN), book 3, title 7, s. 4, says:

"It is not necessary to consider the motives of these different dispositions of the Roman law, nor the reasons why they are not observed in many of the customs. Every usage hath its views, and considers in the opposite usages their inconveniences. And it sufficeth to remark here what is common to all these different dispositions of the Roman law, and of the customs as to what concerns the times of prescriptions. Which consists in two views; one, to leave to the owners of things, and to those who pretend to any rights, a certain time to recover them; and the other to give peace and quiet to those whom others would disturb in their possessions or in their rights after the said time is expired."

Those who framed the CODE NAPOLÉON had to make one law for all France. To facilitate their task they divided servitudes into classes, those that were continuous and those that were discontinuous, and those that were apparent and non-apparent (CODE CIVIL, Arts. 688, 689). Those divisions, and the definitions, were, as far as I can discover, perfectly new, for, though the difference between the things must always have existed, I cannot find any trace of the distinction having been taken in the old French law, and it certainly is not to be found in any English law authority before GALE ON EASEMENTS in 1839. On this division their legislation was founded. The first Projet of the CODE allowed continuous servitudes, whether apparent or not, and discontinuous servitudes, if apparent, to be gained by title or by possession for thirty years. The CODE CIVIL as it was finally adopted by art.

A 690, allows servitudes, if continuous and apparent, to be acquired by title or by possession for thirty years, and by art. 691 enacts that continuous servitudes not apparent and servitudes, if discontinuous, whether apparent or not, can only in future be established by titles, but saves vested rights already acquired. The authors of *LEX PANDECTES FRANÇAISES* (Paris, 1804), on whose authority I state this, say (vol. v., p. 488) that this great change from the principle of the *Projet* was made without any publication of the discussions concerning it, or of the reasons that led to it. And they state more openly than I should have expected in a book published in Paris in 1804, that in their opinion it was not an improvement. It certainly has never been received in English law.

I think that what I have above stated is quite enough to confirm LORD STAIR'S position that the laws of different countries relating to prescription are positive laws differing in matter, manner, and time in different countries. I think that, though the English law as to prescription was, beyond controversy, greatly derived from the Roman law, the very words of which are often quoted in the earliest English authorities, yet, to borrow the idea expressed by DOMAT in the passage I have above cited, every system of law is founded on its own ideas of expediency, and that we must look to the English decisions to see what principles have been adopted in it, as upon the balance of inconvenience and convenience expedient, and what have in it been rejected as on the balance inexpedient.

It cannot be disputed that from the earliest times the owner of adjoining land was bound to respect the access of light and air acquired by enjoyment of an ancient window. The immemorial custom of London to build upon an ancient foundation, though thereby an ancient window was obstructed, which was pleaded and held to be a good custom in *Hughes v. Keme* (25), in 1613, proves the great antiquity of this law. But as far as I find, the first mention of it in a reported case is *Bowry and Pope's Case* (26). I will read the whole of it, for, though the point actually decided was only that a window first erected in the reign of Queen Mary, that is, after 1553, and not later than 1558, had not acquired in 1587 the status of an ancient window, I think the opinion of the court on points not actually decided is important.

F "Bowry brought an action upon the case against Pope, and declared that in the time of Edward VI, the Dean and Chapter of Westminster leased two houses in St. Martin's, in London, to Mason for sixty years. The which Mason leased one of the said houses to one A, and covenanted by the indenture of lease with the said A, that it should be lawful for the said A, his executors and assigns, to make a window in the shop of the house so to him assigned, and afterwards in G the time of Queen Mary a window was made accordingly where no window was there before. And afterwards A assigned the said house to the plaintiff. And now Pope, having a house adjoining, had erected a new building super solum ipsius Pope ex opposito the said new window, so as the new window is thereby stopped. The defendant pleaded not guilty, and it was found for the plaintiff. And it was moved for the defendant in arrest of judgment that here upon the declaration appeareth no cause of action, for the window, in the stopping of H which the wrong is assigned, appears upon the plaintiff's own showing to be of late erected scilicet in the time of Queen Mary. The stopping of which by any act upon my own land was held lawful and justifiable by the whole court. But if it were an ancient window time out of memory, &c., there the light or benefit I of it ought not to be impaired by any act whatsoever, and such was the opinion of the whole court. But if the case had been that the house and soil upon which Pope had erected the said building had been under the estate of Mason, who covenanted as above said, then Pope could not have justified the nuisance, which was granted by the whole court."

It is for this last opinion that I cite the case. The Court of Common Pleas do not seem to have felt the difficulty which pressed so strongly on LITLEDALE, J., in *Moore v. Rawson* (6), and which leads FRY, J., in his very able opinion, to declare that this right does not lie in grant [post p. 29]. They seem to have had no doubt

that the express covenant operated as a grant of the window, and that neither Mason nor any who held under his estate, could derogate from that grant by stopping the benefit of the window. A

In *Trinity*, 29 Eliz. [1587], about nine months later, the Queen's Bench, in *Bland v. Moseley* (27), decided the second point resolved by the Common Pleas the same way, and they also seem to have agreed with the third resolution. The reasons, as reported by LORD COKE, are: B

"It may be that, before time of memory, the owner of the said piece of land has granted to the owner of the said house to have the said windows without any stopping of them, and so the prescription may have a lawful beginning; and WRAY, C.J., then said that for stopping as well of the wholesome air as of light, an action lies, and damages shall be recovered for them, for both are necessary, for it is said *et vescitur aura ætherea*, and the said words *horrida tenebritate* are significant, and imply the benefit of the light. But he said that for prospect, which is a matter only of delight and not of necessity, no action lies for stopping thereof, and yet it is a great commendation of a house if it has a long and large prospect, unde dicitur, *laudaturque domus longos quæ prospicit agros*. But the law does not give an action for such things of delight." C

It will be noticed that not a word is said about the possibility of obstructing the light; and, indeed, it seems to me clear that no one could ever have thought of stopping his neighbour's lights by hoardings until it was established that uninterrupted enjoyment for a period short of time immemorial would give a right. Then some ingenious lawyer thought of that easy mode of preventing the acquisition of a right in a window not yet privileged. The distinction between a right to light and a right of prospect, on the ground that one is matter of necessity and the other of delight, is, to my mind, more quaint than satisfactory. A much better reason is given by LORD HARDWICKE in *A.-G. v. Doughty* (28), where he observes that if that was the case there could be no great towns. I think this decision, that a right of prospect is not acquired by prescription, shows that, while on the balance of convenience and inconvenience, it was held expedient that the right to light, which could only impose a burden upon land very near the house, should be protected when it had been long enjoyed, on the same ground it was held expedient that the right of prospect, which would impose a burden on a very large and indefinite area, should not be allowed to be created, except by actual agreement. This seems to me the real ground on which *Webb v. Bird* (9) and *Chasemore v. Richards* (10) are to be supported. The rights there claimed were analogous to prospect in this, that they were vague and undefined, and very extensive. Whether that is or is not the reason for the distinction, the law has always, since *Bland v. Moseley* (27), been that there is a distinction—that the right of a window to have light and air is acquired by prescription, and that a right to have a prospect can only be acquired by actual agreement. D E F G

Shury v. Pigott (29), was decided in 1625. It seems to have excited a good deal of attention, and many things collaterally to have been discussed which were not necessary for the decision. The actual point decided in *Shury v. Pigott* (29) was, that in a conveyance there was (though nothing was said), an implied grant that neither the conveyor nor any who claimed under him should use their lands so as to deprive the property conveyed of what was necessary for its enjoyment, in that case an artificial supply of water, a principle which, in the case of a house, would certainly include support. H

In *Palmer v. Fleshees* (30) the first point ruled by TWYSDEN and WYNDHAM, JJ., was, I

"if I, being seised of land, lease forty feet to A, to erect a house upon it, and other forty feet to B to erect a house on it, and one of them builds a house, and then the other dig a cellar in his land by which the wall of the first house adjoining falls, no action lies for this. And so they said it had been adjudged in *Shury v. Pigott* (29), for each can make the best advantage of his own. but

A to them it seemed that the law was otherwise if it had been an ancient wall or house which fell by this digging."

The reference to *Shury v. Pigott* (29) shows that in this place "ancient" means "existing before the conveyance of the land." The point actually decided was as to light, and the ratio decidendi is thus stated in the report in 1 LEVINZ, 122.

B "It was resolved that, although it be a new messuage, yet no person who claims the land by purchase under the builder [vendor] can obstruct the lights any more than the builder himself could, who cannot derogate from his own grant, by TWYSDEN and WINDHAM, JJ., HYDE being absent and KELYNGE doubting. For the lights are a necessary and essential part of the house. And KELYNGE said, Suppose the land had been sold first and the house after, the vendee of the land might stop the lights. TWYSDEN, to the contrary, said, Whether the land be sold first or afterwards, the vendee of the land cannot stop the lights in the hands of the vendor or his assigns. But all agreed that a stranger having lands adjoining to a messuage newly erected, may stop the lights, for the building of any man on his lands cannot hinder his neighbour from doing what he will with his own lands; otherwise if the messuage be ancient, so that he has gained a right in the lights by prescription."

D I say nothing as to the questions whether there is an implied reservation where the lands are parted with, as well as an implied grant where the house is parted with; or whether, when the land is sold before the house is erected on it, but on the terms that a house is to be built, the purchaser is driven to have recourse to equity to protect his subsequently built house, as neither of these questions is raised by the facts in the present case. But I think it is now established law that one who conveys a house does, by implication and without express words, grant to the vendee all that is necessary and essential for the enjoyment of the house, and that neither he, nor any who claim under him, can derogate from his grant by using his land so as to injure what is necessary and essential to the house. And I think that the right of support from the adjoining soil is necessary and essential for the enjoyment of the house.

E If the motive for introducing prescription is that given in the DIGEST, lib. 41, tit. 3, art. 1, quoted before, I think it irresistibly follows that the owner of a house who has enjoyed the house with a de facto support for the period and under the conditions prescribed by law, ought to be protected in the enjoyment of that support, and should not be deprived of it by showing that it was not originally given to him. And I think that the decisions ending in *Backhouse v. Bonomi* (4), decide that he should not be deprived of it. FRY, J., thinks those decisions are contrary to principle, but too strong to be departed from [post p. 29]. I have come to the conclusion, for the reasons I have given, that they are founded on principle.

H But it still remains to inquire whether any of the doctrines established by the English law, which on the ground of expediency prevent the acquisition of a right by enjoyment, would apply. In *Backhouse v. Bonomi* (4) the workings which did the mischief were at a considerable distance from the plaintiff's house, and would not have done any harm if the intervening minerals had not been previously removed by the defendant. Very different considerations may arise where the intervening minerals have been removed by the plaintiff himself, or those under whose estate he claims, or even by a third person. I express no opinion as to this, because it is not raised by the facts; but I mention *Birmingham Corp'n. v. Allen* (31), to show that it has not been overlooked. Neither do I think it necessary to express any opinion as to the distinction taken in *Solomon v. Vintners' Co.* (32), where it was said that, at all events, the right, if it could be acquired against the next adjoining house, could not be acquired when there were intervening properties, for, in this case, the defendants' land which they excavated was next adjoining to the plaintiffs' house, and I think the right to support from the adjoining land is not open to the objection that it is extensive and indefinite, and so far analogous to a

prospect. It seems much nearer in analogy to the right to the access of light to a window; perhaps if it were *res integra* one might doubt if it was expedient to protect an ancient window. But I see no ground for doubting that the right to forbid digging near the foundations of a house without taking proper precautions to avoid injuring it, is, for the reasons given by LUSH, J. (3 Q.B.D. at p. 89), one very little onerous to the neighbours, and one which it is expedient to give to the owner of the house.

No question here arises as to the effect of any disability on the part of the owner of the land, nor as to the effect of any restrictions arising from the state of the title. But a question does arise whether there was not, or at least might have been, evidence of something which would prevent the enjoyment here being of that nature which would give rise to prescription on the ground that the possession was not open. The edict of the Prætor that possession must not be *vi vel clam*, as I think, is so far adopted in English law that no prescriptive right can be acquired where there is any concealment, and probably none where the enjoyment has not been open. And in cases where the enjoyment was in the beginning wrongful, and the owner of the adjoining land may be said to have lost the full benefit of his rights through his laches, it may be a fair test of whether the enjoyment was open or not to ask whether it was such that the owner of the adjoining land, but for his laches, must have known what the enjoyment was, and how far it went. But in a case of support where there is no laches, and the rights of the owner of the adjoining land are curtailed for the public benefit, on the assumption that, in general, rights not exercised during a long time are not of much value, and that it is for the public good that such rights (generally trifling) should be curtailed in favour of quieting title, where that is the principle, I do not see that more can be requisite than to let the enjoyment be so open that it is known that some support is being enjoyed by the building. That is enough to put the owner of the land on exercising his full rights, unless he is content to suffer a curtailment, not in general of any consequence.

In the present case all that is suggested is that the plaintiffs' building was not an ordinary house, but a building used as a factory, which concentrated a great part of its weight on a pillar. It had stood for twenty-seven years, and, as far as appears, would, but for the defendants' operations, have stood for many more years; and there was nothing in the nature of concealment. Any one who entered the factory must have seen that it was supported in a great degree by the pillar. And there is not the slightest suggestion that those who made the excavation were not perfectly aware that the factory did rest on the pillar, or that they took such precautions as would have been sufficient if the building had been supported in a more usual way, but that the mischief happened from its unusual construction. That being so, I am at a loss to see what question the learned judge could, at the trial, on this evidence have left to the jury, beyond the question whether the building had for more than twenty years openly, and without concealment, stood as it was and enjoyed without interruption the support of the neighbouring soil. The judge offered to ask the jury if the building fell on account of the weight of the goods stored on the upper storey, and I cannot see what else could have been asked.

The second defence is a question of pure law. Ever since *Quarman v. Burnett* (33) it has been considered settled law that one employing another is not liable for his collateral negligence unless the relation of master and servant existed between them. So that a person employing a contractor to do work is not liable for the negligence of that contractor or his servants. On the other hand, a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor. He may bargain with the contractor that he shall perform the duty and stipulate for an indemnity from him if it is not performed, but he cannot thereby relieve himself from liability to those injured by the failure to perform it: *Hole v. Sittingbourne and Sheerness Rail. Co.* (34); *Pickard v. Smith* (35); *Tarry v. Ashton* (36). I do not think either side disputed these principles, nor that.

A in *Bower v. Peate* (1), the Queen's Bench Division thought that the case of a man employing a contractor to excavate near the foundation of a house which had a right of support, fell within the second class of cases; nor that, if correctly decided, that case was decisive. But *Butler v. Hunter* (37) was relied on, which case the Court of Exchequer held fell within the first class of cases. I am not quite sure that I understand from the report what the state of the evidence was. But assuming that B the defendants are right in saying that it was such as to make the case not distinguishable from *Bower v. Peate* (1), I think that the reasoning in *Bower v. Peate* (1) is the more satisfactory of the two.

The Court of Appeal in this case ordered that unless the defendants elected within fourteen days to take a new trial, judgment should be entered for the plaintiffs. If your Lordships take the view of the case which I have stated, and which is that C of LUSH, J., POLLOCK, B., FIELD, MANISTY, and FRY, JJ., it will be sufficient to dismiss the appeal, for the time for the election to take a new trial is long passed, and it need not be noticed.

LORD WATSON.—It is unnecessary for me to make any lengthened observations in this case. Seeing that my opinion is in substantial concurrence with what has D already been said, few words of explanation will suffice to express my views.

I am of opinion that a right to lateral support from the adjoining soil may be acquired for a building which has enjoyed that support peaceably and without interruption for the prescriptive period of twenty years. That proposition appears to me to have been recognised as the law of England in a long series of weighty, if not conclusive, judicial opinions, and to have been tacitly accepted by this House E in *Backhouse v. Bonomi* (4). The obligation which the creation of such a right by user imposes upon the owner of the adjacent soil, is to give continued support to the building. Consistently with that obligation he can make any lawful use of his land which he thinks proper. He may dig into, or even remove, the strata from which the building derives support, provided he gives efficient substituted support, by means of a retaining wall or other device. The proprietor of the building cannot, according to the decision in *Backhouse v. Bonomi* (4), complain that his right F has been infringed, unless and until the stability of the edifice has been affected by the withdrawal of its lateral support.

I agree with the noble and learned Lord on the Woolsack in holding the right in question to be a proper easement, and in the results which follow from taking that view of its character. In one sense every easement may be regarded as a right of G property in the owner of the dominant tenement, not a full or absolute right, but a limited right or interest in land which belongs to another, whose plenum dominium is diminished to the extent to which his estate is affected by the easement. But a right constituted in favour of estate A and its owners, in or over the adjoining lands of B is, in my opinion, of the nature of an easement, and that whether such right is one of the natural incidents of property, or has its origin in grant or H prescription. I am unable to regard the right of support to a building, whether lateral or vertical, as a negative easement, and I concur in the observations which have been made upon that point by the noble and learned Lord on the Woolsack; as well as by LINDLEY and BOWEN, JJ.* It appears to me to be as truly a positive easement, as the well-known servitude *oneris ferendi*, when a wall or beam is rested on the servient tenement. The distinction between positive and negative easements I may not be of vital importance in the present case; but in dealing with this point I am probably influenced by the consideration that a decision to the effect that an easement of lateral support to buildings is negative, would form an unsatisfactory precedent in another part of the country where positive servitudes alone are capable of being acquired by prescriptive enjoyment.

* LINDLEY, J.: Lapse of time is essential to the acquisition of a right to have a building supported by the land of another person, and such right is by English law an easement, or a right in the nature of an easement. A little reflection, however, will suffice to show that the easement of lateral support is of a peculiar kind; it is not a purely negative easement like the

It appears to me, for reasons which have already been fully explained by your Lordships, that the respondents have adduced proof of possession for the prescriptive period sufficient to establish their right to support from the adjacent soil, for the new or altered building which has stood for the last twenty-seven years. I do not think that any question of fact is disclosed by the pleadings or by the evidence in the case, which ought to have been, but was not, submitted to the jury.

Upon the point of law which was not remitted to the learned judges who have favoured the House with their opinions upon the main questions arising in this appeal, I agree with your Lordships. The operations of the Commissioners were obviously attended with danger to the building in question, but these appellants seek to shelter themselves from responsibility by proving that they took their contractor bound to adopt all measures necessary for ensuring the safety of the building. When an employer contracts for the performance of work which, properly conducted, can occasion no risk to his neighbour's house which he is under obligation to support, he is not liable for damage arising from the negligence of the contractor. But in cases where the work is necessarily attended with risk he cannot free himself from liability by binding the contractor to take effectual precautions. He is bound, as in a question with the party injured, to see that the contract is performed, and is, therefore, liable, as well as the contractor, to repair any damage which may be done. I, therefore, concur in the judgment which has been proposed by your Lordships.

LORD COLERIDGE. I have read the opinions of LORD SELBORNE, L.C., and LORD BLACKBURN. I entirely concur in their conclusions and the reasons they give for them.

Appeals dismissed.

right to light; for support, even when lateral, involves pressure on and an actual use of the laterally supporting soil. Further, the actual enjoyment of lateral support is incapable of interruption by physical means except by the removal of the soil which affords the support, or, in other words, by the destruction, more or less of the servient tenement.

BOWEN, J.: The form in which the presumption built upon a twenty years' enjoyment has usually been framed is that of a lost grant or covenant, according as the right claimed is to an affirmative or a negative easement. At the time when the twenty years' rule was first promulgated by the courts, a document under seal was the only specific mode known to the common law in which an incorporeal hereditament could be created. But there are many cases in which equitable rights in the nature of an easement arise without any deed at all. Even at a time when a deed was the only origin for an easement known to the common law, language is found in the judgments of the law courts suggestive of the notion that this lost deed was merely the specific form in which the lawful origin had taken shape. It is further to be noted that the exact inference recommended by the law was not, in the case of affirmative easements, that the consent of the adjoining owner had been first given during the twenty years' user, but that some lawful origin preceded the earliest act of enjoyment. The lost grant was in theory anterior to the user; it was not the shape in which the submission of the servient owner was supposed during the twenty years to mould itself. In this sense it is inaccurate to speak of such rights as arising from the twenty years' acquiescence of the servient owner. His acquiescence for twenty years, in the case of affirmative easements, was evidence that the right had existed previously. It appears to be manifest, in spite of some inexact expressions of earlier judges, that this presumption of a lost grant or covenant was nothing more than a rebuttable presumption of fact. It seems a contradiction in terms to maintain that this rebuttable presumption of the existence of a grant would not at any time have been necessarily counteracted by actual proof that no such grant ever had been made. The question, so far as lost grants and lost covenants are involved, seems to me to have lost much of its practical importance, owing to recent changes in the law. It would not now be sufficient to disprove a legal origin, unless the possibility of an equitable origin were negatived as well. Such is the history and character of the twenty years' rule as applied to affirmative easements, and further to the negative easement of the window light. Is there any valid reason to doubt that such also is its history and explanation as applied to the claim of support for modern buildings? The presumption raised in cases of support to buildings by the shorter user of twenty years is modelled upon the presumption growing out of immemorial enjoyment. The one presumption is the echo at a distance of the other. The distinction is, that the shorter period gives rise to a rebuttable, the longer to an irresistible inference.

A Solicitors: *Hare & Fell*, for Solicitor to the Treasury; *Prior, Bigg & Co.*, for *J. Dalton*, Leeds; *Shum, Crossman*, *Crossman & Prichard*, for *Stanton & Atkinson*, Newcastle-on-Tyne.

[Reported by C. E. MALDEN, ESQ., Barrister-at-Law.]

B

APPENDIX

FRY, J.—Before specifically replying to the questions propounded by your Lordships, I think it desirable to express the views which I entertain upon the general subject of the right of the owner of a building to lateral support for that building by the land of an adjoining proprietor. Such a right may be created by an actual instrument between the two owners. The right, being not to a thing to be done or used in the neighbour's soil, but to a limitation of the user of that soil by the neighbour himself, does not lie in grant, but would be created by a covenant by the neighbour not to use his own land in any manner inconsistent with the support of the adjoining buildings: see the judgment of LITLEDALE, J., in *Moore v. Rawson* (6); and such a covenant might either be express or might be inferred from the object and purport of the instrument, as in the *Caledonian Rail. Co. v. Sprot* (5).

D Leaving the consideration of the right as constituted by actual contract between the parties, questions of great difficulty arise; and, in respect to these, I have arrived at the conclusion that principle and authority are in direct opposition to one another. On principle it might well be held that every man must build his own house upon his own land, and that he cannot look to support from the land of adjoining proprietors. Such a principle would prevent the owner of a house from

E ever acquiring a right to lateral support except by actual contract.

An opposite view might be taken, for which also much reason could be given. The right of soil to support by adjoining soil is given by our law as a natural right, and it might well have been held that this natural right to support carried with it a right to the support of all those burdens which man is accustomed to lay upon the soil. On this principle, the right to support would arise as soon as the house

F was built, and would exist independently of user, consent or contract. It might thus be reasonable to hold that a house should never have the right of support, or that it should always have it. But I am unable to find any principle upon which to justify the acquisition of the right to support by a house independently of express covenant or grant. For casting aside all technicalities, I think that the only principle upon which rights of a kind like the one in question can be acquired is that

G of acquiescence. But I further think that, as he who cannot prevent cannot acquiesce, and as the owner of adjoining land cannot prevent his neighbour from erecting a house upon his own land, he can never be said to have acquiesced in the construction of that house, or in the burden which thence results. Such are the conclusions to which I should be driven by a consideration of this question on principle.

H When I turn to the authorities of our law bearing on the subject, I find, as it appears to me, that it has been decided that an ancient house does possess the right in question, that a new house does not possess this right, and, consequently, that the right is one which may be acquired independently of express covenant. All the efforts which I have made to find some principle upon which to justify the authorities have to my mind entirely failed. I must now consider somewhat more

I in detail the views which I have thus briefly expressed. In the absence of express stipulation, rights of the kind to which the one now in question belongs, can arise in law only from one or other of two sources, namely, either as incidents attached to property by nature herself, or as incidents attached to property by the force of long-continued user under circumstances importing acquiescence in such user.

There is no doubt on the authorities that, as the support of soil by soil is in fact a result of nature, so the right to such support is given by the law as *ex jure nature*, and as a proprietary right. It arises in all its force the moment two adjoining pieces of land are held by different owners and has no connection with the user of the land :

Humphries v. Brogden (2); *Rowbotham v. Wilson* (3). But it is equally clear on the cases that the right to support of buildings by land is not a right *ex jure naturæ*, but must arise by grant, or, as I think more accurately speaking, by covenant (*Partridge v. Scott* (38)), and to the like effect are the judgments of the Queen's Bench in *Humphries v. Brogden* (2), and of the Exchequer Chamber in *Bonomi v. Backhouse* (4). That the right in question may be acquired, even where no instrument creating it is shown, is established as a matter of positive law by a series of authorities which appear to determine (i) that the owner of an ancient building has a right of action against the owner of land adjoining, if he disturb his land so as to take away the lateral support previously afforded by that land, and (ii) that the owner of a new building has no such right. The authorities, commencing in the year 1803, include rulings *at nisi prius* by LORD ELLENBOROUGH, C.J., PARKE, B., and COCKBURN, C.J.; an expression of opinion by BLACKBURN, J., and judgments by the Courts of Exchequer and Common Pleas which assert or involve the propositions referred to; and, though no clear authority of an earlier date is found, the distinction between a new and an old house as regards the right to support appears to be hinted at in *Wilde v. Minsterley* (39) and *Palmer v. Fleshees* (30). These cases constitute a body of authority, which, in my opinion, must be regarded as conclusive that, according to the law of England, an ancient house possesses a right to support from the adjoining soil; and, therefore, I answer your Lordships' first question in the affirmative.

From what I have said it follows that a right to support may, according to our law, be acquired independently of express contract; and, in order to answer your Lordships' second question, it becomes essential to inquire on what principle, in what time, and under what circumstances it may be so acquired. Mere lapse of time can never, it appears to me, on any intelligible principle, confer a right not previously possessed; though lapse of time accompanied by inaction, where action ought to be taken, may well have such a result: *Gray v. Bond* (40). Strictly speaking, the right in question cannot, I think, be prescribed for; for it is common learning that prescription can only be for incorporeal hereditaments, "and cannot be for a thing which cannot be raised by grant" (BLACKSTONE'S COMMENTARIES, book ii, c. 17), and, as I have already shown, the right in question does not, in my opinion, lie in grant. But leaving such technical questions aside, I prefer to observe that, in my opinion, the whole law of prescription and the whole law which governs the presumption or inference of a grant or covenant rests upon acquiescence. The courts and the judges have had recourse to various expedients for quieting the possession of persons in the exercise of rights which have not been resisted by the persons against whom they are exercised, but in all cases it appears to me that acquiescence and nothing else is the principle upon which these expedients rest.

It becomes then of the highest importance to consider of what ingredients acquiescence consists. In many cases, as, for instance, in the case of that acquiescence which creates a right of way, it will be found to involve, first, the doing of some act by one man upon the land of another; secondly, the absence of right to do that act in the person doing it; thirdly, the knowledge of the person affected by it that the act is done; fourthly, the power of the person affected by the act to prevent such act either by act on his part or by action in the courts; and lastly, the abstinence by him from any such interference for such a length of time as renders it reasonable for the courts to say that he shall not afterwards interfere to stop the act being done. In some other cases, as, for example, in the case of lights, some of these ingredients are wanting; but I cannot imagine any case of acquiescence in which there is not shown to be in the servient owner: (i) a knowledge of the acts done; (ii) a power in him to stop the acts or to sue in respect of them; and (iii) an abstinence on his part from the exercise of such power.

That such is the nature of acquiescence and that such is the ground upon which presumptions or inferences of grant or covenant may be made appears to me to be plain, both from reason, from maxim, and from the cases. As regards the reason of the case, it is plain good sense to hold that a man who can stop an asserted right

- A or a continued user, and does not do so for a long time, may be told that he has lost his right by his delay and his negligence, and every presumption should therefore be made to quiet a possession thus acquired and enjoyed by the tacit consent of the sufferer. But there is no sense in binding a man by an enjoyment he cannot prevent, or quieting a possession which he could never disturb. Qui non prohibet quod prohibere potest, assentire videtur (2 COKE'S INSTITUTES 305), per PARKE, B., in *Morgan v. Thomas* (18), 8 Exch. at p. 304; Contra non valentem agere, nulla currit prescriptio (POTHIER, TRAITÉ DES OBLIGATIONS, part iii, chap. viii, art. 2, s. 2; BROOM'S MAXIMS (5th Edn.) 903) are two maxims which show that prescription and assent are only raised where there is a power of prohibition. And again, *Chasemore v. Richards* (10), *Webb v. Bird* (9), and *Sturges v. Bridgman* (11), have established a principle that an enjoyment which a man cannot prevent raises no presumption of consent or acquiescence.

- Assuming such to be the true grounds and principles of acquiescence, I next inquire how they can be applied to the question of the right of a house to be supported by the adjoining land. It has been argued that the doctrine applies in its simplest form to the right in question; for that the act of building a house on one piece of land which derives lateral support from the adjoining soil of a different owner is both actionable and preventible, and that, therefore, time constitutes a valid bar. Is such a building actionable? I think not. The lateral pressure of a heavy building on soft ground which causes an ascertainable physical disturbance in a neighbour's soil would no doubt be trespass; but no one ever heard of an action for the mere increment caused by reason of a new building to the pre-existing lateral pressure of soil on soil, producing no ascertainable physical disturbance. If that were the law no one could rightly build on the edge of his land, unless he built upon a rock; and yet the building of walls and other structures on the borders of land is universally recognised as lawful. Nay more, any erection of a house would give a right of action not only to the adjoining neighbours, but to every owner of land within the unascertainable area over which the increase of pressure must, according to the law of physics, extend. Such an increase of pressure when unattended with ascertainable physical consequences is, in my opinion, one of those minima of which the law takes no heed. The distinction between the principles applicable to water collected into visible streams and that running in invisible ones through the ground, affords a very good analogy to the distinction which I draw between the pressure of an adjoining house which produces a visible displacement of the soil, and that which produces no visible or ascertainable result, but is only a matter of inference from physical science or subsequent experiment.

- Is the support of the house by the adjoining soil preventible? I think not. It is, of course, physically possible for one man so to excavate his own soil as to let down his neighbour's building, and a man may or may not have occasion to excavate his own land for his own purposes, but such an excavation for the sole purpose of letting down a neighbour's house is of so expensive, so difficult, so churlish a character, that it is not reasonably to be required in order to prevent the acquisition of a right. In fact, in the case of adjoining houses, it would be to require a man to destroy his own property in order to protect his rights to it. In the case of air, it is physically possible for the adjoining owners to build a lofty wall round a windmill and shut out the access of air; and in the case of underground water it would, at least in some cases, be physically possible to construct a water-tight barrier through all the water-bearing strata of the soil; but such acts would require such an unreasonable waste of time and money that the not doing of them has been held to import no acquiescence in the flow of air and water respectively: *Chasemore v. Richards* (10) and *Webb v. Bird* (9). If the building of a house by one man which derives support from the adjoining land is neither actionable nor preventible by the owner of the adjoining soil, it seems difficult to see on what principle a covenant as to the user of his own soil can be inferred against the man who can do nothing. The right to support and the rights to the access of light and air are very similar the one to the other, and are broadly distinguished from most other

easements or analogous rights. They are negative as contrasted with affirmative easements. They are analogous with servitudes *ne facias* in the civil law. Such rights, when they arise, spring, not from acts originally actionable or unlawful on the part of the dominant owner, but from acts done on his own land and within his own rights; they confer on the dominant owner, not the right to use the subject, but a right to forbearance on the part of the owner from using the subject; i.e., they create an obligation on the owner of the servient tenement not to do anything on his own land inconsistent with a particular user of the dominant tenement: AUSTIN'S JURISPRUDENCE (3rd Edn.), vol. 2, p. 836. They rest on a presumption or inference, not of a grant by the neighbour of a right to do something on the grantor's land, but of a covenant by the owner not to do something on his own land. It is difficult in principle to see how such rights can arise from the doing of lawful acts on the dominant tenement, except in the few cases where the owner of the servient tenement can both lawfully and with reasonable ease interfere to prevent the continued user by his neighbour.

The close likeness between the right to support and to light has been much pressed on your Lordships as a reason for inferring a right to support by analogy with the cases which, before the Prescription Act, established the right to light. The peculiarity of these cases is that the courts required the servient owner to submit to the acquisition of the right by his neighbour, or to signify his dissent by putting up an actual obstruction. BAYLEY, J., in *Cross v. Lewis* (19), said:

"If his neighbour objects to [the windows] he may put up an obstruction, but that is his only remedy."

This rule as to light appears to have arisen without any full discussion in the courts of the principle on which it rests. But it is plain that the erection of an obstruction was thought so slight a matter that it might reasonably be demanded of a servient owner to negative acquiescence on his part. This rule I consider to be an anomaly, and, therefore, as not furnishing any principle which ought to be extended. LORD WENSLEYDALE, in *Chasemore v. Richards* (10), said:

"It is going very far to say that a man must be at the expense of putting up a screen to window lights to prevent a title being gained by twenty years' enjoyment of light passing through a window."

WILLES, J., in *Webb v. Bird* (9), said:

"These cases as compared with the general law are anomalous."

In the same case in the Exchequer Chamber, BLACKBURN, J., said:

"The case of a right to light before the statute stood on a peculiar ground."

BRAMWELL, L.J., in *Bryant v. Lefever* (24), said:

"Anyone who reads the cases relating to an acquisition of a right to light will see that there has been great difficulty in establishing it on principle."

Accordingly, in *Chasemore v. Richards* (10), your Lordships' House declined to apply the analogy drawn from lights to water passing through the earth in unascertained courses, and the Courts of Common Pleas, Exchequer Chamber, and Appeal have declined to apply it to the cases of air: *Webb v. Bird* (9), *Bryant v. Lefever* (24); and of noise: *Sturges v. Bridgman* (11). Lastly, the way in which the Prescription Act deals with the right to light is significant of its anomalous character. It deals, on the one hand, with easements of an affirmative character which are capable of interruption by the servient owner. It deals, on the other hand, not with negative easements generally, but with the right to light alone of all the class to which it belongs. I believe that this argument, derived from the law of lights, has exercised a great influence on the establishment of the right to support, but I consider that, in principle, it affords no justification for the establishment of such a right.

In order that acquiescence may arise, there must, in my opinion, be the power to prevent; and this, I conclude, for the reasons I have given, is wanting in the

A case of the support of buildings by adjoining soil. But there is, in my opinion, equally wanting another element, namely, knowledge in the owner of the servient tenement. No doubt the owner of property knows, or should be taken to know, what occurs openly and visibly on his estate, or in its immediate neighbourhood, but not that which takes place underground or in a secret manner. Hence, he is justly charged with knowledge that his neighbour walks habitually over his land, or has erected a house with windows deriving light over his fields; but he would not be affected with knowledge of the user of a gangway or gallery constructed in the course of secret mining operations. The question, whether a building does, or does not, derive any practical support from the neighbouring land is one which it appears to me often extremely difficult to answer even for the building owner, and far more difficult to answer for the adjoining owner, who may be ignorant of the nature of the structure erected behind a hoarding—of the incidence of its burden on the soil—of the depth and character of the foundations, whether extending to the rock or resting on the surface soil—and of the nature of the sub-soil itself. He may, indeed, excavate his own land, and probably answer the last of these questions; but, on the other topics, he has no certain means of information, except by a trespass or an impertinence. It is evident that, where the building is on the outcrop of strata, or where the beds have been intersected by dykes or disturbed by faults, it would be difficult or impossible to tell what is the incidence of the burden created by a house except by actual excavation and experiment. The circumstances of the case render it, in my opinion, unjust to impute to a neighbour that plain knowledge of what is going on in his neighbourhood which can alone justify the depriving a man of a right to use his own land in a lawful manner.

E In *Solomon v. Vintners' Co.* (32) the question was as to the right of support of one house by another not immediately adjoining, on the ground of thirty years' enjoyment of such support, and there BRAMWELL, B., made some observations which seem very relevant to the present inquiry. Supposing such a right to exist, he said (4 H. & N. at p. 602):

F “it must be either as a matter of absolute right, or as a matter of prescription, or under the Prescription Act, or as founded on some supposed lost grant. In any of these cases, it can only exist if the benefit was one that was enjoyed as of right, which cannot be unless it was openly and visibly enjoyed. An enjoyment must not be vi, precario, nor clam; it must be open. Now, when one house visibly leans towards another, a person may make a tolerably shrewd guess that it is partly supported by the other, but it will be only a conjecture. . . . In fact, it is impossible to say which house is being supported. It is true that, in this case, when the defendant's house was removed the plaintiff's house fell in; but probably nobody who saw the block of buildings would have guessed that such a result would have followed. If anyone had done so, it would have been but a matter of conjecture. Therefore, supposing that the plaintiff for more than twenty years had an enjoyment which he says ought now to continue, it was an enjoyment clam, not open, and consequently not as of right; [and] no title was gained under any of the different ways in which it has been surmised it might have been gained.”

H On principle, I conclude, therefore, that acquiescence does not apply to the right in question.

I Another argument in favour of the acquisition of the right in question has been based upon an analogy with the operation of the Statute of Limitations. To the extent of holding that, if the right is to be acquired at all by lapse of time, twenty years is a reasonable period to confer the right, I think that the analogy is sound; but beyond that it appears to me not to go. The Statute of Limitations presupposes a right of action, and takes it away if not put in force for twenty years; that furnishes no reason for casting a new burden upon a man where he has no capacity to bring an action or to create a physical obstruction to the exercise of the alleged right. To take away a right of action, if not put in force within a reasonable

time, is one thing: to take away a man's right in his property because he does not bring an action which he cannot bring, seems to be quite another thing. The authorities which establish this existence of the right in question afford no distinct statement of the principle upon which it reposes, but there are to be found in them references to the open character of the user, to the knowledge of the servient owner, and to the lapse of time, which seem to show that some notion of acquiescence was in the minds of the learned judges; but when I ask myself what difference it makes whether the user be open or secret to a man who cannot stop such user, what is the value of knowledge to a man who cannot act on it, and what is the effect of a lapse of time in the course of which nothing can be done, I find myself unable to answer these inquiries; and I think that the circumstances under which the building has been erected and the support enjoyed are immaterial.

I regard the right as resting, not on any principle, but solely on a series of authorities which disclose no clear ground for its existence; but, as it has been established that the right in question may be acquired by the lapse of time, I think that the period of twenty years may and ought to be held a sufficient one to confer the right. The period of twenty years was that limited by the Limitation Act, 1623, for bringing possessory actions and making entries; it was applied by the judges to cases of prescription, so that before the Prescription Act the uninterrupted enjoyment of an easement for that length of time was constantly held to afford a ground for presuming the necessary grant or covenant; it has been referred to in *Stansell v. Jollard* (41), in *Dodd v. Holmes* (42), and in other of the authorities relative to this very right as sufficient to confer it; and it may well be maintained as reasonable in itself. I, therefore, answer your Lordships' second question in the affirmative. I have already shown that I view the right in question as the result of an artificial rule of law, with which knowledge and acquiescence have nothing to do. I, therefore, answer your Lordships' third question by saying that, in my opinion, if the acts done by the defendants would have caused no damage to the plaintiffs' building as it stood before the alterations made in 1849, it is not necessary to prove that the defendants or their predecessors in title had knowledge or notice of those alterations in order to make the damage done by their act in removing the lateral support after the lapse of twenty-seven years an actionable wrong.

For the reasons already given I submit (in answer to your Lordships' fifth question) my opinion that the course taken by the learned judge at the trial of directing a verdict for the plaintiffs was correct, according to the law of England as it now stands. His conclusion involves the proposition that, by the mere act of his neighbour and the lapse of time, a man may be deprived of the lawful use of his own land—a proposition which shocks my notions of justice, and against which I have struggled in vain; because I can find no reasonable proposition on which to rest the long line of decisions on the questions before your Lordships.

A

HEAVEN v. PENDER

[COURT OF APPEAL (Sir Balil Brett, M.R., Cotton and Bowen, L.JJ.), March 8, 5, July 30, 1883]

B

[Reported 11 Q.B.D. 503; 52 L.J.Q.B. 702; 49 L.T. 357;
47 J.P. 709; 27 Sol. Jo. 667]

Negligence—Duty of supplier of goods—Exercise of ordinary skill and care to avoid possible danger—Opportunity for user to discover defect before use—Staging for painters of ship's hull.

C

Whenever one person is placed in such a position with regard to another, apart from any contract between them, that anyone of ordinary sense would at once recognise that, if he did not use ordinary and reasonable care and skill in his own conduct with regard to those circumstances, he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger. Whenever one person supplies goods, or machinery, or the like, for the purpose of their being used by another person under such circumstances that anyone of ordinary sense would, if he thought, recognise at once that unless he used ordinary care and skill with regard to the condition of the thing supplied, or the mode of supplying it, there would be danger of injury to the person or property of him for whose use the thing was supplied, and who was to use it, a duty arises to use ordinary care and skill as to the condition or manner of supplying such thing. For a neglect of such ordinary care and skill, whereby injury happens, a legal liability arises, to be enforced by an action for negligence. This includes the case of goods, etc., supplied to be used immediately by a particular person or persons, or one of a class of persons, where it would be obvious to the person supplying that the goods would in all probability be used at once by such persons before there could be a reasonable opportunity for discovering any defect which might exist, and where the thing supplied would be of such a nature that a neglect of ordinary care and skill as to its condition, or the manner of supplying it, would probably cause danger to the person or property of the person for whose use it was supplied, and who was about to use it: per SIR BALIOL BRETT, M.R., COTTON, L.J., and BOWEN, L.J., dubitante.

D

E

F

G

A master painter contracted with a shipowner to paint a ship, then lying in dock. The defendant, the dock owner, contracted with the shipowner to erect a staging round the ship for the purpose of having the hull painted. While the plaintiff, who was in the master painter's employment, was engaged in painting the hull, the staging gave way, owing to the defective condition of a rope which supported it, in consequence of which the plaintiff fell and was injured. In an action for damages for such injuries,

H

Held: the defendant was under an obligation to the plaintiff to use ordinary care and skill in supplying a safe staging, and, therefore, the plaintiff was entitled to recover.

I

Notes. Considered: *Elliott v. Hall* (1885), 15 Q.B.D. 315; *Elliott v. Nailstone Colliery Co.* (1885), 34 W.R. 16; *Cann v. Willson* (1888), 39 Ch.D. 39; *Thrussell v. Handyside*, [1886–90] All E.R.Rep. 830. Distinguished: *O'Neil v. Everest* (1892), 61 L.J.Q.B. 453. Considered: *Le Lievre v. Gould*, [1893] 1 Q.B. 491; *Hopkins v. Great Eastern Rail. Co.* (1895), 60 J.P. 86; *Hawkins v. Smith* (1896), 12 T.L.R. 532. Distinguished: *Caledonian Rail. Co. v. Mulholland (or Warwick)*, [1895–9] All E.R.Rep. 352. Considered: *Earl v. Lubbock*, [1905] 1 K.B. 253; *Bates v. Batey*, [1913] 3 K.B. 351; *Berg v. Rotterdamsche Lloyd* (1918), 34 T.L.R. 272; *Cunard v. Antifyre, Ltd.*, [1932] All E.R.Rep. 558; *Donoghue (or McAlister) v. Stevenson*, [1932] All E.R.Rep. 1; *Parker v. Oloxo, Ltd., and Senior*, [1937] 3 All E.R. 524; *Buckner v. Ashby and Horner, Ltd.*, [1941] K.B. 321; *Travers*

v. *Gloucester Corpn.*, [1946] 2 All E.R. 506. Applied: *Jerred v. Roddam Dent & Son*, [1948] 2 All E.R. 404. Considered: *London Graving Dock Co. v. Horton*, [1951] 2 All E.R. 1; *Booker v. Wenborn*, [1962] 1 All E.R. 431. Referred to: *Tolhausen v. Davies* (1888), 57 L.J.Q.B. 392; *Scholfield v. Lord Londesborough* (1894), 10 T.L.R. 518; *Lane v. Cox*, [1895-9] All E.R.Rep. 337; *Marney v. Scott*, [1899] 1 Q.B. 986; *Milburn v. Jamaica Fruit Importing and Trading Co. of London*, [1900] 2 Q.B. 540; *Shrimpton v. Hertfordshire County Council* (1910), 74 J.P. 305; *Blacker v. Jake and Elliot* (1912), 106 L.T. 533; *Latham v. Richard Johnson and Nephew, Ltd.*, [1911-13] All E.R.Rep. 117; *Oliver v. Sadler & Co.*, [1929] A.C. 584; *Bottomley v. Bannister*, [1931] All E.R.Rep. 99; *Farr v. Butters Bros. & Co.*, [1932] All E.R.Rep. 339; *Grant v. Australian Knitting Mills, Ltd.*, [1935] All E.R.Rep. 209; *Howard v. Furness Houlder Argentine Lines, Ltd. and Brown, Ltd.*, [1936] 2 All E.R. 781; *Otto v. Bolton and Norris*, [1936] 1 All E.R. 960; *Barnes v. Irwell Valley Water Board*, [1938] 2 All E.R. 650; *Herschtal v. Stewart and Ardern, Ltd.*, [1939] 4 All E.R. 123; *Haseldine v. C. A. Daw & Son, Ltd.*, [1941] 3 All E.R. 156; *Hay or Bourhill v. Young*, [1942] 2 All E.R. 396; *Duncan v. Cammell Laird & Co.*, *Craven v. Cammell Laird & Co.*, *Duncan v. Wailes Dove Bitumastic, Ltd.*, *Craven v. Wailes Dove Bitumastic, Ltd.*, [1943] 2 All E.R. 621; *Glasgow Corpn. v. Muir*, [1943] 2 All E.R. 44; *Deyong v. Shenburn*, [1946] 1 All E.R. 226; *Buckland v. Guilford Gas Light and Transport Co. v. Scruttons, Ltd.* (1950), 66 (pt. 1), T.L.R. 1168; *Candler v. Crane, Christmas & Co.*, [1951] 1 All E.R. 426; *Pratt v. Richards*, [1951] 1 All E.R. 90; *Hawkins v. Coulsdon and Purley U.D.C.*, [1954] 1 All E.R. 97; *Edwards v. West Herts Group Hospital Management Committee*, [1957] 1 All E.R. 541; *A. C. Billings & Sons v. Riden*, [1957] 3 All E.R. 1; *Hedley Byrne & Co., Ltd. v. Heller and Partners, Ltd.*, [1961] 3 All E.R. 891; *Scruttons, Ltd. v. Midland Silicones, Ltd.*, [1962] 1 All E.R. 1.

As to the duty of a supplier of goods, see 28 HALSBURY'S LAWS (3rd Edn.) 58-62; and for cases see 36 DIGEST (Repl.) 80 et seq.

Cases referred to:

- (1) *Langridge v. Levy* (1837), 2 M. & W. 519; 6 L.J.Ex. 137; affirmed sub nom. *Levy v. Langridge* (1838), 4 M. & W. 337; 1 Horn & H. 325; 150 E.R. 1458; sub nom. *Levi v. Langridge*, 7 L.J.Ex. 387, Ex. Ch.; 39 Digest 458, 852.
- (2) *George v. Skivington* (1869), L.R. 5 Exch. 1; 39 L.J.Ex. 8; 21 L.T. 495; 18 W.R. 118; 39 Digest 441, 705.
- (3) *Corby v. Hill* (1858), 4 C.B.N.S. 556; 27 L.J.C.P. 318; 31 L.T.O.S. 181; 22 J.P. 386; 4 Jur.N.S. 512; 6 W.R. 575; 140 E.R. 1209; 36 Digest (Repl.) 67, 370.
- (4) *Smith v. London and St. Katharine Docks Co.* (1868), L.R. 3 C.P. 326; 37 L.J.C.P. 217; 18 L.T. 403; 16 W.R. 728; 3 Mar.L.C. 66; 36 Digest (Repl.) 48, 253.
- (5) *Indermaur v. Dames* (1866), L.R. 1 C.P. 274; Har. & Ruth. 243; 35 L.J.C.P. 184; 14 L.T. 484; 12 Jur.N.S. 432; 14 W.R. 586; affirmed (1867), L.R. 2 C.P. 311; 36 L.J.C.P. 181; 16 L.T. 293; 31 J.P. 390; 15 W.R. 434, Ex. Ch.; 36 Digest (Repl.) 46, 246.
- (6) *Winterbottom v. Wright* (1842), 10 M. & W. 109; 11 L.J.Ex. 415; 152 E.R. 402; 36 Digest (Repl.) 107, 531.
- (7) *Francis v. Cockrell* (1870), L.R. 5 Q.B. 501; 10 B. & S. 950; 39 L.J.Q.B. 291; 23 L.T. 466; 18 W.R. 1205, Ex. Ch.; 34 Digest (Repl.) 208, 1460.
- (8) *Collis v. Selden* (1868), L.R. 3 C.P. 495; 37 L.J.C.P. 233; 16 W.R. 1170; 29 Digest (Repl.) 12, 134.
- (9) *Thomas v. Winchester*, 6 N.Y.Rep. 397.
- (10) *Longmeid v. Holliday* (1851), 6 Exch. 761; 20 L.J.Ex. 430; 17 L.T.O.S. 243; 155 E.R. 752; 39 Digest 458, 854.

- A (11) *Gautret v. Egerton, Jones v. Egerton* (1867), L.R. 2 C.P. 371; 36 L.J.C.P. 191; 15 W.R. 638; sub nom. *Gautret v. Egerton, Jones v. Egerton*, 16 L.T. 17; 36 Digest (Repl.) 47, 247.
- (12) *Blackmore v. Bristol and Exeter Rail. Co.* (1858), 8 E. & B. 1035; 31 L.T.O.S. 12; 120 E.R. 385; sub nom. *Blackmore v. Bristol and Exeter Rail. Co.*, 27 L.J.Q.B. 167; 4 Jur.N.S. 657; 6 W.R. 336; 3 Digest (Repl.) 73, 126.

B Also referred to in argument:

- Sullivan v. Waters* (1864), 14 I.C.L.R. 460; 36 Digest (Repl.) 69, *366.
- Todd v. Flight* (1860), 9 C.B.N.S. 377; 30 L.J.C.P. 21; 3 L.T. 325; 7 Jur.N.S. 291; 9 W.R. 145; 142 E.R. 148; 31 Digest (Repl.) 381, 5094.
- Gandy v. Jubber* (1864), 5 B. & S. 78; 3 New Rep. 569; 33 L.J.Q.B. 151; 9 L.T. 800; 28 J.P. 517; 10 Jur.N.S. 652; 12 W.R. 526; 122 E.R. 762; on appeal (1865), 5 B. & S. 485; 9 B. & S. 15; 29 J.P. 645; 13 W.R. 1022; 122 E.R. 911, Ex. Ch.; 31 Digest (Repl.) 382, 5102.
- Farrant v. Barnes* (1862), 11 C.B.N.S. 553; 31 L.J.C.P. 137; 8 Jur.N.S. 868; 142 E.R. 912; 8 Digest (Repl.) 148, 937.
- Brass v. Maitland* (1856), 6 E. & B. 470; 26 L.J.Q.B. 49; 27 L.T.O.S. 249; 2 Jur.N.S. 710; 4 W.R. 647; 119 E.R. 940; 8 Digest (Repl.) 148, 938.
- D *MacCarthy v. Young* (1861), 6 H. & N. 329; 30 L.J.Ex. 227; 3 L.T. 785; 9 W.R. 439; 158 E.R. 136; 34 Digest (Repl.) 239, 1755.
- Dixon v. Bell* (1816), 5 M. & S. 198; 1 Stark. 287; 105 E.R. 1023; 36 Digest (Repl.) 80, 431.
- Alton v. Midland Rail. Co.* (1865), 19 C.B.N.S. 213; 34 L.J.C.P. 292; 12 L.T. 703; 11 Jur.N.S. 672; 13 W.R. 918; 144 E.R. 768; 34 Digest (Repl.) 225, 1633.
- E *Barker v. Midland Rail. Co.* (1856), 18 C.B. 46; 25 L.J.C.P. 184; 20 J.P. 582; 139 E.R. 1281; sub nom. *Parker v. Midland Rail. Co.*, 27 L.T.O.S. 107; 8 Digest (Repl.) 206, 1301.
- Dickson v. Reuter's Telegram Co.* (1877), 3 C.P.D. 1; 37 L.T. 370; 42 J.P. 308; 26 W.R. 23; sub nom. *Dixon v. Reuter's Telegraph Co., Ltd.*, 47 L.J.Q.B. 1, C.A.; 36 Digest (Repl.) 13, 41.
- F *Southcote v. Stanley* (1856), 1 H. & N. 247; 25 L.J.Ex. 339; 27 L.T.O.S. 173; 156 E.R. 1195; 34 Digest (Repl.) 275, 1948.
- Gerhard v. Bates* (1853), 2 E. & B. 476; 22 L.J.Q.B. 364; 22 L.T.O.S. 64; 17 Jur. 1097; 1 W.R. 383; 1 C.L.R. 868; 118 E.R. 845; 12 Digest (Repl.) 199, 1379.

Appeal from a decision of the Divisional Court (FIELD and CAVE, JJ.), making a rule absolute to set aside a judgment which had been entered for the plaintiff at Bow County Court.

The action was brought in the Bow County Court to recover damages for injuries sustained by the plaintiff while working in the defendant's dock, through the negligence of the defendant. The plaintiff, a ship painter, was employed by one Gray to paint a ship then lying in the defendant's dock. The shipowner had contracted with Gray for the painting of the ship, and the defendant, the dock owner, had agreed to supply and erect a staging round the ship for that purpose. Owing to a defect in one of the ropes supplied by the defendant to support the staging, the staging gave way while the plaintiff was at work upon it, whereby he was thrown down and severely injured. The rope, when examined after the accident, appeared to have been burnt at the place where it broke, but there was no evidence to show its condition when the staging was put up, or that the defendant or his servants had any knowledge that the rope was defective. The defendant had no control over the plaintiff during the progress of the work. At the trial the defendant contended that the plaintiff was not in his employment, that there was no privity of contract between them, and that the plaintiff, therefore, could not recover. The learned county court judge, however, gave judgment for the plaintiff for damages, of which the amount was agreed upon between the parties. The defendant obtained a rule nisi to set aside the judgment on the ground that there was no evidence of the defendant's liability to the plaintiff, or that, upon the facts proved at the trial,

judgment should have been entered for the defendant. The Divisional Court (FIELD and CAVE, JJ.) made the rule absolute to enter judgment for the defendant, and from this decision the plaintiff appealed. A

Charles, Q.C., and C. C. Scott for the plaintiff.

Bompas, Q.C., and H. F. Dickens for the defendant.

Cur. adv. vult. B

July 30, 1883. The following judgments were read.

SIR BALIOL BRETT, M.R.—In this case the plaintiff was a workman in the employ of Gray, a ship painter. Gray entered into a contract with a shipowner, whose ship was in the defendant's dock, to paint the outside of his ship. The defendant, the dock owner, supplied, under a contract with the shipowner, an ordinary stage, to be slung in the ordinary way outside the ship for the purpose of painting her. It must have been known to the defendant's servants, if they had considered the matter at all, that the stage would be put to immediate use; that it would not be used by the shipowner, but that it would be used by such a person as the plaintiff, a working ship painter. The ropes by which the stage was slung, which were supplied as a part of the instrument by the defendant, had been scorched and were unfit for use, and were supplied without a reasonably careful attention to their condition. When the plaintiff began to use the stage the ropes broke, the stage fell, and the plaintiff was injured. The Divisional Court held that the plaintiff could not recover against the defendant. The plaintiff appealed. C D

The action is, in form and substance, an action for negligence. That the stage was, through want of attention of the defendant's servants, supplied in a state unsafe for use is not denied. But want of attention, amounting to a want of ordinary care, is not a good cause of action, although injury ensue from such want, unless the person charged with such want of ordinary care had a duty to the person complaining to use ordinary care in respect of the matter called in question. Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff has suffered injury to his person or property. E F

The question in this case is whether the defendant owed such a duty to the plaintiff. If a person contracts with another to use ordinary care or skill towards him or his property, the obligation need not be considered in the light of a duty; it is an obligation of contract. It is undoubted, however, that there may be the obligation of such a duty from one person to another, although there is no contract between them with regard to such duty. Two drivers meeting have no contract with each other, but under certain circumstances they have a reciprocal duty towards each other. So two ships navigating the sea. So a railway company, which has contracted with one person to carry another, has no contract with the person carried, but has a duty towards that person. So the owner or occupier of house or land who permits a person or persons to come to his house or land has no contract with such person or persons, but has a duty towards him or them. It should be observed that the existence of a contract between two persons does not prevent the existence of the suggested duty between them also being raised by law, independently of the contract, by the facts with regard to which the contract is made, and to which it applies an exactly similar but a contract duty. G H I

We have not in this case to consider the circumstances in which an implied contract may arise, to use ordinary care and skill to avoid danger to the safety of person or property. We have not in this case to consider the question of a fraudulent misrepresentation, express or implied, which is a well-recognised head of law. The questions which we have to solve in this case are: What is the proper definition of the relation between two persons, other than the relation established by contract or fraud, which imposes on the one of them a duty towards the other to observe, with regard to the person or property of such other, such ordinary care

A or skill as may be necessary to prevent injury to his person or property? and Whether the present case falls within such definition?

When two drivers or two ships are approaching each other, such a relation arises between them, when they are approaching each other in such a manner that, unless they use ordinary care and skill to avoid it, there will be danger of an injurious collision between them. This relation is established in such circumstances between B them, not only if it can be proved that they actually know and think of this danger, but whether such proof be made or not. It is established, as it seems to me, because anyone of ordinary sense who did think would at once recognise that, if he did not use ordinary care and skill under such circumstances, there would be such danger. And everyone ought, by the universally recognised rules of right and wrong, to think so much with regard to the safety of others who may be C jeopardised by his conduct; and if, being in such circumstances, he does not think, and in consequence neglects, or if he neglects to use ordinary care or skill, and injury ensue, the law, which takes cognisance of and enforces the rules of right and wrong, will force him to give an indemnity for the injury.

In the case of a railway company carrying a passenger with whom it has not entered into the contract of carriage, the law implies the duty, because it must be D obvious that unless ordinary care and skill be used the personal safety of the passenger must be endangered. With regard to the condition in which an owner or occupier leaves his house or property, other phraseology has been used which it is necessary to consider. If a man opens his shop or warehouse to customers it is said that he invites them to enter, and that this invitation raises the relation between them which imposes on the inviter the duty of using reasonable care so to E keep his house or warehouse that it may not endanger the person or property of the person invited [see now Occupiers' Liability Act, 1957, 37 HALSBURY'S STATUTES (2nd Edn.) 832]. This is in a sense an accurate phrase, and, as applied to the circumstances, a sufficiently accurate phrase. Yet it is not accurate if the word "invitation" be used in its ordinary sense. By opening a shop you do not really invite—you do not ask A. B. to come in to buy, you intimate to him that if it pleases F him to come in he will find things which you are willing to sell. So in the case of a shop, warehouse, road, or premises, the phrase has been used that if you permit a person to enter them, you impose on yourself a duty not to lay a trap for him. This, again, is in a sense a true statement of the duty arising from the relation constituted by the permission to enter. It is not a statement of what causes the relation which raises the duty. What causes the relation is the permission to enter G and the entry. But it is not a strictly accurate statement of the duty. To lay a trap means, in ordinary language, to do something with an intention. Yet it is clear that the duty extends to a danger, the result of negligence without intention. And with regard to both these phrases, though each covers the circumstances to which it is particularly applied, yet it does not cover the other set of circumstances from which an exactly similar legal liability is inferred.

H It follows, as it seems to me, that there must be some larger proposition which involves and covers both sets of circumstances. The logic of inductive reasoning requires that, where two major propositions lead to exactly similar minor premises, there must be a more remote and larger premise which embraces both of the major propositions. That, in the present consideration, is, as it seems to me, the same proposition which will cover the similar legal liability inferred in the cases of I collision and carriage. The proposition which these recognised cases suggest, and which is, therefore, to be deduced from them, is that whenever one person is by circumstances placed in such a position with regard to another that anyone of ordinary sense who did think would at once recognise that, if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger. Without displacing the other propositions, to which allusion has been made as applicable to the particular circumstances in respect of which they have been enunciated, this proposition includes, I

think, all the recognised cases of liability. It is the only proposition which covers them all. It may, therefore, safely be affirmed to be a true proposition, unless some obvious case can be stated in which the liability must be admitted to exist, and which yet is not within this proposition. There is no such case. A

Let us apply this proposition to the case of one person supplying goods, or machinery, or instruments, or utensils, for the purpose of their being used by another person, but with whom there is no contract as to the supply. The proposition will stand thus. Whenever one person supplies goods, or machinery, or the like, for the purpose of their being used by another person under such circumstances that anyone of ordinary sense would, if he thought, recognise at once that unless he used ordinary care and skill with regard to the condition of the thing supplied, or the mode of supplying it, there would be danger of injury to the person or property of him for whose use the thing was supplied, and who was to use it, a duty arises to use ordinary care and skill as to the condition or manner of supplying such thing. And for a neglect of such ordinary care or skill, whereby injury happens, a legal liability arises, to be enforced by an action for negligence. This includes the case of goods, etc., supplied to be used immediately by a particular person or persons, or one of a class of persons, where it would be obvious to the person supplying, if he thought, that the goods would in all probability be used at once by such persons before there could be a reasonable opportunity for discovering any defect which might exist, and where the thing supplied would be of such a nature that a neglect of ordinary care or skill as to its condition, or the manner of supplying it, would probably cause danger to the person or property of the person for whose use it was supplied, and who was about to use it. It would exclude a case in which the goods are supplied under circumstances in which it would be a chance by whom they would be used, or whether they would be used or not, or whether they would be used before there would probably be means of observing any defect, or where the goods would be of such a nature that a want of care or skill as to their condition, or the manner of supplying them, would not probably produce danger of injury to person or property. The cases of vendor and purchaser, and lender and hirer under contract, need not be considered, as the liability arises under the contract, and not merely as a duty imposed by law, though it may not be useless to observe that it seems difficult to import the implied obligation into the contract, except in cases in which, if there were no contract between the parties, the law would, according to the rule above stated, imply the duty. B C D E F

Examining the rule which has been above enunciated with the cases which have been decided with regard to goods supplied for the purpose of being used by persons with whom there is no contract, the first case to be considered is inevitably *Langridge v. Levy* (1). It is not an easy case to act upon. It is not, it cannot be, accurately reported; the declaration is set out; the evidence is assumed to be reported; the questions left to the jury are stated; and then it is said that a motion was made to enter a nonsuit in pursuance of leave reserved on particular grounds. Those grounds do not raise the question of fraud at all, but only the question of remoteness. And although the question of fraud seems, in a sense, to have been left to the jury, yet no question was, according to the report, left to them whether the plaintiff acted on the faith of the fraudulent misrepresentation, which is, nevertheless, a necessary question in a case of fraudulent misrepresentation. The report of the argument makes the object of the argument depend entirely upon an assumed motion to arrest the judgment, which raises always a discussion depending entirely on the form of the declaration, and the effect on it of a verdict, in respect of which it is assumed that all questions were left to the jury. If this was the point taken, the report of the evidence and of the questions left to the jury is idle. The case was decided on the ground of a fraudulent misrepresentation as stated in the declaration. It is inferred that the defendant intended the representation to be communicated to the son. Why he should have such an intention, in fact, it seems difficult to understand. His immediate object must have been to induce the father G H I

A to buy and pay for the gun. It must have been wholly indifferent to him whether, after the sale and payment, the gun would be used or not by the son.

I cannot hesitate to say that, in my opinion, the case is a wholly unsatisfactory case to act on as an authority. But, taking the case to be decided on the ground of a fraudulent misrepresentation made hypothetically to the son, and acted upon by him, such a decision upon such a ground in no way negatives the proposition
 B that the action might have been supported on the ground of negligence without fraud. It seems to be a case which is within the proposition enunciated in this judgment, and in which the action might have been supported without proof of actual fraud. And this seems to be the meaning of *CLEASBY, B.*, in the observations he made on *Langridge v. Levy* (1) in *George v. Skivington* (2). In that case the proposition laid down in this judgment is clearly adopted. The ground of the
 C decision is that the article was, to the knowledge of the defendant, supplied for the use of the wife, and for her immediate use. And certainly if he, or anyone in his position, had thought at all, it must have been obvious that a want of ordinary care or skill in preparing the prescription sold would endanger the personal safety of the wife. In *Corby v. Hill* (3) it is stated by the Lord Chief Justice that an allurement was held out to the plaintiff; and *WILLES, J.*, stated that the defendant
 D had no right to set a trap for the plaintiff. But in the form of declaration suggested by *WILLES, J.* (4 C.B.N.S. at p. 567), there is no mention of allurement, or invitation, or trap. The facts suggested in that form are "that the plaintiff had licence to go on the road; that he was in consequence accustomed and likely to pass along it; that the defendant knew of that custom and probability; that the defendant negligently placed slates in such a manner as to be likely to prove dangerous to persons driving along the road; that the plaintiff drove along the road, being
 E by reason of the licence lawfully on the road, and that he was injured by the obstruction." It is impossible to state a case more exactly within the proposition laid down in this judgment.

In *Smith v. London and St. Katharine Docks Co.* (4) the phrase is again used of invitation to the plaintiff by the defendants. Again, let it be observed that there
 F is no objection to the phrase as applied to the case. But the real value of the phrase may not improperly be said to be that invitation imports knowledge by the defendant of the probable use by the plaintiff of the article supplied, and, therefore, carries with it the relation between the parties which establishes the duty. In *Indermaur v. Dames* (5) reliance is again placed on a supposed invitation of the plaintiff by the defendant. But, again, it is hardly possible to state facts which
 G bring a case more completely within the definition of the present judgment.

In *Winterbottom v. Wright* (6) it was held that there was no duty cast upon the defendant with regard to the plaintiff. The case was decided on what was equivalent to a general demurrer to the declaration. And the declaration does not seem to show that the defendant, if he had thought about it, must have known, or ought to have known, that the coach would be necessarily or probably driven by the
 H plaintiff, or by any class of which he could be said to be one, or that it would be so driven within any time which would make it probable that the defect would not be observed. The declaration relied too much on contracts entered into with other persons than the plaintiff. The facts alleged did not bring the case within the proposition herein enunciated. It was an attempt to establish a duty towards all the world. The case was decided on the ground of remoteness. And it is at too
 I great a remoteness that the observation of *LORD ABINGER* is pointed, when he says that the doctrine of *Langridge v. Levy* (1) is not to be extended.

In *Francis v. Cockrell* (7) the decision is put by some of the judges on an implied contract between the plaintiff and the defendant. But *CLEASBY, B.* (L.R. 5 Q.B. at p. 515), puts it on the duty raised by the knowledge of the defendant that the stand was to be used immediately by persons, of whom the plaintiff was one. In other words, he acts upon the rule above laid down. In *Collis v. Selden* (8) it was held that the declaration disclosed no duty, and obviously the declaration was too uncertain. There is nothing to show that the defendant knew more of the

probability of the plaintiff, rather than any other of the public, being near the chandelier. There is nothing to show that the plaintiff was more likely to be in the public-house than any other member of the public. There is nothing to show how soon after the hanging of the chandelier anyone might be expected or permitted to enter the room in which it was. The facts stated do not bring it within the rule. There is an American case (*Thomas v. Winchester* (9) cited in MR. HORACE SMITH's treatise on the LAW OF NEGLIGENCE, p. 88, note t), which goes a very long way—I doubt whether it does not go too far. In *Longmeid v. Holliday* (10) a lamp was sold to the plaintiff to be used by the wife. The jury were not satisfied that the defendant knew of the defect in the lamp; if he did, there was fraud; if he did not, there seems to have been no evidence of negligence. If there was fraud, the case was more than within the rule; if there was no fraud, the case was not brought by other circumstances within the rule. In *Gautret v. Egerton* (11) the declaration was held by WILLES, J., to be bad on demurrer, because it did not show that the defendant had any reason to suppose that persons going to the docks would not have ample means of seeing the holes and cuttings relied on. He does not say there must be fraud in order to support the action. He says there must be something like fraud. He says: "Every man is bound not wilfully to deceive others." And then, in the alternative, he says, "or to do any act which may place them in danger."

There seems to be no case in conflict with the rule above deduced from well-admitted cases. I am, therefore, of opinion that it is a good, safe, and just rule. I cannot conceive that, if the facts were proved which would make out the proposition I have mentioned, the law can be that there would be no liability. Unless that be true the proposition must be true. If it be the rule, the present case is clearly within it. The case is also, I agree, within that which seems to me to be a minor proposition—namely, the proposition which has been often acted upon, that there was, in a sense, an invitation of the plaintiff by the defendant to use the stage. The appeal must, in my opinion, be allowed, and judgment must be entered for the plaintiff.

COTTON, L.J.—The judgment I am about to read is concurred in by **BOWEN, L.J.** In this case the defendant was the owner of a dock for the repair of ships, and provided for use in the dock the stages necessary to enable the outside of the ship to be painted while in the dock, and the stages which were to be used only in the dock were appliances provided by the dock owner as appurtenant to the dock and its use. After the stage was handed over to the shipowner it no longer remained under the control of the dock owner. But when ships were received into the dock for repair, and provided with stages for the work on the ships which was to be executed there, all those who came to the vessels for the purpose of painting and otherwise repairing them were there for business in which the dock owner was interested, and they, in my opinion, must be considered as invited by the dock owner to use the dock and all appliances provided by the dock owner as incident to the use of the dock. To these persons, in my opinion, the dock owner was under an obligation to take reasonable care that, at the time the appliances provided for immediate use in the dock were provided by him, they were in a fit state to be used—that is, in such a state as not to expose those who might use them for the repair of the ship to any danger or risk not necessarily incident to the service in which they are employed [see now Occupiers' Liability Act, 1957, *supra*].

That this obligation exists, as regards articles of which the control remains with the dock owner, was decided in *Indermaur v. Dames* (5); and in *Smith v. London and St. Katharine Docks Co.* (4) the same principle was acted on. I think that the same duty must exist as to things supplied by the dock owner for immediate use in the dock, of which the control is not retained by the dock owner, to the extent of using reasonable care as to the state of the articles when delivered by him to the ship under repair for immediate use in relation to the repairs. For any neglect of those having control of the ship and the appliances he would not be liable, and

A to establish his liability it must be proved that the defect which caused the accident existed at the time when the article was supplied by the dock owner.

Blakemore v. Bristol and Exeter Rail. Co. (12) may be relied on as at variance with the opinion thus expressed by me, but I think that the objection is not well founded. If the plaintiff is to be considered as a volunteer, there would be no implied request or invitation to him by the defendant to use the dock and the appliances provided. But he was there for the purpose of work, for the due execution of which the defendant received the ship into his dock, and the defendant received payment as remuneration for allowing the work to be done in his dock, and for providing the necessary appliances for enabling it to be done. The plaintiff was, therefore, engaged in work, in the performance of which the defendant was interested, and he cannot be looked upon in the light of a volunteer. Whether the court was right in *Blakemore Case* (12) in treating the plaintiff as a volunteer may be a question. But, as the ground of the decision is that he was so, that circumstance prevents the case being an authority inconsistent in principle with the conclusion at which I have arrived.

This decides this appeal in favour of the plaintiff, and I am unwilling to concur with the Master of the Rolls in laying down unnecessarily the larger principle which he entertains, inasmuch as there are many cases in which the principle was impliedly negated. Take, for instance, *Langridge v. Levy* (1), to which the principle, if it existed, would have applied. But the judges who decided that case based their judgment on the fraudulent representation made to the father of the plaintiff by the defendant. In other cases, where that decision has been referred to, judges have treated fraud as the ground of the decision, as was done by COLERIDGE, J., in *Blakemore v. Bristol and Exeter Rail. Co.* (12); and in *Collis v. Selden* (8), WILLES, J., says that the judgment in *Langridge v. Levy* (1) was based on the fraud of the defendant. This impliedly negatives the existence of the larger general principle which is relied on, and the decisions in *Collis v. Selden* (8), and in *Longmeid v. Holliday* (10), in each of which the plaintiff failed, are, in my opinion, at variance with the principle contended for. *George v. Skivington* (2), and especially what is said by CLEASBY, B., in giving judgment in that case, seems to support the existence of the general principle, but it is not in terms laid down that any such principle exists, and that case was decided by CLEASBY, B., on the ground that the negligence of the defendant, which was his own personal negligence, was equivalent, for the purposes of the action, to fraud, on which, as he said, the decision in *Langridge v. Levy* (1) was based.

G In declining to concur in laying down the principle enunciated by the Master of the Rolls, I in no way intimate any doubt as to the principle that anyone who leaves a dangerous instrument, such as a gun, in such a way as to cause danger, or who, without due warning, supplies to others for use an instrument or thing which to his knowledge, from its construction or otherwise, is in such a condition as to cause danger not necessarily incident to the use of such instrument or thing, is liable for injury caused to others by reason of his negligent act. For the reasons stated I agree that the plaintiff is entitled to judgment, though I do not entirely concur with the reasoning of the Master of the Rolls.

Judgment reversed.

Solicitors: *E. J. Anning; Watson, Sons & Room.*

I

[Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.]

A

HUGHES v. PERCIVAL

[HOUSE OF LORDS (Lord Blackburn, Lord Watson and Lord FitzGerald), May 8, 9, June 4, 1883]

[Reported 8 App. Cas. 443; 52 L.J.Q.B. 719; 49 L.T. 189;
47 J.P. 772; 31 W.R. 725]

B

Negligence—Adjoining premises—Duty of owner of premises to neighbour—Dangerous work—Exercise of reasonable skill and care—Right to take indemnity from contractor.

C

D

A person who does work on his land which exposes his neighbour to risk is not an insurer of his neighbour and does not warrant him against damage to his premises, but he is required to see that reasonable skill and care are exercised in the operations which expose the neighbour to risk and that every reasonable precaution is taken to protect the neighbour's property from damage. He cannot get rid of his responsibility by delegating its performance to a third person. He is at liberty to employ such a third person to fulfil the duty which the law casts on himself and can take an indemnity in case of mischief coming from that person not fulfilling that duty, but he remains subject to that duty and liable for the consequences if it is not fulfilled. He must be vigilant and careful, for he is liable for injury to his neighbour caused by any want of prudence or precaution, even though it may be culpa levissima.

Butler v. Hunter (1) (1862), 7 H. & N. 826, disapproved.

E

Notes. Considered: *Hardaker v. Idle District Council*, [1895-9] All E.R.Rep. 311; *Cribb v. Kynoch*, [1907] 2 K.B. 548. Applied: *Newcombe v. Yewen and Croydon R.D.C.* (1913), 29 T.L.R. 299. Referred to: *Barham v. Ipswich Dock Comrs.* (1885), 54 L.T. 23; *Crawford v. Consett Local Board* (1891), 55 J.P.Jo. 218; *Black v. Christchurch Finance Co.*, [1894] A.C. 48; *Joliffe v. Woodhouse* (1894), 10 T.L.R. 553; *Blake v. Woolf*, [1895-9] All E.R.Rep. 185; *Holliday v. National Telephone Co.*, [1895-9] All E.R.Rep. 359; *Penny v. Wimbledon Urban Council* (1899), 68 L.J.Q.B. 704; *Newton v. Huggins* (1906), 50 Sol. Jo. 617; *Cox v. Coulson*, [1916] 2 K.B. 177; *Sack v. Jones*, [1925] All E.R.Rep. 514; *Brooke v. Bool*, [1928] All E.R.Rep. 155; *Honeywill and Stein, Ltd. v. Larkin Bros. (London's Commercial Photographers), Ltd.*, [1933] All E.R.Rep. 77; *Cassidy v. Ministry of Health*, [1951] 1 All E.R. 574; *Jones v. Manchester Corpn.*, [1952] 2 All E.R. 125; *Thomson v. Cremin*, [1953] 2 All E.R. 1185; *Balfour v. Barty-King*, [1956] 2 All E.R. 555; *Davie v. New Merton Board Mills, Ltd.*, [1958] 1 All E.R. 67; *Green v. Fibreglass, Ltd.*, [1958] 2 All E.R. 521.

F

G

As to party walls, see 3 HALSBURY'S LAWS (3rd Edn.) 376-381; and for cases see 7 DIGEST (Repl.) 303 et seq.

H

Cases referred to:

I

- (1) *Butler v. Hunter* (1862), 7 H. & N. 826; 31 L.J.Ex. 214; 10 W.R. 214; 158 E.R. 702; 34 Digest (Repl.) 197, 1386.
- (2) *Pickard v. Smith* (1861), 10 C.B.N.S. 470; 4 L.T. 470; 142 E.R. 535; 34 Digest (Repl.) 203, 1425.
- (3) *Dalton v. Angus* (1881), ante p. 1; 6 App. Cas. 740; 50 L.J.Q.B. 689; 44 L.T. 844; 46 J.P. 132; 30 W.R. 191, H.L.; 34 Digest (Repl.) 198, 1394.
- (4) *Bower v. Peate* (1876), 1 Q.B.D. 321; 45 L.J.Q.B. 446; 35 L.T. 821; 40 J.P. 789; 7 Digest (Repl.) 317, 322.
- (5) *Quarman v. Burnett* (1840), 6 M. & W. 499; 9 L.J.Ex. 308; 4 Jur. 969; 151 E.R. 509; 34 Digest (Repl.) 157, 1095.
- (6) *Tarry v. Ashton* (1876), 1 Q.B.D. 314; 45 L.J.Q.B. 260; 34 L.T. 97; 40 J.P. 439; sub nom. *Terry v. Ashton*, 24 W.R. 581; 34 Digest (Repl.) 205, 1437.

A Also referred to in argument :

Ellis v. Sheffield Gas Consumers Co. (1853), 2 E. & B. 767; 2 C.L.R. 249; 23 L.J.Q.B. 42; 22 L.T.O.S. 84; 17 J.P. 823; 18 Jur. 146; 2 W.R. 19; 118 E.R. 955; 34 Digest (Repl.) 208, 1456.

May v. Burdett (1846), 9 Q.B. 101; 16 L.J.Q.B. 64; 7 L.T.O.S. 253; 10 Jur. 692; 115 E.R. 1213; 36 Digest (Repl.) 189, 1002.

B *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70, H.L.; 36 Digest (Repl.) 282, 334.

Gray v. Pullen (1864), 5 B. & S. 970; 5 New Rep. 249; 34 L.J.Q.B. 265; 11 L.T. 569; 29 J.P. 69; 13 W.R. 257; 122 E.R. 1091, Ex. Ch.; 34 Digest (Repl.) 207, 1443.

C *Allen v. Hayward* (1845), 7 Q.B. 960; 4 Ry. & Can. Cas. 104; 15 L.J.Q.B. 99; 5 L.T.O.S. 409; 10 Jur. 92; 115 E.R. 749; 34 Digest (Repl.) 196, 1378.

Steel v. South-Eastern Rail. Co. (1855), 16 C.B. 550; 25 L.T.O.S. 129; 139 E.R. 875; 34 Digest (Repl.) 200, 1406.

Gayford v. Nicholls (1854), 9 Exch. 702; 2 C.L.R. 1066; 23 L.J.Ex. 205; 18 J.P. 441; 156 E.R. 301; sub nom. *Nicholls v. Gayford*, Saund. & M. 30; 23 L.T.O.S. 96; 2 W.R. 453; 34 Digest (Repl.) 196, 1382.

D *Gilbert v. Beach*, 4 Duer, 423.

Milligan v. Wedge (1840), 12 Ad. & El. 737; Arn. & H. 73; 4 Per. & Dav. 714; 10 L.J.Q.B. 19; 5 J.P. 209; 113 E.R. 993; 34 Digest (Repl.) 30, 88.

Lemaitre v. Davis (1881), 19 Ch.D. 281; 51 L.J.Ch. 173; 46 L.T. 407; 46 J.P. 324; 30 W.R. 360; 34 Digest (Repl.) 206, 1440.

E *Pearson v. Cox* (1877), 2 C.P.D. 369; 36 L.T. 495; 42 J.P. 117, C.A.; 34 Digest (Repl.) 198, 1393.

Laugher v. Pointer (1826), 5 B. & C. 547; 8 Dow. & Ry.K.B. 556; 4 L.J.O.S.K.B. 309; 108 E.R. 204; 34 Digest (Repl.) 20, 29.

Appeal by the defendant in the action from a decision of the Court of Appeal (BAGGALLAY and BRETT, L.JJ., HOLKER, L.J., dissenting), reported 9 Q.B.D. 441, affirming a decision of the Queen's Bench Division (LORD COLERIDGE, C.J., MANISTY and BOWEN, JJ.), discharging a rule nisi for a new trial.

The action was brought by the respondent against the appellant to recover damages for negligence under the following circumstances. The appellant was the owner of two houses at the corner of Panton Street and the Haymarket, London, abutting on the east on a house of the respondent in Panton Street, and on the south on a house in the Haymarket belonging to one Barron. The appellant wished to pull down his houses and to erect a new house on the site, and he employed a competent architect to prepare plans and to superintend the work, and a competent builder to carry it out. In the course of the operations girders to support the appellant's new house were fixed into the party wall between his house and that of the respondent. When the work was nearly completed some of the contractor's workmen, who were employed in fixing a staircase, cut into the party wall between the appellant's house and Barron's for that purpose. This act was not permitted by the plans or specifications and was objected to by the architect when he discovered it. The wall was old and rotten and gave way, and in consequence the girders which had been fixed in the other party wall were let down, and that wall and the respondent's house were damaged. The case came on for trial before MANISTY, J., and a special jury, and at the conclusion of the opening address of the appellant's counsel the learned judge said that, even if all that had been opened were proved it would be no defence to the action, and directed a verdict for the plaintiff. The appellant obtained a rule nisi for a new trial, which was discharged, and the appellant's appeal to the Court of Appeal was dismissed.

Philbrick, Q.C., and *Kingsford* for the appellant.

Webster, Q.C., and *M'Call* for the respondent.

Their Lordships took time for consideration.

June 4, 1883. The following opinions were read.

A

LORD BLACKBURN.—This is an appeal against an order of the Court of Appeal dismissing an appeal from an order of the Queen's Bench Division discharging a rule obtained by the defendant to enter judgment on the ground that the judge ought to have directed a verdict for the defendant, or that there should be a new trial.

B

The first point to be considered is: What was the relation in which the defendant stood to the plaintiff? It was admitted that the parties were owners of adjoining houses between which was a party wall, the property of both. The defendant pulled down his house and had it re-built on a plan which involved in it the tying together of the new building and the party wall which was between the plaintiff's house and the defendant's, so that if one fell the other would be damaged. The defendant had a right so to utilise the party wall, for it was his property as well as the plaintiff's; a stranger would not have had such a right. But I think the law cast upon the defendant, when exercising this right, a duty towards the plaintiff. I do not think that duty went so far as to require him absolutely to provide that no damage should come to the plaintiff's wall from the use he thus made of it, but I think that the duty went so far as to require him to see that reasonable skill and care were exercised in those operations which involved a use of the party wall, exposing it to this risk. If such a duty were cast upon the defendant he could not get rid of the responsibility by delegating the performance of it to a third person. He was at liberty to employ such a third person to fulfil the duty which the law cast on himself, and, if they so agreed together, to take an indemnity to himself in case of mischief coming from that person not fulfilling the duty which the law cast upon the defendant; but the defendant still remained subject to that duty and liable for the consequences if it was not fulfilled.

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This is the law, I think, clearly laid down in *Pickard v. Smith* (2) and finally in *Dalton v. Angus* (3). But in all the cases on the subject there was a duty cast by law on the party who was held liable. In *Dalton v. Angus* (3) and in *Bower v. Peate* (4) the defendants had caused an interference with the plaintiff's right of support. **COCKBURN, C.J.**, it is true in *Bower v. Peate* (4), after showing this, says (1 Q.B.D. at p. 326):

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"The answer to the defendant's contention may, however, as it appears to us, be placed on a proper ground, namely, that a man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing someone else—whether it be the contractor employed to do the work from which the danger arises, or some independent person—to do what is necessary to prevent the act he has ordered to be done from becoming wrongful."

I doubt whether this is not too broadly stated. If taken in the full sense of the words, it would seem to render a person who orders post horses and a coachman from an inn bound to see that the coachman, though not his servant, but that of the innkeeper, used that skill and care which is necessary when driving the coach to prevent mischief to the passengers. But the Court of Queen's Bench had no intention, and, indeed not being a court of error, had no power to alter, the law laid down in *Quarman v. Burnett* (5).

I

If I am right in thinking that the defendant, in consequence of his using the party wall of which the plaintiff was part owner, had a duty cast upon him by law similar to that which in *Dalton v. Angus* (3) it was held was cast upon the defendant in that case, in consequence of his using the foundations on which the plaintiff had a right of support, it is not necessary now to inquire how far

A this general language should be qualified. I do not think *Butler v. Hunter* (1) is consistent with my view of the law. I do not know whether the Court of Exchequer meant to deny that such a duty was cast upon the defendant in that case, or meant to say that he might escape liability by employing a contractor. If either was meant by the Court of Exchequer I am obliged to differ from them.

B If this be so, the question is, I think, narrowed to this: Was the operation during which the defendant's duty required him to see that reasonable skill and care should be used over at the time when those engaged in the work cut into the party wall between the defendant's house and Barron's, for it is not disputed that there was a want of skill in doing this and that it caused the damage, and it is not disputed that the men who did it were intending to carry out the work on which they were employed. The defence opened at the trial, I think, was directed to this, that the contractor was bound not to do anything without written authority, and that there was no authority at all to cut into the party wall. I do not think that that could prevent the act which was done from being in breach of the defendant's duty. HOLKER, L.J., however, thought as I understand him, that the whole of the operation connected with the use of the plaintiff's party wall were over, and that the contractor's men were engaged in a subsequent independent job, and that the defendant was under no further duty than he would have been if, after the house was finished, he had brought in carpenters to repair a wooden staircase. I cannot, however, take this view. I regret that the case was stopped in the counsel's opening, for I feel convinced that if the evidence had been gone into this view of the facts could not have been taken. As it is, I do not think it necessary to say more of the view of the law taken by the late lord justice [HOLKER, L.J.] than that I think it well worthy of consideration in any case where the facts are as he seemed to suppose. I think that the order appealed against should be affirmed, and the appeal dismissed with costs.

LORD WATSON.—In this case I have had great difficulty in forming an opinion satisfactory to my own mind, not because of any doubts as to the law, but because I do feel doubtful whether I rightly apprehend the facts which I ought to assume as the basis of my judgment. It is very much to be regretted that the case was not submitted to the jury. Had that course been followed it is certain that the facts would have been ascertained, and it is highly probable that no question of law would have arisen. As it is we are left to discover the facts upon which our judgment must depend from a very long and argumentative statement made by the appellant's counsel, and in regard to the true import of that statement the parties at the Bar widely differed. Accordingly, we heard quite as much argument about the meaning of what was said to the jury as upon the law of the case. In the Court of Appeal the result of this unsatisfactory state of matters was that HOLKER, L.J., took a somewhat different view of the facts from his colleagues, which led him to a different result in law. Had your Lordships not thought otherwise, I should have been inclined to send the case back to the jury for their determination.

H It is, in my opinion, neither satisfactory nor expedient to decide important questions of law upon a hypothetical statement of facts, especially when the litigant parties are not agreed as to the meaning of the statement. Here the appellant says that his counsel meant to indicate to the jury that he was about to prove, or would try to prove certain facts; the respondent, on the other hand, says that the statement of the appellant's counsel, when carefully read and construed, indicates that he meant to prove something materially different from those facts. I feel a great dislike to criticising the oral statements of a counsel as if they were part of the record, and conceive that I am bound to construe them most liberally in favour of his client. I rather think that HOLKER, L.J., must have been to some extent influenced by these considerations in putting a different construction upon the language from that which was adopted by the other members of the Court of Appeal.

Although I do not agree with the view taken by him, I am not certain that I A
take precisely the same view of the facts with your Lordships, and it is on that
account that I have thought it necessary to explain the grounds upon which I
have come to the same result. I agree with your Lordships that it was the
duty of the appellant, in carrying out his building operations, to see that reason-
able precautions were taken in order to protect from injury the eastern wall of his
tenement, of which the respondent was part owner. The appellant does not deny B
that many of the operations which he contemplated, and had employed a contractor
to execute, were such as would necessarily, or possibly, imperil the stability of
the party wall if no precautions were used, nor does he dispute that it was encum-
bered upon him to see that these operations were safely carried out by the con-
tractor. What he did allege and offer to prove before the jury was that all these
hazardous operations had been brought to a safe termination months before the
occurrence which resulted in damage to the respondent's house. Looking to
the terms of the contract and specification I think it does appear that extensive
structural operations, fraught with obvious risk to the party wall in question,
had been carefully and successfully executed, and if I had been able to come to
the conclusion in fact, that after these were completed, there remained nothing
to be done by the contractor which would reasonably be supposed to involve D
danger to the party wall, I should have been disposed to agree with HOLKER, L.J.

I do not think that the combination in one contract of operations hazardous and
operations in no reasonable sense hazardous does affect the character of those
operations, or impose upon the employer legal duties and liabilities to which he
would not have been subject had he employed a different contractor for each
operation. But I am not satisfied that the fitting up of a wooden staircase from
the basement floor of the appellant's tenement to the cellar below, was an operation
which could occasion no risk to the party wall. It was an operation which might
be executed in at least two ways, either by cutting a groove in the south party
wall, and inserting in it one of the wooden stringers supporting the stair, or by
leaving the wall untouched and fixing the staircase outside it. I see no reason to
doubt that the latter method would have been unattended with danger to the wall
against which the stair was to be placed, or to the party wall in which the respon-
dent is interested. The other method was, as the result showed, attended with
serious danger to both these walls, and I cannot find any suggestion in the state-
ment made by the appellant's counsel to the effect that no one could have reason-
ably anticipated that a workman might cut the wall in order to let in a stringer.
The statement which was very strongly and repeatedly made regarding it was
that the cutting of the wall was unnecessary and was not only unauthorised but
positively forbidden. Unnecessary it certainly was, because the staircase might
have been securely fixed without interfering with the wall. Unauthorised and
forbidden it also was in this sense, that by the terms of the contract and relative
specification the contractor was bound to leave the wall untouched. But the
terms of the contract and specification are, in my opinion, of no relevancy as in a
question with the respondent. E
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If there were any reason to suppose that an ordinary workman entrusted with
the job might cut into the wall, the appellant took a very proper precaution when
he bound his contractor not to cut it, but he failed in his duty to the respondent
when he permitted the contractor and his workmen to neglect that precaution.
I am of opinion that the appellant could not establish a good defence to the
respondent's claim by simply proving that it was not in the least necessary to
cut the wall, and that the contractor was under an obligation not to do it. It
appears to me that he could not escape from liability unless he further proved
that it could not have been reasonably anticipated that any workman of ordinary
skill in such operations, who was neither insane nor dishonest, would have dreamt
of cutting the wall. I can find no allegation to that effect, nor do the statements
made by the appellant's counsel appear to me to sustain the inference that the
cutting of the wall was an act of that improbable description. It is not said I

A that the contractor's workmen were deficient in ordinary skill, or that their act, however ill-judged, was dictated by any other motive than a desire to perform their work efficiently.

B In these circumstances the only inference in fact which I can draw is, that these men ought to have been specially directed not to interfere with the wall, and that care should have been taken that they obeyed the direction. These precautions ought, no doubt, to have been taken by the contractor, but, in accordance with the principle laid down in *Bower v. Peate* (4) and *Dalton v. Angus* (3), it was no less the duty of the appellant, as in a question with the respondent, to see that they were strictly observed.

C **LORD FITZGERALD.**—The question in the case seems to me rather one of controverted fact than of law. The defendant did not endeavour to escape from the principles to be deduced from *Dalton v. Angus* (3), *Tarry v. Ashton* (6), *Bower v. Peate* (4) and *Pickard v. Smith* (2), or to deny their applicability; and, on the other hand, the plaintiff's counsel admitted the law as stated by the defendant's counsel.

D If for the defendant it was contended that the work on which he was engaged, if originally hazardous, had ceased to be so, inasmuch as all that was hazardous had been completed, and that the particular work which was being done was not dangerous in itself, or likely to produce danger, and that the wrongful or negligent act of the workman, which it was said caused the calamity, was entirely collateral, and wholly unauthorised. I agree with LORD BLACKBURN in regretting the course taken at the trial, for I cannot help thinking that, if the evidence had been fully gone into, we should probably not have heard of the case. We are now obliged E to take our view of the facts from the opening statement of the defendant's counsel at the trial, and I have considerable doubt whether the real cause of the fall of the plaintiff's new house is not traceable to another and different source than that which has been assumed, and which, if ascertained as a matter of fact, might have exonerated the contractor, and rendered clear the liability of the defendant. F

G The undertaking the defendant was engaged on was, no doubt, as a whole perilous to his neighbours on both sides, and such as to render care and precaution necessary at every step until the whole of the new structure was substantially completed, or so far at least that nothing remained to be done which could affect the stability of either of the party walls. Part of the original design was that the party wall at Barron's side should be taken down and re-built from top to bottom. Thus we find that the specification provides :

"The contractor to take down the party wall of adjoining building in the Hay-market, and cut away all the old bricks and rubbish, grub up old foundations, and prepare levels for re-building new party wall."

H The defendant's counsel, in one part of his statement, said :

I "I ought to mention to you one very important fact, and it is this. There was the party wall which stood between Barron's house and the house here, which was to be re-built by Mr. Hughes [the appellant]. This party wall it was proposed, and assented to by Mr. Hughes, on these plans and specifications, should be entirely taken down and re-built. Mr. Hughes would have to be at the expense of doing so, because he was the building owner."

In place of carrying out the specification the plan was departed from as to this old party wall; it was underpinned, and then up to the first floor, about fourteen feet, left untouched, but from that point upwards a new party wall was built on it, and necessarily of greater height and greater weight than the old wall. It was the old portion of this party wall which gave way, and by its fall caused the fall of the defendant's house, and the displacement of the girder which was clinched into the plaintiff's party wall, and caused the mischief of which he complains. If Barron's wall had been entirely re-built, as it ought to have been,

it is not at all probable that the calamity would have occurred. A new brick wall has great cohesive power, and, as it would be smooth no chipping or hacking would be necessary to fit on the stairs, and it would probably be unaffected by chipping or hacking, and even cutting into it to fit the wooden staircase or stone steps would not affect its stability so as to create danger. As to the old wall it was different; it was of unknown antiquity, and the part that was left seems to have been weak, out of plumb, with an uneven and rough front, which, according to specification, was to be hacked off and levelled, and it had a great superincumbent weight of new work placed on it. It yielded from its inherent weakness to the cutting and shaking it received in the process of fixing the wooden and stone steps and came down.

It is thus described :

"Then from the first floor up to the second floor, it was intended to have a flight of stone steps, the ends to be let into the wall from which they depend, pinned into the wall; that involves of course cutting into the wall a sufficient depth, and plugging up the holes, after you have got the end of the step in. But they began at the bottom, and got the bottom step with the door on the floor morticed or let into the wall, pinning it into the wall properly at one end and filling that up with cement, and then the next step is fixed above it, and the next above that, and so you go on according to the slope at which your staircase rises. The men were fixing on the day of the accident this flight of stone steps. But independently of that the men who were employed by the carpenters were also fixing a flight of steps which led down into the basement, wooden steps, and without any knowledge of the foreman of the works, and without any order from him, without any knowledge at all of either of the architects, or anything shown on the plans to that effect or prescribed in the specification, the workman had, on his own head, and, as it were, utterly unauthorised, cut into the wall below the level of the ground floor, that is to say, the lower portion of the party wall which had been left."

The fall is described :

"The whole appeared to collapse in the centre, to go down, no doubt partly or chiefly put in motion by the fact that this party wall had been by the unauthorised act of the workmen unduly and improperly weakened; that had set the thing going and the girder gave way, the wall gave way, and the collapse took place as I have described."

The act of the workmen may have been unauthorised and ill-judged, but it was an act no doubt done in the execution of the work entrusted to them, and can in no sense be said to have been entirely collateral; and it is not to be forgotten that the contract provides that

"complete copies of the drawings and specifications are to be kept in the buildings in charge of a competent foreman, who is to be constantly kept on the ground by the contractors, and to whom instructions can be given by the architect,"

who, of course, is to direct the workmen in their operations, and ought to see that what they are doing is necessary and lawful, and carried out in the safest manner.

Was the perilous portion of the work completed before the doing of the act which it is said led immediately to the fall of Barron's party wall, and the consequent injuries to the plaintiff's house? I should have answered that question in the negative without any hesitation if it had not been for the opinion expressed by HOLKER, L.J., which I receive with the utmost respect. The event shows that the danger was not over, and I should have thought that it could not be as long as anything was being done that could affect the stability of either party wall. HOLKER, L.J., seems to have been of opinion that, though the operation as a whole

A was perilous, yet that the peril had ceased, though the work was not completed. He says, as to the particular portion of the work :

“It seems to me perfectly clear that it was not hazardous work, and the workmen exceeded their duty; they made a mistake.”

B But is it open to us to divide the work thus into sections, and to say as to a particular part taken by itself that it carried with it no special peril, and that the defendant is not responsible? It seems to me this cannot be done. We should not be justified in thus breaking it into parts, or considering the case as if the putting in the stairs or the stone steps was the sole work which the defendant was getting done.

C The conclusion I have reached is that the defendant had undertaken a work which, as a whole, necessarily carried with it considerable peril to his neighbours. In the execution of that work the party wall at Barron's side was so injured that it fell in, and its fall dragged down the new building, and injured the plaintiff's party wall and premises. What is the law applicable? What was the defendant's duty? The law has been verging somewhat in the direction of treating parties engaged in such an operation as the defendant as insurers of their neighbours, or warranting them against injury. It has not, however, reached quite to that point. It does declare that under such a state of circumstances it was the duty of the defendant to have used every reasonable precaution that care and skill might suggest in the execution of his works so as to protect his neighbours from injury, and that he cannot get rid of the responsibility thus cast on him by transferring that duty to another. He is not in the actual position of being responsible for injury no matter how occasioned, but he must be vigilant and careful, for he is liable for injuries to his neighbours caused by any want of prudence or precaution, even though it may be culpa levissima. It seems to me that the peril to the plaintiff's house continued as long as there remained anything to be done which could interfere with the stability of the girder on which the defendant's house rested, which the defendant had fastened into the plaintiff's party wall, and that there was that want of due supervision and due precaution which makes the defendant liable.

Appeal dismissed.

Solicitors : *Hughes, Hooker, Buttanshaw & Thunder; T. R. Apps.*

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

HARVEY v. FARNIE

[HOUSE OF LORDS (The Earl of Selborne, L.C., Lord Blackburn and Lord Watson), November 29, 30, 1882]

[Reported 8 App. Cas. 43; 52 L.J.P. 33; 48 L.T. 273; 47 J.P. 308;
31 W.R. 433]

Conflict of Laws—Marriage—Dissolution under foreign law—Marriage solemnised in England—Husband a foreigner—Residence of parties in country of husband's domicile—Wife granted divorce in that country on ground not ground of divorce in England.

Where a marriage has been duly solemnised according to the local law of the place of solemnisation, the wife no longer retains any other domicile than that of the husband. Where, therefore, an Englishwoman married in England, according to English law, a foreigner with a foreign domicile, and resided with him in the country of his domicile abroad,

Held: the courts of the country of the husband's domicile had power to dissolve the marriage on a ground on which a divorce could not have been granted in England, and a decree of divorce on that ground would be recognised in England.

M'Carthy v. Decaix (1) (1831), 2 Russ. & M. 614, disapproved.

Notes. Considered: *Green v. Green*, [1893] P. 89; *Armitage v. A.-G.*, *Gillig v. Gillig*, [1906] P. 135. Applied: *Bates v. Bates*, [1906] P. 206. Considered: *R. v. Hammersmith Superintendent Registrar, Ex parte Mir-Anwaruddin*, [1916-17] All E.R.Rep. 464; *Re Luck, Walter v. Luck*, [1940] 3 All E.R. 307. Referred to: *Scott v. A.-G.* (1886), 56 L.T. 924; *Turner v. Thompson*, [1886-90] All E.R.Rep. 576; *Salvesen (or Von Lorang) v. Austrian Property Administrator*, [1927] All E.R.Rep. 78; *Nachimson v. Nachimson*, [1930] All E.R.Rep. 114; *Apt (otherwise Magnus) v. Apt*, [1947] 1 All E.R. 620; *Thynne (Bath, Marchioness) v. Thynne (Bath, Marquess)*, [1955] 3 All E.R. 129; *Mountbatten v. Mountbatten*, [1959] 1 All E.R. 99; *Russ v. Russ*, [1962] 1 All E.R. 649.

As to the validity of foreign decrees of divorce, see 7 HALSBURY'S LAWS (3rd Edn.) 112-119; and for cases see 11 DIGEST (Repl.) 466 et seq.

Cases referred to:

- (1) *M'Carthy v. Decaix* (1831), 2 Russ. & M. 614; 2 Cl. & Fin. 568, n.; 9 L.J.Ch. 180; 39 E.R. 528, L.C.; 11 Digest (Repl.) 481, 1080.
- (2) *R. v. Lolley* (1812), Russ. & Ry. 237; sub nom. *Sugden v. Lolley*, 2 Cl. & Fin. 567, n., C.C.R.; 11 Digest (Repl.) 486, 1103.
- (3) *Geils v. Geils (or Dickenson)* (1852), 20 L.T.O.S. 145; 17 Jur. 423; 1 W.R. 537; 1 Macq. 255, H.L.; 11 Digest (Repl.) 467, 1007.
- (4) *Maghee v. M'Allister* (1853), 3 I.Ch. R. 604.
- (5) *Warrender v. Warrender* (1835), 2 Cl. & Fin. 488; 9 Bli.N.S. 89; 6 E.R. 1239, H.L.; 11 Digest (Repl.) 356, 250.
- (6) *Tovey v. Lindsay* (1) (1813), 1 Dow. 117; 3 E.R. 643, H.L.; 11 Digest (Repl.) 467, 1005.
- (7) *Dolphin v. Robins* (1859), 7 H.L.Cas. 390; 29 L.J.P. & M. 11; 34 L.T.O.S. 48; 23 J.P. 725; 5 Jur.N.S. 1271; 7 W.R. 674; 3 Macq. 563; 11 E.R. 156, H.L.; 11 Digest (Repl.) 356, 252.
- (8) *Shaw v. Gould* (1868), L.R. 3 H.L. 55; 37 L.J.Ch. 433; 18 L.T. 833, H.L.; 11 Digest (Repl.) 481, 1081.
- (9) *Niboyet v. Niboyet* (1878), 4 P.D. 1; 48 L.J.P. 1; 39 L.T. 486; 43 J.P. 140; 27 W.R. 203, C.A.; 11 Digest (Repl.) 469, 1021.
- (10) *Pitt v. Pitt* (1864), 10 L.T. 626; 10 Jur.N.S. 735; 12 W.R. 1089; 4 Macq. 627, H.L.; reversing, 1 Macph. (Ct. of Sess.) 106; 11 Digest (Repl.) 348, 167.

A Also referred to in argument:

Doe d. Birtwhistle v. Vardill (1835), 2 Cl. & Fin. 571; 9 Bli (N.S.) 32; 6 E.R. 1270; 3 Digest (Repl.) 424, 204.

Munro v. Munro (1840), 7 Cl. & Fin. 842; 7 E.R. 1288, H.L.; 11 Digest (Repl.) 349, 172.

Brook v. Brook (1861), 9 H.L.Cas. 193; 4 L.T. 93; 25 J.P. 259; 7 Jur.N.S. 422; 9 W.R. 461; 11 E.R. 703, H.L.; 11 Digest (Repl.) 457, 915.

B

Appeal from a decision of the Court of Appeal (JAMES, COTTON and LUSH, L.JJ.), reported 6 P.D. 35, affirming a decision of SIR JAMES HANNEN, P., reported 5 P.D. 153, dismissing a petition for a declaration of nullity of marriage.

In 1861 the respondent, J. B. Farnie, married in England an Englishwoman according to the forms of English law. He was then a domiciled Scot, and after the marriage he continued to live in Scotland with his wife. In 1863 a decree of divorce was pronounced against him by the Scottish court at the suit of his wife, upon grounds which would not have been sufficient to sustain a petition for divorce in England. He then settled in England, and in 1865 he married the appellant, then a Miss Harvey, in England, and has continued to live there. His first wife was still living at the date of his second marriage, and this petition was brought by the second wife for a declaration of nullity, on the ground that the Scottish decree of divorce was not binding in England.

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Benjamin, Q.C., and *Fooks (Webster, Q.C.)*, with them) for the appellant.

Winch and *A. Ward* for the respondent, were not called on to address the House.

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THE EARL OF SELBORNE, L.C.—This case has been argued by the learned counsel for the appellant at considerable length, and the legal principle involved in it is not new to your Lordships. If it were not that there has been much consideration and discussion, if not in cases in specie exactly resembling the present, yet in cases involving principles bearing upon the present, I have no doubt that your Lordships would have desired to hear the case fully argued on both sides; but, looking to the nature of this particular case, and to the state of authority upon the subject, I believe your Lordships are all of opinion that it is not necessary to call upon the counsel for the respondent here.

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The ground upon which this Scottish divorce is impeached appears to be this and this alone—that by the law of England a divorce for such a cause (adultery) as was alleged here is only granted at the suit of the husband, except under particular circumstances which in this case do not appear to have existed. The husband's adultery, without anything more, would not in England be a ground of divorce. It is a ground of divorce in Scotland; and this divorce was upon such a ground at the suit of the wife. The circumstances under which this divorce was obtained, were these. The marriage had been solemnised in England, but at the time of the marriage the husband was domiciled in Scotland. That matrimonial domicile was never changed. The husband and wife lived in Scotland, the adultery was committed in Scotland, and when both parties were resident there the suit for divorce was instituted in Scotland, and a decree was regularly pronounced in those circumstances by the Scottish courts. The judge of the Divorce Court and the Court of Appeal have both held that, under those circumstances, the sentence of divorce not being impeached for any species of collusion or fraud, was the sentence of a

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court of competent jurisdiction, not only effectual within that jurisdiction, but entitled to recognition in the courts of this country also. On the other side it has been contended that there is a general rule of English law supposed to have been established in *R. v. Lolley* (2), and not to have been since departed from in such a way as to make it now otherwise than binding on this House, to the effect that, if an Englishwoman is married within the limits of the English jurisdiction to a foreigner (a Scotsman being for this purpose in the same position with a foreigner), that is a marriage which the English courts must regard as indissoluble by any other than an English jurisdiction; or if not that, at all events only dissoluble in

the view of an English court, if dissolved by some other competent jurisdiction for a cause for which it might have been dissolved in England. A

I must take the liberty of saying that, if this question is to be tested upon principle apart from authority, although it cannot be denied that the varying jurisprudence, and perhaps legislation also, of different countries may and do introduce some undesirable cases of conflict between the laws of those different countries on questions of matrimonial status, yet, if the question is to be approached on principle, I should certainly say that in such circumstances as those which exist in the present case all the principles of private international law point in the direction of the validity of such a sentence and of its recognition by the courts of other countries. Of course I assume that in the way of that recognition on the principle of international law, there would not be interposed any positive legislation bearing upon the point, or any positive prohibition binding upon the court in which the question arises. B C

Upon the point of principle how does the matter stand? Let it be granted (and I think it is well settled) that the general rule internationally recognised as to the constitution of marriage is that, when there is no personal incapacity attaching upon either party or upon the particular party who is to be regarded by the law to which he is personally subject, that is, the law of his own country, then marriage is held to be constituted everywhere, if it is well constituted *secundum legem loci contractus*; but that merely determines what in all these cases is the point you start from. When a marriage has been duly solemnised according to the local law of the place of solemnisation, the parties do become husband and wife. But when they become husband and wife, what is the character which the wife assumes? She becomes the wife of the foreign husband in a case where the husband is a foreigner in the country in which the marriage is contracted. She no longer retains any other domicile than his which she acquires. The marriage is contracted with a view to that matrimonial domicile which results from her placing herself by contract in the relation of wife to the husband whom she marries knowing him to be a foreigner domiciled and contemplating permanent and settled residence abroad. D E

Therefore, it must be within the meaning of such a contract, if we are to inquire into it, that she is to become subject to her husband's law, subject in respect of the consequences of the matrimonial relation and of all other consequences depending upon the law of the husband's domicile. That would appear to be so upon principle, and that principle followed out would certainly apply in a case like this, where the domicile into which she has married has never undergone a change, where there has been no divergence of cohabitation or residence, and where the crime was committed in the country both of the domicile and of the forum. It would appear that, if this question is to depend on any principle at all, it must be upon the principle of recognising the law of the forum and matrimonial domicile, which in this case both concur. F G

That being my view of the plain and clear conclusion to which we shall be driven upon this subject, let us see how the matter stands upon the authorities. There are a number of different cases which may be mentioned, and may be distinguished from each other; but, as far as I know, there are only two or three cases in which an appeal has been made to this House which present concurrently all the circumstances relied upon for the foundation of the jurisdiction in the present case. H

It is said that those circumstances existed in *M'Carthy v. Decaix* (1), because there the solemnisation of the marriage was also in England, but the husband was a Dane. As far as I recollect, the parties lived together in Denmark as long as they lived together at all, and in the courts of Denmark, while they both lived there, a sentence of divorce was pronounced. That sentence was not for a cause which, even under the present law, would be recognised in England. It was for what abroad I think is called—or at least that is our English translation of the foreign legal term—incompatibility of temper. But, except as to the nature of the cause of the divorce, that case would seem in its original facts to have been like the present. It is said that LORD BROUGHAM in *M'Carthy v. Decaix* (1) decided that. I

A because the solemnisation of the marriage with an Englishwoman had taken place in England, therefore the Danish court could not under those circumstances dissolve the marriage. I have great respect for the judicial decisions of all who have at any time filled the office of Lord Chancellor. I have great respect, also, for the high reputation of LORD BROUGHAM; but I am compelled to speak without great respect of the decision in *M'Carthy v. Decaix* (1), because not only does it appear to me to proceed upon a view of *R. v. Lolley* (2) which is not tenable, but also it is a decision which, upon principles universally recognised, would be incapable of being supported, even if it were true that the English court ought not to have recognised that Danish divorce, because, beyond all doubt on that supposition, both the husband and the wife lived and died domiciled in Denmark, and the distribution of both their personal estates would, by a law which is beyond controversy, fall to be regulated in England and everywhere by the law of Denmark and not by the law of England. Therefore, unless it had been ascertained that the law of Denmark under those circumstances would not distribute those estates in the same manner as if there had been a valid divorce, the decision manifestly lost sight of the true question in the cause.

D I do not, therefore, think it necessary to say more about *M'Carthy v. Decaix* (1). It has been commented upon on various occasions in a manner certainly tending to shake its authority; but, to my mind, nothing more is necessary entirely to destroy its authority than to bear in mind the fact that, even if the English courts ought to have declined to recognise in that case the Danish divorce, still the English courts could not with propriety have applied the English law to the case, because the distribution of the movable property in question depended entirely upon Danish law, and the English courts were bound to treat it as depending upon Danish law. Therefore *M'Carthy v. Decaix* (1) may be put aside.

E I am not quite sure, but I think that in *Geils v. Geils* (3) the circumstances were also parallel with those of the present case, because there, if I am not mistaken, not only was the Scottish matrimonial domicile unchanged at the time of the divorce, but I think the adultery was committed in Scotland, and I think at the time of the action brought both parties were resident in Scotland. In that case the decision of the Scottish court was upheld upon an appeal from Scotland to this House. No doubt, that by itself does not show that an English court ought to have also recognised the validity of the decision; but, having regard to what has constantly fallen from the judges who in this House have determined questions of that kind with reference to general principles, I think the presumption rather is that an English court ought, unless some reason which at present I am unable to perceive be shown to the contrary, to recognise the decision of a Scottish court in a case in which this House has held that the Scottish court had proper jurisdiction to pass such a sentence.

G The third case is *Maghee v. M'Allister* (4), a case in Ireland before BLACKBURNE, L.C. There, as in the Danish case, the cause of divorce was one which would not be sufficient in England, desertion and non-adherence, but the parties there also had been from the first matrimonially and actually domiciled in Scotland. They were not both in Scotland when the action was brought, and that makes it stronger. I rather think that the cause of action arose out of the fact that the wife had withdrawn herself, and she was elsewhere.

H I Nevertheless, the jurisdiction was upheld on the same principles on which this House upheld the Scottish jurisdiction in *Warrender v. Warrender* (5), where the matrimonial domicile had all along been Scottish, but the crime was alleged to have been committed out of Scotland, and the wife was resident there; still this House held, in a Scottish appeal undoubtedly, that the Scottish court had proper jurisdiction; and the Lord Chancellor of Ireland, under circumstances similar in principle, held that an Irish court ought upon principle, according to the comity of nations, to recognise the competency of the Scottish jurisdiction to pronounce the divorce which had been pronounced in *Maghee v. M'Allister* (4).

I believe that those are the only cases which are in their circumstances exactly like the present case. Much of illustration and of valuable and important doctrine is undoubtedly to be found in other authorities. I will just glance at some of those authorities in order to see precisely what they do and what they do not determine. I will begin with *R. v. Lolley* (2). What was *R. v. Lolley* (2)? It was a case of this class, that persons who had married, and had always been and always continued to be matrimonially and actually domiciled in England, had recourse to Scotland for the purpose of constituting a merely collusive domicile, and there obtained a divorce for a crime, I take it, committed in Scotland. It was held by the English courts that that was not a valid sentence. I do not think that there was certainly any very great hardship upon Mr. Lolley, the husband, because whether there was collusion on the part of his wife or not, it is quite certain that he went through the whole proceeding in order to get rid of his wife and marry another woman, with whom he had already entered into a conditional engagement. But there was a total absence of matrimonial or actual domicile. We need not consider whether a change of domicile would or would not have been sufficient. The domicile was throughout English, and the recourse to Scotland was merely for the purpose of getting rid of the marriage. That case decided, and every subsequent case is consistent with the decision, that in those circumstances the Scottish court had no proper jurisdiction, or at all events not such a jurisdiction as could be recognised as giving any effect to its sentence in England.

There arose a somewhat similar question in *Tovey v. Lindsay* (6), and it is remarkable that there LORD ELDON did, in the course of the argument, once or twice before he came to deliver judgment, express himself in terms not different from the terms used at your Lordships' Bar, by the learned counsel for the appellant, as to the point decided in *R. v. Lolley* (2). He is reported to have said (1 Dow. at p. 124), that the

"twelve judges had lately decided that, as by the English law marriage was indissoluble, a marriage contracted in England could not be dissolved in any way except by an act of the legislature,"

which is very much the way in which counsel for the present appellant put it. Again (*ibid.* at p. 125):

"You say that the marriage ought to be dissolved. Her answer to that is, that being contracted within the pale of the English law, it is indissoluble."

So LORD ELDON during the argument once or twice expressed himself, with regard to *R. v. Lolley* (2), in the terms of the appellant's argument in this case; but when he came to deliver his judgment, it is quite plain that upon mature consideration he saw reason to take a different view.

The material facts there were these: The original domicile of the husband was Scottish. He had afterwards lived a good deal in England, particularly at Durham. He had separated from his wife. His wife remained in Durham, and he afterwards sued her for a divorce in Scotland, she being out of the jurisdiction, and there being no corpus delicti in Scotland. The Scottish courts had treated it as a confessedly Scottish domicile. LORD ELDON in the whole of his judgment treats domicile as the point upon which the question ought properly to depend; not, however, ultimately deciding anything, and certainly not deciding the very important question which might have arisen if the change to an English domicile had been established, namely, how far a subsequent change of domicile would affect the jurisdiction to dissolve the marriage; but he considered the fact of domicile to be necessary to be ascertained, which, according to the view of *R. v. Lolley* (2) taken by the appellant's counsel at your Lordships' Bar, could not possibly have been necessary at all. Therefore, I think we may infer very clearly that in LORD ELDON's mind it could not be determined off-hand that the Scottish court had no jurisdiction merely on the ground that the marriage had taken place in England.

Then I come to observe upon two other classes of cases, or rather one other class, because *Dolphin v. Robins* (7) and *Shaw v. Gould* (8) seem to me to be very nearly

A the same in their circumstances as *R. v. Lolley* (2), and I will not, therefore, dwell upon those cases. In the other class of cases is *Niboyet v. Niboyet* (9), where the forum which dissolved the marriage was not that of the matrimonial domicile, but was that of the bona fide residence of both parties, both being within the jurisdiction, and the crime having been committed there. If that case was well decided, it is not certainly an authority in the appellant's favour, because it goes to this length, B that, at all events under the English statute, if those circumstances are found concurring, even domicile is not necessary to give jurisdiction to dissolve a marriage. Whether or not another country, in that case the country of the parties (France), would have recognised that decision we need not at present inquire, because either it is applicable on the present occasion, or it is not. If it is applicable, it is certainly an authority against the appellant; if it is not applicable, it does not C help her.

Pitt v. Pitt (10) no doubt was a case which did not unite the circumstances which your Lordships have to consider here, because, in *Pitt v. Pitt* (10), in which this House on an appeal from Scotland reversed an order which had affirmed the jurisdiction of the Scottish court, and, therefore, determined that the court had no jurisdiction, the circumstances were these. The matrimonial domicile was English, D the solemnisation of the marriage was in England. Mr. Pitt, the husband, had gone to Scotland. It was in controversy whether he had there acquired an actual domicile or not, but it was decided that he had not. He, therefore, retained his English domicile. The wife was not in Scotland, and the alleged adultery was not committed in Scotland. In those circumstances the House came to the opposite decision from that which it had arrived at in *Warrender v. Warrender* (5), the circumstances being very parallel, except that in the one case there was, and in the other there was not, a Scottish domicile. In *Warrender v. Warrender* (5), where E there was a Scottish domicile, the jurisdiction was upheld, though the crime had not been committed in Scotland, and though the wife, who was the defender, was not resident in Scotland. In *Pitt v. Pitt* (10) the jurisdiction was denied, because there was not a Scottish domicile, the other circumstances being the same.

F I do not say that *Pitt v. Pitt* (10) would of necessity govern cases like *Niboyet v. Niboyet* (9), for example, if they were to arise in Scotland. That is not a question which your Lordships have now to determine, and it is not desirable that you should go beyond the case which you have to determine; but this I will say, without going through all the cases which have been cited, that when they are carefully G examined you find that the current of the best authority which pervades them is in favour of regarding and not disregarding international principles upon this subject, when you do not find the positive law of the country where the forum is in conflict with those principles, unless *M'Carthy v. Decaix* (1) may be considered to be an exception. The present decision in the Court of Appeal is in accordance with H international law and with the whole stream of sound authority, including LORD LYNTHURST, LORD BROUGHAM himself (though no doubt from the view which he took of *R. v. Lolley* (2) he not infrequently contended against it in terms which your Lordships probably would not unreservedly adopt), LORD ST. LEONARDS, LORD WESTBURY, LORD CRANWORTH, LORD CHELMSFORD, and LORD KINGSDOWN, all of whom concur. I have no hesitation in saying that, from the passages which have been read from the judgments of each and every one of those noble and learned I Lords, I should confidently infer that, if the present case had been argued before all or any one of them, they would have concurred in the judgment which I now move your Lordships to pronounce, which is, that the present appeal be dismissed with costs.

LORD BLACKBURN.—I am entirely of the same opinion. I agree in almost everything that has been said, and I should hardly consider it necessary to add anything if it were not that I wish to point out that the only question that we have to decide at present is that in this case the divorce was good, that the court in Scotland had, under the circumstances of this case, the proper power to divorce,

and that that divorce put an end to the marriage. Several cases were cited and arguments used for the purpose of showing that in some cases a divorce might not have been good where there was not so much ground for it as there is here. That, I apprehend we have not to consider. It is no objection to this being a good divorce and putting an end to the marriage in this case to say that there might be cases in which the facts did not go so far and in which a divorce might not be good according to some of the decisions. That would not affect the present decision, which is that in the present case there is enough to do it.

Let us now see what the present case is. A Scotsman domiciled in Scotland, and being to all intents and purposes a Scotsman, comes to England, and there marries an English wife. She was an Englishwoman up to the moment of her marriage. The marriage took place in England according to the forms of English law, and from the moment of her marriage she became a domiciled Scotswoman, just as her husband was a domiciled Scotsman. There was nothing whatever to change that domicile; and while they were both in Scotland there was a divorce by a Scottish court from the marriage, a dissolution a vinculo matrimonii on the particular ground of an offence committed in Scotland. The question is: Is that divorce good in England? Is it according to English law that a dissolution of marriage by a Scottish court under those circumstances is a good dissolution of marriage in England? Whether it would have been good in Scotland or not would not have been the same question. I can easily suppose that there might be good divorces in Scotland that would not be good in England. Seeing that there was this complete domicile, which almost every writer and speaker upon the subject has regarded as certainly the most important element in considering what the status of married people and the status of those divorced from a marriage is, this was in its origin a Scottish domicile from the very beginning.

The only ground upon which it has been said that a Scottish court could not divorce the parties was that the actual marriage contract was made in England. I do not myself see why, upon any principle, that should make any difference. What was urged was that there was authority for that proposition, and for that purpose *R. v. Lolley* (2) was cited. LORD BROUGHAM did more than once cite and act upon *R. v. Lolley* (2), as though he had understood it as going to the full extent of what I have just said—that the fact that a marriage was contracted locally in England made it an English marriage, and, therefore, indissoluble by any foreign court on the ground of adultery or anything else. LORD BROUGHAM appears to have thought that that was the decision in *R. v. Lolley* (2), but I think that that was not the decision. When you look at the facts in *R. v. Lolley* (2) they are clear. An English husband married an English wife in England; he was a domiciled Englishman, she was a domiciled Englishwoman. They continued to be domiciled Englishman and Englishwoman down to the moment when, going into Scotland for a temporary purpose, he committed adultery there, and she caused him to be divorced in a Scottish court.

In that state of facts the point which was decided by the twelve judges upon the point being brought forward was this. They said they could not and would not inquire into whether there was fraud or not, because if there had been any fraud it ought to have been left to a jury to find it and fraud was not left to a jury; but they did find upon the very point that was brought before them, that there was an English domicile throughout the whole period of the case, and when they decided that an "English marriage," which I think was the phrase that was used, was indissoluble by a foreign court, I think they meant an English marriage where the domicile was English from the beginning to the end of the transaction. LORD BROUGHAM did not understand it so, and more than once in his anger against *R. v. Lolley* (2) he was inclined to maintain that it was decided upon the ground of the contract being English, and to drive it to absurd results, a *reductio ad absurdum*, to show that the decision, as he understood it was wrong. But there is no case that I am aware of which says that *R. v. Lolley* (2) as I have just put it

A is not right. There is no case which, either in Scotland or in this country, decides finally that even in Scotland a divorce under such circumstances as those of *R. v. Lolley* (2) would not be good. Whether upon the authorities it might not be decided hereafter (it has not yet been decided) that a divorce in Scotland in such circumstances as those of *R. v. Lolley* (2) would not be valid even by Scottish law, is a point which does not arise in the present case, and one upon which I wish to

B express no opinion either one way or the other. Assuming that in *R. v. Lolley* (2) the divorce would be good in Scotland, it would be, to my mind, a very uncomfortable result that it should be good in Scotland and bad in England; but that does not, to my mind, prove that this case was not rightly decided. We have not to consider whether or not a divorce under the circumstances of *R. v. Lolley* (2) would in England be bad; we have to consider whether a divorce under the circum-

C stances of the present case would be bad because it might have been shown to have been void in *R. v. Lolley* (2) under the circumstances of that case. The validity of the divorce in *R. v. Lolley* (2) is not the question which is now at all before your Lordships.

Several of the other cases which were cited, such as *Niboyet v. Niboyet* (9), would only, I think, at the utmost go to this, that there may be grounds (I do not

D inquire whether they would be good or bad grounds) for saying that a divorce may be good and valid in every country, if it is valid in the country where it is pronounced under circumstances that go the length of those in the present case. There was a difference of opinion in *Niboyet v. Niboyet* (9), and I wish to express no opinion upon it one way or the other; but, supposing it were valid, going even further than

E this case, how can that be an authority for saying that it is not valid when the circumstances only go as far as they do here? I need not repeat what has been said with regard to LORD BROUGHAM's expressions. I can only say that, weighing them, not as authorities binding upon me, but merely as expressions of LORD BROUGHAM's opinion, his reasoning in the cases which have been cited does not

F carry much weight or influence in my mind, and the authority of BLACKBURNE, L.C. (in *Maggee v. M'Allister* (4)), certainly seems to me to decide exactly the contrary. It appears to me that he was quite right in his decision upon the facts before him, and he gives very good grounds for it. I think his decision is in conformity with all that has been thrown out by various judges at different times. Without going further than that, and without entering into the question and saying whether a bona fide change of a domicile which was originally English would affect

G the question or not, I say that it seems to me that there is no authority except LORD BROUGHAM's against the proper doctrine which was laid down by the court below in the present case, but that there is every authority, except LORD BROUGHAM's, going the other way.

I must observe one thing further. I should have said it, perhaps, a little earlier. I think, when you come to look at the expressions which, in a case decided immediately after *R. v. Lolley* (2), namely, *Tovey v. Lindsay* (6), LORD ELDON used with reference to *R. v. Lolley* (2), you find that, although LORD BROUGHAM had said that it was held that a marriage was indissoluble in Scotland when contracted in England, LORD ELDON, before he came to deliver judgment, said that the decision in *R. v. Lolley* (2) was that a marriage was indissoluble when it was an English domiciled marriage ab initio down to the time of the divorce. All that was done

I in that case was to send the cause back again to Scotland in order that the Scottish courts might consider with great care before they decided that they had the power to divorce under circumstances which raised such a question as that. It appears that the party died shortly afterwards, and it was not decided then, and I do not think it was ever finally decided by the Scottish courts. At all events, I do not think it would be proper now for your Lordships to form the opinion that that question was decided. I think that all that should be decided here is that upon such facts as are here stated, the Scottish court had power to direct a divorce which should be valid everywhere.

LORD WATSON.—I am of the same opinion. In this case it is very clear to my mind, and it has not been disputed by the appellant, that, according to the decisions of this House in Scottish appeals, the Court of Session had, under the law of Scotland, jurisdiction to pronounce a sentence of divorce between these parties in December, 1863. But the question which is raised for determination is whether that decree must be respected by the courts of England, or whether it must be set aside as an invalid decree because it dissolves an English marriage.

I must confess that, to my mind, it would be contrary to the plainest principles of international private law, as expounded in a long series of decisions in this House by noble and learned Lords of the highest judicial eminence, from *Warrender v. Warrender* (5) in 1835 down to *Shaw v. Gould* (8) in 1868, to give effect to the contention which has been addressed to your Lordships on behalf of the appellant. But then it is said that those principles do not admit of application to the present case because the question falls to be decided, not upon general principles of international law, but upon a certain principle which is peculiar to the law of England. That principle, when explained by the learned counsel for the appellant, is neither more nor less than that, in a case where a marriage takes place in England between a foreigner and an English lady, the law of England regards the place of celebration as fixing within England the jurisdiction, and the only jurisdiction, to dissolve the marriage, and alter the status of the parties from that of married to that of single persons.

For that proposition no authority has been cited either concurrent with, or subsequent to, the long series of decisions to which I have already adverted. But it is said that it was so settled in *R. v. Lolley* (2), approved of in *Tovey v. Lindsay* (6), and followed in *M'Carthy v. Decaix* (1). I agree with every word that has fallen from your Lordships in regard to what was decided in *R. v. Lolley* (2). I think it is by a mere play upon words that the appellant's counsel has even had a show of plausibility in support of his argument here by using the words "English marriage" which are capable of two very different meanings, either as signifying the substance of the contract or union between the parties out of which their rights as spouses arise, or as signifying the mere place of celebration. I cannot think that, in remitting *Tovey v. Lindsay* (6), LORD ELDON had in view that it meant merely the place of celebration of the marriage. It is very remarkable, if that was in his Lordship's mind, that he should have remitted the case to the Court of Session to consider, not whether the court in Scotland had power to dissolve a marriage celebrated in England, but whether their judgment was well founded in respect of the domicil of the parties. The only difficulty or doubt upon which the case was remitted was that it appeared to the noble and learned Lord that there was great room for difference of opinion as to the fact of the pursuer being domiciled in Scotland at the time. He asked the judges in Scotland to consider whether he was not really domiciled in Durham, and not in Scotland, as they had assumed in their judgment, and, in the event of their coming to that conclusion in point of fact, he remitted the matter to them with directions carefully to consider the law upon the point.

So far as regards *M'Carthy v. Decaix* (1), I think that there are considerations arising upon the face of that judgment which render it of little value as an authority. Even if it had been a decision more in point than it seems to me to be I should not have been inclined to follow it in the face of those very weighty observations which have been made by judges, as I have already said, entitled to the highest respect, in subsequent cases. I can only say that throughout the argument in this case I have felt very little doubt as to the result at which your Lordships ought to arrive, because, from beginning to end of that argument it has been a struggle to represent that the words "English marriage" were used throughout these cases, or the more important of them by the judges who used the expression, to designate mere celebration.

Appeal dismissed.

Solicitors: *Savile A. Tucker; J. S. Ward.*

[Reported by C. E. MALDEN, ESQ., Barrister-at-Law.]

R. v. DUDLEY AND STEPHENS

[QUEEN'S BENCH DIVISION (Lord Coleridge, C.J., Grove and Denman, JJ., Pollock, B., and Huddleston, B.), December 4, 9, 1884]

[Reported 14 Q.B.D. 273; 54 L.J.M.C. 32; 52 L.T. 107; 49 J.P. 69; 33 W.R. 347; 1 T.L.R. 118; 15 Cox, C.C. 624]

Criminal Law—Murder—Defence—Necessity to kill to preserve own life—No threat or violence against prisoner.

It is not lawful for any person, in order to save his own life, to kill another when that other is neither attempting or threatening his life nor is guilty of any illegal act of violence towards him. Anyone who kills an innocent and unoffending person to save his own life is guilty of murder.

The two prisoners were indicted for wilful murder, and on the trial the jury returned a special verdict, stating the facts, and referred the matter to the court. The facts stated in the special verdict were substantially as follows: The prisoners, able-bodied English seamen, and the deceased, an English boy between seventeen and eighteen years of age, the crew of an English yacht, were cast away in a storm on the high seas 1,600 miles from land, and were compelled to put into an open boat. The food they took with them was consumed, and, they, having been for eight days without food, and for six days without water, the prisoners killed the boy. The boy when killed was lying at the bottom of the boat, helpless, weak, and unable to make any resistance, and did not assent to his being killed. The prisoners, and another man who was with them, fed upon the body and blood of the boy for four days, when they were picked up by a passing vessel. The verdict went on thus: "If the men had not fed upon the body of the boy, they would probably not have survived to be so picked up and rescued, but would within the four days have died of famine; the boy, being in a much weaker condition, was likely to have died before them; at the time of the act in question there was no sail in sight nor any reasonable prospect of relief; under the circumstances there appeared to the prisoners every probability that, unless they then fed, or very soon fed, upon the boy or one of themselves, they would die of starvation; there was no appreciable chance of saving life except by killing someone for the others to eat; assuming any necessity to kill anybody, there was no greater necessity for killing the boy than any of the three men."

Held: the facts as found afforded no justification for the killing of the boy, and the prisoners were guilty of wilful murder.

Notes. Referred to: *R. v. Steventon Parish* (1885), 1 T.L.R. 395; *R. v. Staines Local Board* (1888), 4 T.L.R. 364; *R. v. Brooke* (1894), 59 J.P. 6; *R. v. Jameson* (1896), 60 J.P. 662.

As to the crime of murder, see 10 HALSBURY'S LAWS (3rd Edn.) 704-715; and for cases see 15 DIGEST (Repl.) 930 et seq.

Cases referred to:

- (1) *Commonwealth v. Holmes*, 1 Wall Jr. 1.
- (2) *R. v. Stratton* (1779), 1 Doug.K.B. 239; 99 E.R. 156; 21 State Tr. 1045; 14 Digest (Repl.) 75, 358.

Trial adjourned from Exeter Assizes for consideration of the special verdict returned by the jury.

The two prisoners, Thomas Dudley and Edwin Stephens, were indicted for the wilful murder of Richard Parker on July 25, 1884, on the high seas, within the jurisdiction of the Admiralty of England. They were tried at the winter assizes at Exeter on Nov. 6, 1884, before HUDDLESTON, B., when, at the suggestion of the learned judge, the jury returned a special verdict, setting out the facts, and referred the matter to the Divisional Court for its decision.

The special verdict was as follows:

"The jurors, upon their oath, say and find that, on July 5, 1884, the prisoners, with one Brooks, all able-bodied English seamen, and the deceased, also an English boy, between seventeen and eighteen years of age, the crew of an English yacht, were cast away in a storm on the high seas, 1,600 miles from the Cape of Good Hope, and were compelled to put into an open boat. That in this boat they had no supply of water and no supply of food, except two 1lb. tins of turnips, and for three days they had nothing else to subsist upon. That on the fourth day they caught a small turtle, upon which they subsisted for a few days, and this was the only food they had up to the twentieth day, when the act now in question was committed. That on the twelfth day the remains of the turtle were entirely consumed, and for the next eight days they had nothing to eat. That they had no fresh water, except such rain as they from time to time caught in their oilskin capes. That the boat was drifting on the ocean, and it was probably more than a thousand miles away from land. That on the eighteenth day, when they had been seven days without food and five without water, the prisoners spoke to Brooks as to what should be done if no succour came, and suggested that someone should be sacrificed to save the rest, but Brooks dissented, and the boy to whom they were understood to refer was not consulted. That on July 24, the day before the act now in question, the prisoner Dudley proposed to Stephens and to Brooks that lots should be cast who should be put to death to save the rest, but Brooks refused to consent, and it was not put to the boy, and in point of fact there was no drawing of lots. That on that day the prisoners spoke of their having families, and suggested that it would be better to kill the boy that their lives should be saved, and the prisoner Dudley proposed that if there was no vessel in sight by the morrow morning the boy should be killed. That next day, July 25, no vessel appearing, Dudley told Brooks that he had better go and have a sleep, and made signs to Stephens and Brooks that the boy had better be killed. The prisoner Stephens agreed to the act, but Brooks dissented from it. That the boy was then lying at the bottom of the boat quite helpless, and extremely weakened by famine and by drinking sea water, and unable to make any resistance, nor did he ever assent to his being killed. The prisoner, Captain Dudley, offered a prayer, asking forgiveness for them all if either of them should be tempted to commit a rash act, and that their souls might be saved. That the prisoner Dudley, with the assent of the prisoner Stephens, went to the boy, and telling him that his time was come, put a knife into his throat and killed him then and there. That the three men fed upon the body and blood of the boy for four days. That, on the fourth day after the act had been committed, the boat was picked up by a passing vessel, and the prisoners were rescued still alive, but in the lowest state of prostration. That they were carried to the port of Falmouth, and committed for trial at Exeter. That, if the men had not fed upon the body of the boy, they would probably not have survived to be so picked up and rescued, but would within the four days have died of famine. That the boy, being in a much weaker condition, was likely to have died before them. That at the time of the act in question there was no sail in sight, nor any reasonable prospect of relief. That under the circumstances there appeared to the prisoners every probability that, unless they then fed, or very soon fed, upon the boy or one of themselves, they would die of starvation. That there was no appreciable chance of saving life except by killing someone for the others to eat. That, assuming any necessity to kill anybody, there was no greater necessity for killing the boy than any of the three men.

"But whether upon the whole matter aforesaid by the said jurors in form aforesaid found the killing of the said Richard Parker by the said Thomas Dudley and Edwin Stephens done and committed in manner aforesaid be felony and murder or not the said jurors so as aforesaid chosen, tried, and sworn, are ignorant, and pray the advice of the court thereupon. And if upon the whole matter aforesaid by the said jurors in form aforesaid found the court

A shall be of opinion that the aforesaid killing of the said Richard Parker in manner aforesaid done and committed be felony and murder, then the said jurors on their oath say that the said Thomas Dudley and Edwin Stephens are each guilty of the felony and murder aforesaid in manner and form as in and by the indictment aforesaid above specified is against them alleged. And if upon the whole matter aforesaid by the said jurors in form aforesaid found the court shall be of opinion that the aforesaid killing of the said Richard Parker in manner aforesaid done and committed be not felony and murder, then the jurors aforesaid on their oath aforesaid say that the said Thomas Dudley and Edwin Stephens are not guilty of the felony and murder aforesaid in manner and form as in and by the said indictment above specified is against them alleged. And if upon the whole matter aforesaid by the said jurors in form aforesaid found the court shall be of opinion that the killing of the said Richard Parker in manner aforesaid done and committed be felony and manslaughter, then the said jurors on their said oath say that the said Thomas Dudley and Edwin Stephens are each guilty of the felonious killing and slaying of the said Richard Parker. And if upon the whole matter aforesaid by the said jurors in form aforesaid found the court shall be of opinion that the aforesaid killing of the said Richard Parker be neither felony and murder nor felony and manslaughter, then the said jurors on their oath say that the said Thomas Dudley and Edwin Stephens are not guilty of the premises in the indictment specified and charged upon them."

Collins, Q.C., H. Clark and L. E. Pyke for the prisoners.

E *The Attorney-General (Sir Henry James, Q.C.), Charles, Q.C., C. Mathews and Danckwerts for the Crown.*

Cur. adv. vult.

Dec. 9, 1884. The following judgment of the court was delivered by

F **LORD COLERIDGE, C.J.**—The two prisoners, Thomas Dudley and Edwin Stephens, were indicted for the murder of Richard Parker on the high seas on July 25 in the present year. They were tried before HUDDLESTON, B., at Exeter on Nov. 6, and, under the direction of my learned brother, the jury returned a special verdict, the legal effect of which has been argued before us, and on which we are now to pronounce judgment. From the facts, stated with the cold precision of a special verdict, it appears sufficiently that the prisoners were subject to terrible temptation and to sufferings which might break down the bodily power of the strongest man, and try the conscience of the best. Other details yet more harrowing, facts still more loathsome and appalling, were presented to the jury, and are to be found recorded in my learned brother's notes. But nevertheless this is clear, that the prisoners put to death a weak and unoffending boy upon the chance of preserving their own lives by feeding upon his flesh and blood after he was killed, and with a certainty of depriving him of any possible chance of survival. The verdict finds in terms that: "if the men had not fed upon the body of the boy, they would probably not have survived . . ." and that "the boy, being in a much weaker condition, was likely to have died before them." They might possibly have been picked up next day by a passing ship; they might possibly not have been picked up at all; in either case it is obvious that the killing of the boy would have been an unnecessary and profitless act. It is found by the verdict that the boy was incapable of resistance, and, in fact, made none; and it is not even suggested that his death was due to any violence on his part attempted against, or even so much as feared by, them who killed him. Under these circumstances the jury say they are ignorant whether those who killed him were guilty of murder, and have referred it to this court to say what is the legal consequences which follow from the facts which they have found.

[His LORDSHIP dealt with objections taken by counsel for the prisoners which do not call for report, and continued.] There remains to be considered the real

question in the case—whether killing, under the circumstances set forth in the verdict, be or be not murder. The contention that it could be anything else was to the minds of us all both new and strange, and we stopped the Attorney-General in his negative argument that we might hear what could be said in support of a proposition which appeared to us to be at once dangerous, immoral, and opposed to all legal principle and analogy. All, no doubt, that can be said has been urged before us, and we are now to consider and determine what it amounts to.

First, it is said that it follows, from various definitions of murder in books of authority—which definitions imply, if they do not state, the doctrine—that, in order to save your own life you may lawfully take away the life of another, when that other is neither attempting nor threatening yours, nor is guilty of any illegal act whatever towards you or anyone else. But, if these definitions be looked at, they will not be found to sustain the contention. The earliest in point of date is the passage cited to us from BRACTON, who wrote in the reign of Henry III. It was at one time the fashion to discredit BRACTON because he was supposed to mingle too much of the canonist and civilian with the common lawyer. There is now no such feeling; but the passage upon homicide, on which reliance is placed, is a remarkable example of the kind of writing which may explain it. Sin and crime are spoken of as apparently equally illegal; and the crime of murder, it is expressly declared, may be committed *lingua vel facto*; so that a man, like Hero, “done to death by slanderous tongues,” would, it seems, in the opinion of BRACTON, be a person in respect of whom might be grounded a legal indictment for murder. But in the very passage as to necessity, on which reliance has been placed, it is clear that BRACTON is speaking of necessity in the ordinary sense, the repelling by violence—violence justified so far as it was necessary for the object—any illegal violence used towards oneself. If, says BRACTON (*Lib. iii, Art. De Corona, cap. 4, fol. 120*), the necessity be “*evitabilis et evadere posset absque occisione, tunc erit reus homicidii*”—words which show clearly that he is thinking of physical danger, from which escape may be possible, and that “*inevitabilis necessitas*,” of which he speaks as justifying homicide, is a necessity of the same nature.

It is, if possible, yet clearer that the doctrine contended for receives no support from the great authority of LORD HALE. It is plain that in his view the necessity which justifies homicide is that only which has always been, and is now, considered a justification. He says (*1 Hale, P.C. 491*):

“In all these cases of homicide by necessity, as in pursuit of a felon, in killing him that assaults to rob, or comes to burn or break a house, or the like, which are in themselves no felony.”

Again, he says that the necessity which justifies homicide is of two kinds:

“(1) That necessity which is of a private nature; (2) That necessity which relates to the public justice and safety. The former is that necessity which obligeth a man to his own defence and safeguard; and this takes in these inquiries: 1. What may be done for the safeguard of a man’s own life;”

and then follow three other heads not necessary to pursue. LORD HALE proceeds (*1 Hale, P.C. 478*):

“1. As touching the first of these, viz., homicide in defence of a man’s own life, which is usually styled *se defendendo*.”

It is not possible to use words more clear to show that LORD HALE regarded the private necessity which justified, and alone justified, the taking the life of another for the safeguard of one’s own to be what is commonly called self-defence. But if this could be even doubtful upon LORD HALE’s words. LORD HALE himself has made it clear, for, in the chapter in which he deals with the exemption created by compulsion or necessity, he thus expresses himself (*1 Hale, P.C. 51*):

“If a man be desperately assaulted, and in peril of death, and cannot otherwise escape, unless to satisfy his assailant’s fury he will kill an innocent person then

A present, the fear and actual force will not acquit him of the crime and punishment of murder if he commit the fact, for he ought rather to die himself than to kill an innocent; but if he cannot otherwise save his own life, the law permits him in his own defence to kill the assailant, for, by the violence of the assault and the offence committed upon him by the assailant himself, the law of nature and necessity hath made him his own protector *cum debito modamine inculpatæ tutelæ*."

But, further still, LORD HALE, in the following chapter (1 Hale, P.C. 54), deals with the position asserted by the casuists, and sanctioned, as he says, by GROTIUS and PUFFENDORF, that in a case of extreme necessity, either of hunger or clothing,

C "theft is no theft, or at least not punishable as theft, and some even of our own lawyers have asserted the same; but I take it that here in England that rule, at least by the laws of England, is false, and, therefore, if a person, being under necessity for want of victuals or clothes, shall upon that account clandestinely and *animo furandi* steal another man's goods, it is a felony and a crime by the laws of England punishable with death."

D If, therefore, LORD HALE is clear, as he is, that extreme necessity of hunger does not justify larceny, what would he have said to the doctrine that it justified murder?

E It is satisfactory to find that another great authority, second probably only to LORD HALE, speaks with the same unhesitating clearness on this matter. SIR MICHAEL FOSTER, in chapter 3 of his DISCOURSE ON HOMICIDE, deals with the subject of "Homicide founded in Necessity," and the whole chapter implies, and is insensible unless it does imply, that, in the view of SIR MICHAEL FOSTER, necessity and self-defence (which in s. 1 he defines as "opposing force to force even to the death") are convertible terms. There is no hint, no trace of the doctrine now contended for; the whole reasoning of the chapter is entirely inconsistent with it. In EAST (1 East, P.C. 271), the whole chapter on "Homicide by Necessity" is taken up with an elaborate discussion of the limits within which necessity in SIR MICHAEL FOSTER's sense (given above) of self-defence is a justification of or excuse for homicide. There is a short section at the end (p. 294), very generally and very doubtfully expressed, in which the only instance discussed is the well-known one of two shipwrecked men on a plank able to sustain only one of them, and the conclusion is left by SIR EDWARD EAST entirely undetermined.

G What is true of SIR EDWARD EAST is true also of MR. SERJEANT HAWKINS. The whole of his chapter on "Justifiable Homicide" assumes that the only justifiable homicide of a private nature is in defence against force of a man's person, house, or goods. In s. 26 we find again the case of the two shipwrecked men and the single plank, with this significant expression from a careful writer: "It is said to be justifiable." So, too, DALTON, c. 150, clearly considers necessity and self-defence, in SIR MICHAEL FOSTER's sense of that expression, to be convertible terms, though he prints without comment LORD BACON's instance of the two men on one plank as a quotation from LORD BACON, adding nothing whatever to it of his own; and there is a remarkable passage at p. 339, in which he says that even in the case of a murderous assault upon a man, yet before he may take the life of the man who assaults him, even in self-defence, "*cuncta prius tentanda*." The passage in STAUNFORD, on which almost the whole of the dicta we have been considering are built, when it comes to be examined, does not warrant the conclusion which has been derived from it. The necessity to justify homicide must be, he says, inevitable, and the example which he gives to illustrate his meaning is the very same which has just been cited from DALTON, showing that the necessity he was speaking of was a physical necessity, and the self-defence a defence against physical violence. RUSSELL merely repeats the language of the old textbooks, and adds no new authority nor any fresh considerations.

I Is there, then, any authority for the proposition which has been presented to us? Decided cases there are none. The case of the seven English sailors referred to by

the commentator on GROTIUS and by PUFFENDORF has been discovered by a gentleman of the Bar (Sir Sherston Baker), who communicated with HUDDLESTON, B., to convey the authority, if it conveys so much, of a single judge of the island of St. Kitts, when that island was possessed partly by France and partly by this country, somewhere about the year 1641. It is mentioned in a medical treatise published at Amsterdam (OBSERVATIONUM MEDICARUM by NICOLAUS TULPIUS), and is altogether, as authority in an English court, as unsatisfactory as possible. The American case (*Commonwealth v. Holmes* (1)) cited by STEPHEN, J., in his DIGEST from WHARTON ON HOMICIDE, p. 237, in which it was decided, correctly indeed, that sailors had no right to throw passengers overboard to save themselves, but, on the somewhat strange ground that the proper mode of determining who was to be sacrificed was to vote upon the subject by ballot, can hardly, as STEPHEN, J., says, be an authority satisfactory to a court in this country. The observations of LORD MANSFIELD in *R. v. Stratton* (2), striking and excellent as they are, were delivered in a political trial, where the question was, whether a political necessity had arisen for deposing a governor of Madras. But they have little application to the case before us, which must be decided on very different considerations.

The one real authority of former time is LORD BACON, who in his Commentary on the maxim, "*Necessitas inducit privilegium quoad jura privata*," lays down the law as follows:

"Necessity carrieth a privilege in itself. Necessity is of three sorts: Necessity of conservation of life, necessity of obedience, and necessity of the act of God or of a stranger. First, of conservation of life. If a man steals viands to satisfy his present hunger, this is no felony nor larceny. So if divers be in danger of drowning by the casting away of some boat or barge, and one of them get to some plank, or on the boat's side, to keep himself above water, and another to save his life thrusts him from it, whereby he is drowned, this is neither *se defendendo* nor by misadventure, but justifiable."

On this it is to be observed that LORD BACON's proposition that stealing to satisfy hunger is no larceny is hardly supported by STAUNDFORDE, whom he cites for it, and is expressly contradicted by LORD HALE in the passage already cited. As for the proposition regarding the plank or boat it is said to be derived from the canonists; at any rate, he cites no authority for it, and it must stand upon his own. LORD BACON was great even as a lawyer, but it is permissible to much smaller men, relying upon principle and on the authority of others the equals and even the superiors of LORD BACON as lawyers, to question the soundness of his dictum. There are many conceivable states of things in which it might possibly be true, but, if LORD BACON meant to lay down the broad proposition that a man may save his life by killing, if necessary, an innocent and unoffending neighbour, it certainly is not law at the present day.

There remains the authority of STEPHEN, J., who both in his DIGEST (art. 32) and in his HISTORY OF THE CRIMINAL LAW (vol. 2, p. 108) uses language perhaps wide enough to cover this case. The language is somewhat vague in both places, but it does not in either place cover this case of necessity, and we have the best authority for saying that it was not meant to cover it. If it had been necessary we must with true deference have differed from him; but it is satisfactory to know that we have, probably at least, arrived at no conclusion in which, if he had been a member of the court, he would have been unable to agree. Neither are we in conflict with any opinion expressed upon this subject by the learned persons who formed the commission for preparing the CRIMINAL CODE. They say on this subject:

"We are not prepared to suggest that necessity should in every case be a justification; we are equally unprepared to suggest that necessity should in no case be a defence. We judge it better to leave such questions to be dealt with when, if ever, they arise in practice by applying the principles of law to the circumstances of the particular case."

A It would have been satisfactory to us if these eminent persons could have told us whether the received definitions of legal necessity were, in their judgment, correct and exhaustive, and, if not, in what way they should be amended; but as it is we have, as they say, "to apply the principles of law to the circumstances of this particular case."

B Except for the purpose of testing how far the conservation of a man's own life is in all cases and under all circumstances an absolute, unqualified, and paramount duty, we exclude from our consideration all the incidents of war. We are dealing with a case of private homicide, not one imposed upon men in the service of their Sovereign or in the defence of their country. It is admitted that the deliberate killing of this unoffending and unresisting boy was clearly murder, unless the killing can be justified by some well-recognised excuse admitted by the law. It is further admitted that there was in this case no such excuse, unless the killing was justified by what has been called necessity. But the temptation to the act which existed here was not what the law has ever called necessity. Nor is this to be regretted. Though law and morality are not the same, and though many things may be immoral which are not necessarily illegal, yet the absolute divorce of law from morality would be of fatal consequence, and such divorce would follow if the temptation to murder in this case were to be held by law an absolute defence of it. It is not so.

C To preserve one's life is generally speaking, a duty, but it may be the plainest and the highest duty to sacrifice it. War is full of instances in which it is a man's duty not to live, but to die. The duty, in case of shipwreck, of a captain to his crew, of the crew to the passengers, of soldiers to women and children, as in the noble case of *The Birkenhead*—these duties impose on men the moral necessity, not of the preservation, but of the sacrifice, of their lives for others, from which in no country—least of all it is to be hoped in England—will men ever shrink, as indeed they have not shrunk. It is not correct, therefore, to say that there is any absolute and unqualified necessity to preserve one's life. "Necesse est ut eam, non ut vivam," is a saying of a Roman officer quoted by LORD BACON himself with high eulogy in the very chapter on Necessity, to which so much reference has been made.

F It would be a very easy and cheap display of common-place learning to quote from Greek and Latin authors—from HORACE, from JUVENAL, from CICERO, from EURIPIDES—passage after passage in which the duty of dying for others has been laid down in glowing and emphatic language as resulting from the principles of heathen ethics. It is enough in a Christian country to remind ourselves of the Great Example which we profess to follow.

G It is not needful to point out the awful danger of admitting the principle which has been contended for. Who is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured? Is it to be strength, or intellect, or what? It is plain that the principle leaves to him who is to profit by it to determine the necessity which will justify him in deliberately taking another's life to save his own. In this case the weakest, the youngest, the most unresisting was chosen. Was it more necessary to kill *him* than one of the grown men? The answer must be, No.

"So spake the Fiend; and with necessity,
The tyrant's plea, excused his devilish deeds."

I It is not suggested that in this particular case the "deeds" were "devilish"; but it is quite plain that such a principle, once admitted, might be made the legal cloke for unbridled passion and atrocious crime. There is no path safe for judges to tread but to ascertain the law to the best of their ability, and to declare it according to their judgment, and if in any case the law appears to be too severe on individuals, to leave it to the Sovereign to exercise that prerogative of mercy which the Constitution has entrusted to the hands fittest to dispense it. It must not be supposed that, in refusing to admit temptation to be an excuse for crime, it is forgotten how terrible the temptation was, how awful the suffering, how hard in such trials to keep the judgment straight and the conduct pure. We are often compelled

to set up standards we cannot reach ourselves, and to lay down rules which we could not ourselves satisfy. But a man has no right to declare temptation to be an excuse, though he might himself have yielded to it, nor allow compassion for the criminal to change or weaken in any manner the legal definition of the crime. It is, therefore, our duty to declare that the prisoners' act in this case was wilful murder; that the facts as stated in the verdict are no legal justification of the homicide; and to say that, in our unanimous opinion, they are, upon this special verdict, guilty of murder.

THE LORD CHIEF JUSTICE thereupon passed sentence of death in the usual form.*

Judgment for the Crown.

Solicitors: *Solicitor to the Treasury; Irvine & Hodges.*

[Reported by W. P. EVERSLEY, ESQ., Barrister-at-Law.]

R. v. COX AND ANOTHER

[COURT FOR CONSIDERATION OF CROWN CASES RESERVED (Grove, J., Pollock, B., Huddleston, B., Hawkins, Lopes, Stephen, Watkin Williams†, Mathew, Day and A. L. Smith, JJ.), June 21, December 20, 1884]

[Reported 14 Q.B.D. 153; 54 L.J.M.C. 41; 52 L.T. 25; 49 J.P. 374;
33 W.R. 396; 1 T.L.R. 181; 15 Cox, C.C. 611]

Solicitor—Privilege—Communication between solicitor and client—Advice sought to assist client to commit crime.

If a client applies to a solicitor for advice which is intended to facilitate, or to guide the client in the commission of, a crime or fraud, the solicitor being ignorant of the purpose for which his advice is wanted, the communication between the two is not privileged. The rule relating to privilege does not apply to all which passes between a client and his solicitor. For the rule to apply there must be both professional confidence and professional employment. If the client has a criminal object in view in his communications with his solicitor, one of these elements must necessarily be absent. The client must either conspire with his solicitor or deceive him. If his criminal object is avowed, the client does not consult his solicitor professionally because it cannot be the solicitor's business to further any criminal object. If the client does not avow his object he reposes no confidence and the solicitor's advice is obtained by fraud. Accordingly, no privilege can be claimed for a communication between a solicitor and his client which is a step preparatory to the commission of a criminal offence, and evidence of the communication is admissible on the prosecution of the client for the offence. In each case the court must determine, on the facts actually given in evidence or proposed to be given in evidence, whether it seems probable that the accused person may have consulted his legal adviser, not after the commission of the crime for the legitimate purpose of being defended, but before the commission of the crime for the purpose of being guided or helped in committing it.

Notes. Considered: *Re Postlethwaite, Re Rickman, Postlethwaite v. Rickman* (1887), 35 Ch.D. 722. Distinguished: *Ward v. Marshall* (1887), 3 T.L.R. 578.

* The prisoners were afterwards respited and their sentence commuted to one of six months' imprisonment without hard labour.

† WATKIN WILLIAMS, J., died between the date when the case was argued and that when judgment was delivered.

- A Applied: *Williams v. Quebrada Railway, Land and Copper Co.*, [1895] 2 Ch. 751. Considered: *Knaresborough and Clare Banking Co. v. Lorrimer* (1897), 41 Sol. Jo. 734. Applied: *R. v. Smith*, [1914-15] All E.R.Rep. 262. Considered: *Weld-Blundell v. Stephens*, [1919] 1 K.B. 520; *Minter v. Priest*, [1929] 1 K.B. 655. Referred to: *Proctor v. Smiles* (1886), 2 T.L.R. 845; *O'Rourke v. Darbishire*, [1920] All E.R.Rep. 1.
- B As to privilege relating to communications between solicitor and client, see 36 HALSBURY'S LAWS (3rd Edn.) 51, 52; and for cases see 18 DIGEST (Repl.) 90 et seq., 22 DIGEST (Repl.) 399 et seq.
- Cases referred to:
- (1) *Greenough v. Gaskell* (1833), 1 My. & K. 98; Coop. temp. Brough. 96; 39 E.R. 618, L.C.; 18 Digest (Repl.) 95, 782.
- (2) *Follett v. Jefferyes* (1850), 1 Sim.N.S. 3; 20 L.J.Ch. 65; 15 Jur. 118; 61 E.R. 1; 18 Digest (Repl.) 115, 974.
- (3) *Russell v. Jackson* (1851), 9 Hare, 387; 21 L.J.Ch. 146; 18 L.T.O.S. 166; 15 Jur. 1117; 68 E.R. 558; 18 Digest (Repl.) 116, 976.
- (4) *Gartside v. Outram* (1856), 26 L.J.Ch. 113; 28 L.T.O.S. 120; 3 Jur.N.S. 39; 5 W.R. 35; 18 Digest (Repl.) 115, 973.
- (5) *Annesley v. Earl of Anglesea* (1743), 17 State Tr. 1139; 22 Digest (Repl.) 403, 4326.
- (6) *R. v. Orton* (1873), Notes of Proceedings, p. 9381; cited in 14 Q.B.D. 170; 18 Digest (Repl.) 116, 979.
- (7) *Tichborne v. Lushington* (1872), Notes of Proceedings, p. 5212; cited in 14 Q.B.D. 172; 22 Digest (Repl.) 409, 4399.
- (8) *Kelly v. Jackson* (1849), 1 Ir. Jur. 233; 18 Digest (Repl.) 98, *424.
- (9) *Mornington v. Mornington* (1861), 2 John. & H. 697; 70 E.R. 1239; 18 Digest (Repl.) 117, 992.
- (10) *Charlton v. Coombes* (1863), 4 Giff. 372; 1 New Rep. 547; 32 L.J.Ch. 284; 8 L.T. 81; 27 J.P. 725; 9 Jur.N.S. 534; 11 W.R. 504; 66 E.R. 751; 18 Digest (Repl.) 117, 993.
- (11) *R. v. Dixon* (1765), 3 Burr. 1687; 97 E.R. 1047; 22 Digest (Repl.) 424, 4597.
- (12) *Cromack v. Heathcote* (1820), 2 Brod. & Bing. 4; 4 Moore, C.P. 357; 129 E.R. 857; 22 Digest (Repl.) 403, 4329.
- (13) *R. v. Smith* (1822), 1 Phillips and Arnold on Evidence, p. 118.
- (14) *R. v. Avery* (1838), 8 C. & P. 596; 14 Digest (Repl.) 491, 4752.
- (15) *R. v. Tuffs* (1848), 1 Den. 319; 12 L.T.O.S. 224; 3 Cox, C.C. 160; sub nom. *R. v. Tyliney, etc.*, 18 L.J.M.C. 36; 12 J.P. 281, 645, C.C.R.; 14 Digest (Repl.) 492, 4755.
- (16) *Doe d. Shellard v. Harris* (1833), 5 C. & P. 592, N.P.; 18 Digest (Repl.) 96, 798.
- (17) *Knight v. Turquand* (1836), 2 M. & W. 101.
- (18) *R. v. Hayward* (1846), 2 Car. & Kir. 234; 2 Cox, C.C. 23, C.C.R.; 14 Digest (Repl.) 492, 4754.

Case Stated for the opinion of the court with regard to a prosecution for conspiracy tried before the recorder of London at the Central Criminal Court.

F. Clarke, Q.C., Gore and Gill for the defendants.

Woollett and Willoughby for the Crown.

Cur. adv. vult.

Dec. 20, 1884. **STEPHEN, J.**, read the following judgment of the court.—This case was tried before the recorder of London at the February sessions of the Central Criminal Court. The defendants were convicted subject to a Case reserved for our opinion. The matter was argued first before five judges on April 5, and afterwards, on account of its great importance, before ten judges on June 21. We said on that occasion that we were unanimously of opinion that the conviction must

be confirmed, but we deferred the statement of our reasons in order that they might be given with due fullness and deliberation. A

The facts were as follows. The two defendants, Richard Cobden Cox and Richard Johnson Railton, were indicted for a conspiracy with intent to defraud Henry Munster. The indictment was set out as part of the case. It contained six counts, and was objected to on grounds which we do not think it necessary to state, as we are all of opinion that some at least of the counts were good, and as the objections made to others were not insisted on in argument. The serious question was as to the admissibility of the evidence of a solicitor, which was given under the following circumstances. On April 9, 1881, the two defendants entered into a partnership in the business of newspaper proprietors with respect to a newspaper called "The Brightonian." In February, 1882, Mr. Munster brought an action against Railton for a libel which appeared in that paper. On June 24, 1882, the action ended in a verdict for the plaintiff for 40s. and costs as between solicitor and client. The costs were taxed on Aug. 18, and on Aug. 20 execution was issued against Railton for the amount. The sheriff was met by a bill of sale from Railton to Cox, dated Aug. 12, 1882, and withdrew. An interpleader action to test the validity of the bill of sale was tried on Jan. 15, 1883. At that trial the deed of partnership of April 9, 1881, was produced, bearing upon it an endorsement purporting to be a memorandum of dissolution of partnership, dated Jan. 3, 1882. B C D

The case for the prosecution was that the bill of sale was a fraudulent bill of sale of the partnership assets, entered into between Railton and Cox while they were partners, for the purpose of depriving Mr. Munster of the fruits of his judgment, and that the memorandum of dissolution of partnership was endorsed on the deed, not on Jan. 3, 1882, when it bore date, but subsequently to Mr. Munster's judgment. In order to prove this case, Mr. Goodman, a solicitor, was called, who said (his evidence having been objected to, and the objection having been overruled): E

"On June 28, or thereabouts, Railton and Cox came to me. Railton said: 'I suppose you have heard the result of the Munster case?' I said: 'Yes.' He said: 'Can anything be done to prevent the property being seized under an execution?' I said: 'Only a sale to a bona fide purchaser.' He said: 'Could the property be sold and I remain in possession as manager?' I said: 'No; you must go out of possession.' He said: 'That won't do. Can I give a bill of sale to Mr. Cox?' I said: 'You cannot, because of the partnership.' Railton said: 'Does anyone know of the partnership besides you and ourselves?' I said: 'No; not that I am aware of, only my clerks.' Cox said: 'Then you do not think a bill of sale will do?' I said: 'Certainly not.' They then asked my fee and paid it, and left the office. Nothing was said about a dissolution at that interview. The interview was with me as a solicitor, and I was paid my fee. It was expressly arranged that the partnership should be kept secret. Nothing either way was said about a dissolution." F G

The question for our decision was whether this evidence was rightly admitted. We must take it after the verdict of the jury, that, so far as the defendants Railton and Cox were concerned, their communication with Mr. Goodman was a step preparatory to the commission of a criminal offence, namely, a conspiracy to defraud. The conduct of Mr. Goodman, the solicitor, appears to have been unobjectionable. He was consulted in the ordinary course of business, and gave a proper opinion in good faith. The question, therefore, is whether, if a client applies to a legal adviser for advice intended to facilitate, or to guide the client in the commission of, a crime or fraud, the legal adviser being ignorant of the purpose for which his advice is wanted, the communication between the two is privileged. H
We expressed our opinion at the end of the argument that no such privilege existed. If it did, the result would be that a man intending to commit treason or murder might safely take legal advice for the purpose of enabling himself to do so with impunity, and that the solicitor to whom the application was made would not be at liberty to give information against his client for the purpose of frustrating his

A criminal purpose. Consequences so monstrous reduce to an absurdity any principle or rule in which they are involved.

Upon the fullest examination of the authorities, we believe that they are not warranted by any principle or rule of the law of England; but it must be admitted that the law upon the subject has never been so distinctly and fully stated as to show clearly that these consequences do not follow from principles which do form
 B part of the law, and which it is of the highest importance to maintain in their integrity. We must also observe that decisions have been given—one by the Court of Common Pleas, and several by single judges sitting in the Crown Courts, or at nisi prius—which have afforded some countenance to the supposition that the law of England is committed to doctrines from which these consequences might be deduced. We propose, accordingly, first to state what, upon a full consideration
 C of the cases, appears to us to be the principle upon which the present case must be decided, and then to examine the principal cases in which it has been applied, with the view of showing that our decision is not inconsistent with the great majority of them, though it undoubtedly does differ from others.

The case which has always been regarded as the great leading authority on the question of privilege of legal advisers is *Greenough v. Gaskell* (1) decided by LORD
 D BROUGHAM in 1833. The question in that case was whether a solicitor, Gaskell, charged with a fraud upon Greenough arising out of the affairs of Darwell, could be compelled to disclose to Greenough communications between Gaskell and Darwell, giving an account of the transactions which led to the commission of the alleged fraud, and it was held that he could not. In this case the rule as to professional communications was laid down in the following words (1 My. & K. at
 E p. 102):

“If touching matters which come within the ordinary scope of professional employment [legal advisers] receive a communication in their professional capacity, either from a client, or on his account, and for his benefit in the transaction of his business, or, which amounts to the same thing, if they
 F commit to paper, in the course of their employment on his behalf, matters which they know only through their professional relation to the client, they are not only justified in withholding such matters, but bound to withhold them, and will not be compelled to disclose the information or produce the papers in any court of law or equity, either as party or as witness.”

LORD BROUGHAM adds (*ibid.* at p. 103):

G “The foundation of this rule is not difficult to discover. . . . It is out of regard to the interests of justice, which cannot be upholden, and the administration of justice, which cannot go on without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings.”

H LORD BROUGHAM then proceeds to comment on the terms of the rule so stated, and to show that many apparent exceptions to it are not really within its terms.

This rule has been accepted and acted upon ever since, and we fully recognise its authority; but we think that the present case does not fall either under the reason on which it rests, or within the terms in which it is expressed. The reason on which the rule is said to rest cannot include the case of communications criminal in themselves, or intended to further any criminal purpose, for the protection
 I of such communications cannot possibly be otherwise than injurious to the interests of justice, and to the administration of justice. Nor do such communications fall within the terms of the rule. A communication in furtherance of a criminal purpose does not “come into the ordinary scope of professional employment.” A single illustration will make this plain. It is part of the business of a solicitor to draw wills. Suppose a person, impersonating someone else, instructs a solicitor to draw a will in the name of the supposed testator, executes it in the name of the supposed testator, gives the solicitor his fee, and takes away the will. It would

be monstrous to say that the solicitor was employed in the "ordinary scope of professional employment." He in such a case is made an unconscious instrument in the commission of crime. It is probable that if cases of this kind had been present to LORD BROUGHAM's mind when he delivered judgment in *Greenough v. Gaskell* (1), he would have inserted words by way of exception or explanation to express his meaning more explicitly; but the caution with which he worded the principle appears to us to have the same effect as the insertion of such a qualification would have had. It seems to us, at all events, that the case which we are now considering falls neither within the letter nor the spirit of the description given by LORD BROUGHAM of the privilege of legal advisers.

We will now state in the order of time the cases which confirm us in this view. In *Follett v. Jefferyes* (2) a defendant was interrogated as to letters written by her to her solicitor, said to have been intended to carry out a fraud. It was held that what she proposed to do was not fraudulent, but at the end of his judgment LORD CRANWORTH, V.-C., said (1 Sim.N.S. at p. 17):

"It is not accurate to speak of cases of fraud contrived by the client and solicitor in concert together as cases of exception to the general rule. They are cases not coming within the rule itself, for the rule does not apply to all which passes between a client and his solicitor, but only to what passes between them in professional confidence, and no court can permit it to be said that the contriving of a fraud can form part of the professional occupation of an attorney or solicitor."

It is true that this is only a dictum, but it shows decisively how LORD CRANWORTH understood the rule on this subject, and this suggests another observation. In order that the rule may apply there must be both professional confidence and professional employment, but if the client has a criminal object in view in his communications with his solicitor, one of these elements must necessarily be absent. The client must either conspire with his solicitor or deceive him. If his criminal object is avowed, the client does not consult his adviser professionally, because it cannot be the solicitor's business to further any criminal object. If the client does not avow his object he reposes no confidence, for the state of facts, which is the foundation of the supposed confidence, does not exist. The solicitor's advice is obtained by a fraud.

To return to our former illustration. If A., proposing to forge a will, says to B., a solicitor: "Forge for me a will in the name of C.," he asks B. to commit a crime, which is not B.'s professional business. If he says: "I am C., and I want you to make my will for me," he reposes no confidence in B., but, on the contrary, commits a gross fraud upon him. In 1851 *Russell v. Jackson* (3) was decided before TURNER, V.-C. It was alleged that a testator had left certain property upon a secret trust, and his solicitor was examined as to the existence of the trust and its nature. A motion was made to suppress his deposition, on the ground that he had been compelled to violate professional confidence in making it. TURNER, V.-C., held that the privilege did not exist at all as between different people claiming under the client, as the client's intentions were more likely to be carried out if his communication with his solicitor were known than if they were concealed. It was further objected that the disclosure of the communication "might lead to the disclosure of an illegal purpose." SIR GEORGE TURNER observed on this that he thought that the communication could not be protected on that account. He added (9 Hare, at pp. 392, 393):

"On the contrary, I am very much disposed to think that the existence of the illegal purpose would prevent any privilege attaching to the communication. When a solicitor is a party to a fraud, no privilege attaches to the communications with him upon the subject, because the contriving of a fraud is no part of his duty as solicitor, and I think it can as little be said that it is part of the duty of a solicitor to advise his client as to the means of evading the law."

A In 1857 *Gartside v. Outram* (4) was decided by SIR W. PAGE WOOD, V.-C. It was a case in which a firm of woolbrokers sought to restrain a man who had been their sale clerk from disclosing their transactions. He replied that the transactions were fraudulent. The Vice-Chancellor delivered a judgment, which we think is well summed-up by the headnote (26 L.J.Ch. 113): "Confidential communications involving fraud are not privileged from disclosure." The following observations in B the judgment appear to us very weighty, and bear directly on the present question (ibid. at p. 114):

"The true doctrine is that there is no confidence as to the disclosure of iniquity. You cannot make me the confidant of a crime or a fraud, and be entitled to close up my lips upon any secret which you have the audacity to disclose to me relating to any fraudulent intention on your part. Such a confidence cannot exist."

C He afterwards refers, by way of illustration, to the question of professional confidence (ibid. at p. 115):

"As regards the question before courts of justice, when the question has been whether a witness ought to disclose that which has been communicated to him, D I think the authorities largely preponderate for allowing no such protection, even in one of the most confidential relations—that between attorney and client."

After referring to some cases which we shall examine more fully hereafter, he says that he adopts as his own language used in argument in *Annesley v. Earl of Anglesea* (5) by SERJEANT TISDALL (17 State Tr. at p. 1229):

E "I shall first beg leave to consider whether an attorney may be examined to any matter which came to his knowledge as an attorney. If he is employed as an attorney in any unlawful or wicked act, his duty to the public obliges him to disclose it. No private obligations can dispense with that universal one which lies on every member of the society to discover every design which may be formed contrary to the laws of the society to destroy the public welfare."

F The Vice-Chancellor quotes with approbation parts of the judgments of the judges in the same case, and to much the same effect.

The last of this series of cases to which we shall refer appears to us to be directly in point in the present case. It is part of *R. v. Orton* (6). Orton was indicted for perjury in denying that he was Orton, and affirming that he was Tichborne. G He gave Mr. Holmes, a solicitor, instructions to prepare a will disposing of the property to which he said he was entitled, and as part of the evidence against him consisted in the alleged resemblance of his handwriting to that of Orton and its alleged difference from that of Tichborne, the instructions for the will were tendered for the purpose of enforcing this argument. They were objected to on the ground of professional privilege, and the court dealt with the matter as follows. H COCKBURN, C.J., said:

I "We must assume *prima facie* for the purpose of the inquiry, but only for that purpose, that the purpose which the defendant had in seeking to obtain these estates, which he proposed here to dispose of by the will for which he gives instructions to Mr. Holmes, was a fraudulent purpose, that of obtaining estates to which he was not entitled. Then the principle on which we proceed is this: that where anything is done, any communication made from a client to an attorney, with reference to a fraudulent purpose, the privilege does not exist. The fraudulent character of the communication takes away the privilege. Now here, assuming hypothetically for the mere purpose of the argument, that which is the subject-matter of this inquiry, which the jury will eventually have to determine, that the defendant was engaged in a fraudulent scheme to acquire estates to which he was not entitled, and gives instructions for a will, by which will these estates which he thus fraudulently seeks to acquire are to be disposed of, and amongst other things these estates, or portions of them, are intended to

be given to his attorney and other persons who are co-operating with him in this scheme. Now, inasmuch as this would be for the purpose of having the effect of stimulating the attorney to more activity and earnestness in assisting him to carry out this scheme, which we assume for the purpose is based on fraud and iniquity, then that is dehors the privilege. If he had told his attorney beforehand that he was seeking to acquire estates to which he was not entitled, and employed the attorney for the purpose, the attorney, however innocent—in the one case of course he would not be innocent; but, assuming the attorney knew nothing of the iniquity or wickedness of the purpose, but believed himself honestly employed—yet if the client had a dishonest purpose in view in the communication he makes to his attorney, with the view of making the attorney the innocent instrument of carrying out the fraud, it deprives the communication of the privilege. So I think here that if the communication has not for its immediate object the carrying out of a fraud, but still affects the accomplishment of it by inducing the attorney to take greater care and to use more diligence and be more careful than he otherwise would be in the furtherance of the thing, it still comes to the same thing. Of course in deciding such a question we must for the purpose assume that the purpose was a fraudulent one, because that is the way the case is presented to us. Of course we are not pronouncing any opinion as to the affirmative. We have still the inquiry involving that question, but whatever further inquiry there may be I think it is admissible."

MELLOR, J., agreed. LUSH, J., said :

"I am disposed myself to put it on this wider ground, and to hold that the law does not allow under the name of privilege any person to withhold evidence which is within his power which may be used in support of a criminal charge."

In *Tichborne v. Lushington* (7), out of which the prosecution of Orton for perjury arose, BOVILL, C.J., at the close of the case said :

"I believe the law is, and properly is, that if a party consults an attorney and obtains advice for what afterwards turns out to be the commission of a crime or fraud, that party so consulting the attorney has no privilege whatever to close the lips of the attorney for stating the truth. Indeed, if any such privilege should be contended for or existed, it would work most grievous hardship on an attorney who, after he had been consulted upon what subsequently appeared a most manifest crime and fraud, would have his lips closed, and might place himself in the very serious position of being suspected to be a party to the fraud, and without his having an opportunity of exculpating himself. . . . There is no privilege in the case which I have suggested of a party consulting another, a professional man, as to what may afterwards turn out to be a crime or fraud, and the best mode of accomplishing it."

Upon these grounds we think that the question asked of Mr. Goodman in the present case was properly put and answered. We now proceed to consider the cases, some of which have produced a different impression.

We may first shortly notice three Chancery cases to which we have been referred. In one of these (*Kelly v. Jackson* (8)) it was decided that a solicitor who had suggested a fraud to his client could not claim privilege on the ground that his knowledge of the matter was derived from his client. In the other two (*Mornington v. Mornington* (9), and *Charlton v. Coombes* (10)) it was held that where client and solicitor were co-conspirators in a fraud, the solicitor must be charged with the fraud if discovery was required of him, but nothing was said as to the case of fraudulent or criminal communications by a guilty client to an innocent solicitor. We may, accordingly, pass by these cases without further notice.

The cases decided at nisi prius, or in the courts of common law, are as follows, taking them in order of time. The first is *Annesley v. Earl of Anglesea* (5), tried in Dublin in 1743. We have already mentioned the principal point in this case

A as having been quoted with approval by LORD HATHERLEY in *Gartside v. Outram* (4). The question was whether Lord Anglesey had caused Annesley, the true heir to the property, to be kidnapped and carried off to America in order that Lord Anglesey might enjoy the family estates. The evidence offered was that Lord Anglesey had employed an attorney to prosecute Annesley for murder in respect of the death of a person whom Annesley had accidentally killed, saying he would "give £10,000 if he could get him hanged." On this evidence the remarks already quoted, and others to the same effect, were made on a trial at Bar.

B The next case was *R. v. Dixon* (11) decided in 1765. In this case one Peach had produced forged vouchers before a master in Chancery, and Dixon, his attorney, was subpoenaed to produce them to the grand jury before which Peach was indicted. He refused, and an attachment was moved for against him, but the court refused to grant it. It does not appear how the papers came into Dixon's hands. There is certainly nothing to show that Peach gave them to him for any unlawful purpose. C He may have deposited them with him after the crime, and for the purposes of his defence.

The next case is *Cromack v. Heathcote* (12) decided in 1820. In this case the question was whether a deed was fraudulent, and

D "to prove the fraud the defendant proposed, among other evidence, to call Smith, an attorney, to whom the father [the assignor] had applied to draw the assignment, and who had refused to draw it, knowing that an execution had been issued against the father."

E The full Court of Common Pleas, DALLAS, C.J., and BURROUGH and RICHARDSON, JJ., held that this evidence was rightly rejected at the trial. This case closely resembles the one now before us. Indeed, the only distinction is that the objection taken to the evidence was that the privilege of solicitors extended only to communications made in the progress of a cause. The court, accordingly, do not seem to have had before them the considerations to which we have addressed ourselves. If the case cannot be supported on this ground we differ from it, as it seems to us to be F opposed not only to all principle but to the series of authorities which we have already referred to. It is right to say that *Cromack v. Heathcote* (12) is approved of in *Greenough v. Gaskell* (1) and in other cases, but it is cited only as a general statement of the doctrine of privilege, and the particular point now under consideration is not discussed or mentioned. The point for which it is cited is that it decides that privilege is not confined to communications made in the course of a G suit.

The next case is *R. v. Smith* (13). In this case HOLROYD, J., refused to compel an attorney to produce a forged promissory note which the prisoner had given to him in order to sue upon it. It had been produced before the magistrates and returned to the attorney at his request, as he said he had a lien on it. We do not agree with this decision. It was said not to be law by PATTISON, J., in *R. v. Avery* (14), though some years afterwards he said that "the observations he was reported to have made about it seem too strong:" *R. v. Tuffs* (15), 1 Den. at p. 324. H The nisi prius case of *Doe d. Shellard v. Harris* (16), decided in 1833 by PARKE, J., was precisely similar to *Cromack v. Heathcote* (12), and was decided expressly on the authority of that case. *Knight v. Turquand* (17) was also mentioned to us. It is enough to say of it that it was not a case of fraud or crime.

I The next case is *R. v. Hayward* (18). In that case POLLOCK, C.B., admitted a forged will which the prisoners by a trick had got into the possession of the attorney who produced it, hoping that he might act on it, as he did. The judges held that this will was rightly admitted, there having been no professional confidence, "even if that could have made any difference." This case is an authority in favour of the view taken by us. There can in reason be no distinction between getting a will into a solicitor's possession by fraudulently putting it among other documents and getting his advice by telling a lie as to the object for which it is asked.

The last case to be mentioned is *R. v. Tuffs* (15). In this case the indictment was for forging a will. It had been put into the hands of an attorney in order to be put in force, and the question was whether he could produce it in evidence. The evidence was admitted, and on the prisoner's conviction a case was reserved for the fifteen judges. They recommended a pardon on another point, and gave no opinion as to the admissibility of the evidence. From the observations made during the argument by different learned judges, as reported in the *LAW JOURNAL*, it would seem that there was some difference of opinion on the subject: see 18 L.J.M.C. at pp. 37, 38. A B

From this examination of the authorities it will be seen that we differ from one decision of the full Court of Common Pleas, and from two decisions at nisi prius, but we do so on the strength of other decisions which appear to us not only to be of greater authority, but also to be more in accordance with legal principles as well as with justice and expediency. C

We have one other matter to notice. We were greatly pressed with the argument that, speaking practically, the admission of any such exception to the privilege of legal advisers as that it is not to extend to communications made in furtherance of any criminal or fraudulent purpose would greatly diminish the value of that privilege. The privilege must, it was argued, be violated in order to ascertain whether it exists. The secret must be told in order to see whether it ought to be kept. We were earnestly pressed to lay down some rule as to the manner in which this consequence should be avoided. The only thing which we feel authorised to say upon this matter is that in each particular case the court must determine, upon the facts actually given in evidence or proposed to be given in evidence whether it seems probable that the accused person may have consulted his legal adviser, not after the commission of the crime for the legitimate purpose of being defended, but before the commission of the crime for the purpose of being guided or helped in committing it. We are far from saying that the question whether the advice was taken before or after the offence will always be decisive as to the admissibility of such evidence. Courts must in every instance judge for themselves on the special facts of each case, just as they must judge whether a witness deserves to be examined on the supposition that he is hostile, or whether a dying declaration was made in the immediate prospect of death. D E F

In this particular case the fact that there had been a partnership (which was proved on the trial of the interpleader issue), the assertion that it had been dissolved, the fact that directly after the verdict a solicitor was consulted, and the fact that the execution creditor was met by a bill of sale which purported to have been made by the defendant to the man who had been and was said to have ceased to be his partner, made it probable that the visit to the solicitor was really intended for the purpose for which, after he had given his evidence, it turned out to have been intended. If the interview had been for an innocent purpose, the evidence given would have done the defendants good instead of harm. Of course, the power in question ought to be used with the greatest care not to hamper prisoners in making their defence, and not to enable unscrupulous persons to acquire knowledge to which they have no right, and every precaution should be taken against compelling unnecessary disclosures. G H

Conviction affirmed.

Solicitors: *Solicitor to the Treasury; Palmer & Bull.*

[Reported by R. C. GLEN, ESQ., Barrister-at-Law.] I

REDGRAVE v. HURD

[COURT OF APPEAL (Sir George Jessel, M.R., Baggallay and Lush, L.JJ.), November 25, 26, 28, 1881]

[Reported 20 Ch.D. 1; 51 L.J.Ch. 113; 45 L.T. 485; 30 W.R. 251]

Misrepresentation—Innocent misrepresentation—Contract—Rescission—Defence—Opportunity given to plaintiff to discover falsity of representation—Failure of plaintiff to act thereon—Need for plaintiff to prove knowledge of falsity by defendant.

It is no defence to an action for rescission of a contract on the ground of misrepresentation that the party who seeks to set aside the contract was afforded opportunities of investigation and so of ascertaining the inaccuracy of the representation, but made the investigation so inefficiently or negligently that he did not discover the misrepresentation. He is not thereby deprived of the relief of rescission. In ordinary circumstances the false representation, once made, relieves him from making an investigation, even if the opportunity is afforded.

Per SIR GEORGE JESSEL, M.R.: In order for a contract which has been obtained by misrepresentation to be set aside it is not necessary that it should be proved that the person who made the misrepresentation knew that it was false when he made it.

Notes. Considered: *Mathias v. Yetts* (1882), 46 L.T. 497. Doubted: *Roots v. Snelling* (1883), 48 L.T. 216. Explained: *Smith v. Chadwick* (1884), post. Considered: *Smith v. Land and House Property Corp.* (1884), 28 Ch.D. 7; *Hughes v. Twisden* (1886), 55 L.J.Ch. 481; *Newbigging v. Adam*, [1886–90] All E.R.Rep. 975; *Armstrong v. Jackson*, [1916–17] All E.R.Rep. 1117; *Bellotti v. Chequers Developments, Ltd.*, [1936] 1 All E.R. 89. Referred to: *Mullens v. Miller* (1882), 22 Ch.D. 194; *Re Liberian Government Concessions and Exploration Co.* (1892), 9 T.L.R. 136; *Aaron's Reefs v. Twiss*, [1896] A.C. 273; *Davis v. Ohrly* (1898), 14 T.L.R. 260; *Whittington v. Seale-Hayne* (1900), 82 L.T. 49; *Law v. Law*, [1904–7] All E.R.Rep. 526; *Merino v. Mutual Reserve Life Insurance Co.* (1904), 21 T.L.R. 167; *Nash v. Calthorpe*, [1904–7] All E.R.Rep. 968; *Mair v. Rio Grande Rubber Estates*, [1913] A.C. 853; *Wells v. Smith*, [1914] 3 K.B. 722; *Compagnie Chemin de Fer Paris-Orléans v. Leeson Shipping Co.* (1919), 36 T.L.R. 68; *Dawsons, Ltd. v. Bonnin*, [1922] All E.R.Rep. 88.

As to actions for rescission on the ground of misrepresentation, see 26 HALSBURY'S LAWS (3rd Edn.) 874 et seq.; and for cases see 35 DIGEST (Repl.) 69 et seq.

Cases referred to:

- (1) *Re Reese River Silver Mining Co., Smith's Case* (1867), 2 Ch. App. 604; 36 L.J.Ch. 618; 16 L.T. 549; 15 W.R. 882, L.JJ.; affirmed sub nom. *Reese River Silver Mining Co., Ltd. v. Smith* (1869), L.R. 4 H.L. 64; 39 L.J.Ch. 849; 17 W.R. 1042, H.L.; 35 Digest (Repl.) 36, 278.
- (2) *Attwood v. Small* (1838), 6 Cl. & Fin. 232; 7 E.R. 684; sub nom. *Small v. Attwood*, 2 Jur. 226, 246, H.L.; 35 Digest (Repl.) 42, 369.
- (3) *Rawlins v. Wickham* (1858), 3 De G. & J. 304; 28 L.J.Ch. 188; 5 Jur.N.S. 278; 44 E.R. 1285; sub nom. *Rawlins v. Wickham*, *Wickham v. Rawlins*, 1 Giff. 355; sub nom. *Rawlins v. Wickham*, *Wickham v. Bailey*, 32 L.T.O.S. 231; 7 W.R. 145, L.JJ.; 35 Digest (Repl.) 35, 275.

Also referred to in argument:

- Re Royal British Bank, Nicol's Case* (1859), 3 De G. & J. 387; 28 L.J.Ch. 257; 33 L.T.O.S. 14; 5 Jur.N.S. 205; 7 W.R. 217; 44 E.R. 1317, L.C. & L.JJ.; 9 Digest (Repl.) 261, 1651.
- Lamare v. Dixon* (1873), L.R. 6 H.L. 414; 43 L.J.Ch. 203; 22 W.R. 49, H.L.; 35 Digest (Repl.) 84, 778.

Appeal by the defendant from a decision of Fry, J., in an action for the specific performance of an agreement for the sale by the plaintiff to the defendant of a leasehold house, in which action the defendant counterclaimed for rescission of the contract on the ground of misrepresentation. A

The plaintiff, who was a solicitor in practice near Birmingham, inserted the following advertisement in the *LAW TIMES* of Jan. 10, 1880 :

"Law Partnership.—An elderly solicitor of moderate practice, with extensive connections in a very populous town in a midland county, contemplates shortly retiring, and, having no successor, would first take as partner an efficient lawyer and advocate about forty, who would not object to purchase advertiser's suburban residence suitable for a family, value £1,600, three-fourths of which might remain on security; no premium for business and introduction. A large field is here open for an efficient man and great advantages for free education of sons.—Address R. J. (No. 1919), 10 Wellington Street, Strand, W.C." B C

The defendant, a solicitor, was attracted by the advertisement and entered into correspondence with the plaintiff with reference to the subject of the advertisement, and it was arranged that the plaintiff should receive the defendant as his partner, and transfer to him a moiety of his practice. Certain representations as to the practice were made by the plaintiff, and certain investigations and inquiries were made by the defendant. On Mar. 2, 1880, the plaintiff and the defendant entered into a written agreement, whereby the plaintiff agreed to sell and the defendant agreed to purchase, for the sum of £1,600, a plot of land on the east side of the Pershore Road, in the parish of Edgbaston, in the county of Warwick, held of Lord Calthorpe for ninety-nine years from Mar. 25, 1876, at a rent of £12 5s. 4d., and also the dwelling-house and other buildings erected on the land. A deposit of £100 was to be paid down, further sums of £100 and £200 were to be paid on May 1 and June 24, 1880. On completion the defendant was to give the plaintiff a second mortgage for £400, and in lieu of paying the balance of the purchase money (£800), was to covenant to pay off an existing mortgage of £800. No mention of the partnership or business was made in the agreement. The deposit was paid, the title was accepted, and the drafts of the assignment and mortgage were approved. On April 17, 1880, the defendant was let into possession of the property comprised in the agreement, and went to reside there with his family. The defendant afterwards ceased to reside on the property, and refused to complete the purchase thereof. The plaintiff commenced the present action for specific performance of the agreement to purchase the land and buildings. The statement of defence alleged that the arrangement was for the transfer of a moiety of the practice and the leasehold house, the defendant agreeing to pay as consideration for the transfer both of the share in the law practice and of the leasehold house the sum of £1,600. The other material parts of the defence were as follows : D E F G

"The defendant earnestly requested the plaintiff that the facts [last stated], as they constituted the real contract between the parties, should be set out in the written agreement of Mar. 2, 1880, in order that it might clearly appear therein that the payment by defendant of the sum of £1,600 was a consideration for the transfer of the leasehold house and of the share in the law practice, but the plaintiff refused, and the defendant for reasons appearing in the next paragraph now alleges that in such refusal the plaintiff was actuated by a fraudulent intention. Shortly after the partnership between the plaintiff and defendant had been entered into in pursuance of the agreement thereto, the defendant discovered that the said law practice was utterly worthless, and that the representations made in regard thereto by the plaintiff were false, and the defendant says that the plaintiff made such false representations for the purpose of inducing him (the defendant) to enter into the contract for the purchase of the said partnership. By way of counterclaim the defendant relies upon the facts stated in his defence as though they were again repeated, and H I

- A claims: (i) To have the contract of Mar. 2, 1880, rescinded, and the sum of £100 [the deposit] returned to him by the plaintiff. (ii) The sum of £100 damages for the loss occasioned and trouble incurred by the defendant in removing his household. . . . (iii) The sum of £200 damages for the surrender by the defendant of his [former practice], such surrender having been occasioned by the misrepresentation of the plaintiff."
- B The action was tried by FRY, J., on Mar. 15, 1881, when the learned judge gave judgment for the defendant and dismissed the counterclaim. The defendant appealed.
- Cookson, Q.C.*, and *Ruegg* for the defendant.
Rigby, Q.C., and *Yate Lee* for the plaintiff.
- C **SIR GEORGE JESSEL, M.R.**—This is an appeal from a decision of FRY, J., granting specific performance to the plaintiff of a contract to buy a house, and dismissing with costs a counterclaim by the defendant asking for rescission of the contract and for damages on the ground of deceit practised by the plaintiff in respect to this agreement. We have not considered the question of deceit raised by the counterclaim, because the defendant has not pleaded knowledge on the part of the plaintiff that the allegations were untrue, nor has he pleaded, in fact, the allegations themselves in sufficient detail to found an action for deceit. Therefore, that part of the case must necessarily fail, so far as damages are concerned. It only remains to consider the portion of the case of the plaintiff asking for specific performance, and the portion of the case for the defendant asking to have the contract rescinded. Before going into the details of the case, I wish to say
- E something about my view of the law of it, because in the books, and even in some observations of noble Lords in the House of Lords, there are remarks which I think, according to the course of modern decision, are not well founded, and do not accurately state the law.
- As regards the rescission of a contract, there was, no doubt, a difference between the rules of courts of equity and the rules of courts of common law—a difference
- F which, of course, has now disappeared by operation of the Judicature Act, which makes the rule in equity prevail. According to the decisions of courts of equity, it was not necessary, in order to set aside the contract, to prove that the person who obtained the contract and sought to keep it, if he obtained it by material false representation, knew at the time the representation was made that such representation was false. It was put in two ways, either of which was to be
- G sufficient to allow a court of equity to rescind. It was said: "A man is not to be allowed to get a benefit from a false statement which he now admits to be false. He is not to be allowed to say for the purpose of civil jurisdiction that he did not know it to be false; he ought to have found that out before he made the representation." That is one way of putting it: and the other way of putting it was this: "Even assuming that you want moral fraud (this was the doctrine of common
- H law) in order to set aside a contract, you have it where a man, having obtained a beneficial contract by a statement which he now knows to be false insists upon keeping that contract." That, of course, is a moral delinquency; no man ought to seek to take advantage of his own falsity. It does not matter which way it is put, but that was the rule in equity. As regards the rule of common law, there is no doubt it was not quite so wide. There were cases in which, even at common
- I law, you could rescind a contract, although you could not show that the man knew the statement or the representation to be false. The cases are variously stated, but I think, according to the later decisions, the statement must have been made recklessly and without care whether it was true or false, and not, of course, at the time with the belief that it was actually true. I think the doctrine in equity was settled beyond controversy, and if it were necessary to refer to the authorities I should content myself with referring to the judgment of LORD CAIRNS, L.J., in *Re Reese River Silver Mining Co., Smith's Case* (1), in which he states the doctrine of equity in the way in which I have stated it.

There is another proposition of law, of very great importance, which I think it is necessary for me to state, because, with great deference to the very learned judge in matters of specific performance from whom this appeal comes, I think it is not quite accurately stated in his judgment. If a man is induced to enter into a contract by false representation, it is not a sufficient answer to him to say: "If you had used due diligence you would have found out that the report was untrue. You had the means afforded you of discovering its falsity, which you did not choose to avail yourself of." I take it, it is a settled doctrine of equity, not only as regards specific performance, but also as regards rescission, that that is not an answer, of course subject to the exception of the statute of limitations, when it is made a statutory answer on the ground of delay. That, of course, is a different thing altogether. There, delay deprived a man of his right, and the only question to be considered was from what time the delay should count. It was decided, and is now so made law by statute, that the time counted from the date when, by due diligence, that fraud might have been discovered [see now Limitation Act, 1939, s. 26 (c)]. Nothing can be plainer, I take it, on the authorities in equity, than that false representation is not got rid of by the defendant—that is, the person resisting performance of the contract, or asking for rescission on the ground of deceit—being guilty of negligence.

One of the most familiar instances in modern times, and one which occurs in case after case, both reported and unreported, is this. Men issue a prospectus containing false statements—false statements of the contracts made before the formation of the company, and on similar matters—and then say the contracts themselves may be inspected at the office of the solicitors. It has always been held that those who accept those false statements as true are not deprived of their remedy merely because they neglected to go and look at the contracts themselves, though they were told the contracts were in writing and might be inspected if they asked to see them. Another instance with which we are familiar is a false statement as to the contents of a lease; such a case as a man saying that there was no covenant or provision in the lease to prevent the carrying on, in the house to be sold, the trade which the purchaser was known by the vendor to be desirous of carrying on therein. Although the lease itself might be produced at the sale, or might have been open to the inspection of the purchaser long previously to the sale, it was held that the vendor could not be allowed to say: "You were not entitled to give credit to my statement, either by word of mouth or in writing." It is not sufficient, therefore, to say that a man has had the opportunity of investigating the real state of the case, but has not availed himself of that opportunity.

It has been apparently supposed by the learned judge in the court below that the decision of the House of Lords in *Attwood v. Small* (2) is an authority which conflicts with that proposition. He says the defendant

"inquired into it to a certain extent, and if he did it carelessly and inefficiently, that is his own fault. As in the case of *Attwood v. Small* (2) those directors and agents of the company who made ineffectual inquiry into the business which was to be sold to the company were nevertheless held, by their investigation, to have bound the company, so here, I think, the defendant, who made a cursory investigation into the position of things on Feb. 17 must be taken to have accepted the statements which appeared in those papers."

Those are the remarks which are, I think, inaccurate in law; and what is more, I think they are not borne out by the case to which the learned judge referred. Where you have five Lords giving independent reasons for their opinions it is difficult, if not impossible, to ascertain with accuracy the ground upon which the House of Lords decided. If the five Lords give five different sets of reasons, as happens sometimes, you have the decision, and you must find out for yourself which of the opinions is to be relied upon as giving the proper reasons; but I think in *Attwood v. Small* (2), and in all these cases, you must only look at the

A judgments of the Lords who decided the case. In *Attwood v. Small* (2) there were three to five. You must look only at the opinions of the Lords who decided the case, because their opinions alone are of importance and, therefore, whatever reasons are to be found in their opinions must be either wholly or to some extent the opinion which guided the House of Lords in coming to their conclusion. Therefore, in considering the opinions in that case, I have confined myself for
B this purpose to the opinions of the three Lords who decided the case in favour of the appellants.

The first opinion is that of the EARL OF DEVON, whose opinion, no doubt, is entitled to great respect. But he was called in to make up the fifth Lord, so to say. He had been a master in Chancery at some period of his life, and, although his opinion is entitled to great respect, yet, standing alone, it would not command
C that respect and that consideration which would be given to that of the Lord Chancellor, LORD COTTENHAM, who was also present. Therefore, in weighing his judgment, it is out of no disrespect to the EARL OF DEVON, or to his memory, that I say that I do not attach so much importance to it as I do to that of LORD COTTENHAM. The ground of the EARL OF DEVON's opinion is reported in these words (6 Cl. & Fin. at p. 344):

D "The question is not as to waiver or acquiescence in fraud, but whether the parties have used that ordinary degree of vigilance and circumspection in order to protect themselves, which the law has a right to expect from those who apply for its aid."

In that sentence I think he is not quite correct as regards the law, but the next
E ground, the ground of his decision, is this:

"The whole course of the proceeding from its commencement to its close tends to show that the purchasers did not rely upon any statements made to them, but resolved to examine and judge for themselves."

That is a good ground if it were borne out. It does not agree with the reasons
F that are given by the other judges, but there it is, and if you rely upon that, the ground was that the representations did not induce the purchasers to enter into the contract.

I now turn to the conclusion in the opinion of the Lord Chancellor. LORD COTTENHAM says (6 Cl. & Fin. at p. 393):

G "We are now trying two propositions by this evidence: first, whether fraud was practised; and secondly, whether that which is alleged as fraud, or rather the facts from which fraud is inferred, were not known to the plaintiff, or to those by whose conduct and by whose knowledge they must be affected from the very commencement of this transaction. I have satisfied myself that both these propositions are in favour of the defendant."

H That is, he found, not only no fraud, but that all the material facts were known before the contract was entered into. He continues:

I "I do not find the fact of fraud made out, although undoubtedly it may be supposed that the bargain was a very good one for Mr. Attwood. That is not the matter in question, but that the fraud alleged, which alone can be resorted to for the purpose of supporting the plaintiff's case, is not made out in fact, and that the circumstances from which that fraud is endeavoured to be inferred by the plaintiffs are in my opinion proved to have been known to them from the beginning."

Those are the two grounds of his decision, and neither of them is anything like the proposition to be found in the judgment of FRY, J., that there may be cursory or ineffectual attempts by his agents to discover the fraud, and that he is liable for the ineffectual attempts so made. There is a sentence in the EARL OF DEVON's opinion to that effect, but not in LORD COTTENHAM's.

The only other opinion which was in favour of the appeal was that of LORD A
BROUGHAM, who says (6 Cl. & Fin. at p. 497):

"When we apply to this case the principles which I stated at the outset, we
find the facts are wanting; we find that there is no misrepresentation which
gave rise to the contract."

That is, he concurs with LORD COTTENHAM that there is no fraud. That is the B
first ground. He continues:

"We find that the purchaser did not rely upon the representation, but said,
'We will inquire ourselves.'"

That is the second ground, and that is the same as the EARL OF DEVON's ground,
and also would be a good answer. LORD COTTENHAM did not take that view. LORD C
BROUGHAM continues:

"From June 6, 1825, downwards they constantly proceeded upon the plan of
satisfying themselves—first, by sending their agents, then by going down
themselves, then by inquiring themselves, then even afterwards by sending
other agents to inquire, and those agents reporting that the representation
was true; and that, those parties, finding by their own inquiries [not, as D
FRY, J., puts it, 'the imperfect inquiries of agents'] that the agents had re-
ported accurately, and that the representation was corroborated by the result
of the inquiry; and that, even when their own interest, when everything in
the commercial world, was down—when shares were falling—when money was
not to be had—when they were asking time for a prolongation of the time of
payment to Mr. Attwood, and when it was their interest to discover a flaw in
the contract—they then inquire again, and send a new agent to inquire (Mr. E
Foster, an engineer); and they state to him their own opinion to be in favour
of Mr. Attwood's representations; and Mr. Foster, in answer, as late as
April 26—less than a month before the bill was put upon the file—reports in
favour of Mr. Attwood's representations. Such being the facts—even if no
observation arose as to the delay as to the adoption and affirmance of the con- F
tract, purging it of all objections which might be made, and supposing that
they had come in time, instead of delaying so many months—then I ask my-
self this question: In these circumstances, have these parties a right to be
released from their contract by the interposition of a court of equity, according
to those principles which I have stated? When I ask myself that question,
upon which alone my judgment must turn, I am bound to say No."

So that his two grounds are—no fraud (no misrepresentation), and that they G
did not rely on the statements made. He agreed in one reason with LORD COTTEN-
HAM, and in the other with LORD DEVON. But, take it which way you will, the
three grounds alleged by the three noble Lords—one having one, and each of the
other two—amounted to, no fraud, actual knowledge of the facts before the contract,
no reliance upon the misrepresentation. In no way, as it appears to me, does H
the real decision, or do the real grounds of decision, in *Attwood v. Small* (2) support
the proposition that it is a good defence to an action for rescission of a contract
on the ground of fraud that the man who comes to set aside the contract inquired
to a certain extent, but did it carelessly and inefficiently, and, therefore, did not
observe the fraud, and is thereby prevented from upsetting the contract. I
thought it right to make these observations because it is very important that the I
law on this subject should be clearly understood, and that no cursory remarks
in an opinion by a Lord in the House of Lords should be allowed to unsettle that
law if it were possible.

Now as to the facts of this case. I must say I agree with FRY, J., as to all of
them except one, and my failure to agree with him in that one is the cause of
my concurring in reversing his decision. What he finds in effect is that the
defendant was induced to enter into the contract by a misrepresentation—a material
misrepresentation—made to him by the plaintiff, and, that being so, the learned

A judge comes to the conclusion that either the defendant did not finally rely upon that representation, or that, if he did rely upon it, he had made an inquiry which, although ineffectual, and made as he says carelessly and inefficiently, bound him in a court of equity and prevented him from saying that he relied on the representation. I have already dealt with that as a matter of law, and I will deal with it presently as a matter of fact. [His LORDSHIP dealt with the facts in some detail, and continued:] The learned judge says that, although the defendant did not trouble to look into the books, he had the opportunity of doing so, and that, if he had intended to rely on a parol representation of business beyond that which appeared in the papers, having the materials before him, he would have made some inquiry. There were no books before the defendant which he could look into to ascertain the correctness of the statements made by the plaintiff, and the whole foundation of the judgment on this part of the case, even if it had been well founded in law, fails in fact, because the defendant was not guilty of negligence in doing that which it was impossible to do, books not being in existence which would show the amount of business done. The learned judge came to the conclusion either that the defendant did not rely on the statement, or that, if he did rely upon it, he had shown such negligence as to deprive him of his title to relief from this court.

As I have already said, the latter part is, in my opinion, not founded in law, and the former part is not founded in fact, and I think also is not founded in law, and for this reason. When a person makes a material representation to another to induce him to enter into a contract, and the other enters into that contract, it is not sufficient to say that the defendant does not prove he entered into the contract relying upon it, because, if it is a material representation calculated to induce him to enter into the contract, that is a conclusion at which you arrive by inference. You must show that he abandoned it—either that he had knowledge of the facts contrary to the representation, or that he did somehow or other state explicitly that he did not rely on the representations. If you tell a man: “You may enter into partnership with me; my business is bringing in between £300 and £400 a year,” the man who makes that representation must know it is a material inducement for the other to enter into the partnership, and you cannot investigate whether it was more or less probable that that inducement would operate on the mind of the defendant. When you have neither evidence that he knew facts to show that the statement was untrue, or that he said or did anything to show that he did not actually rely upon the statement, the inference remains that he did so rely, and it must be treated as an inducement to enter into the contract, and being a material statement, it is a sufficient ground for rescinding the contract.

For all these reasons, I am of opinion that the judgment of the learned judge must be reversed, and the appeal allowed. The defendant has failed in proving his accusations of fraud, and must, therefore, pay the costs of the issues so raised, and on which he has failed. But the general costs of the action should be given to him, and the costs of the appeal. As regards the form of the judgment, as the defendant succeeds on the counterclaim, I think it would be safer to make an order both in the action and the counterclaim, rescinding the contract and ordering the deposit to be returned. It is not a case in which damages should be given.

BAGGALLAY, L.J.—Upon the hearing of this action FRY, J., held, as an inference of fact, from the evidence before him, that a misrepresentation was made by the plaintiff to the defendant as to the value of his professional business. From a finding so arrived at the Court of Appeal will not ordinarily differ. The learned judge of the court below has had the opportunity of hearing and seeing the witnesses, and of observing the manner in which their evidence was given. It must be a very strong case indeed in which the Court of Appeal, upon a question of fact, entirely depending upon oral testimony, will dissent from the finding of the court below. FRY, J., also found that the defendant should be considered in a court of

equity as having been influenced by the misrepresentation to enter into the contract. If the view taken by Fry, J., was right on that second point, the judgment appealed from ought to be affirmed, but I am unable to concur in his conclusion. A

The facts from which that conclusion was drawn were partly suggested by oral testimony and partly by written documents. As regards the oral testimony, if I have followed it aright from the judgment of Fry, J., it amounted to this, that opportunities were afforded to the defendant to ascertain the inaccuracy of the representation made to him, if he had cause to do so, and, further, that to some extent at least he did avail himself of that opportunity. The mere fact that a party has the opportunity of investigating and ascertaining whether the misrepresentation is true or false is not sufficient to deprive the defendant of his right in an action for specific performance to rely upon the representation. The person who has made the misrepresentation cannot be heard to say to the party to whom he has made that representation: "You chose to believe me when you might have doubted me and gone further." The representation once made relieves the party from an investigation, even if the opportunity is afforded. I do not mean to say that there may not be certain circumstances of suspicion which might put a person upon inquiry and make it his duty to inquire, but under ordinary circumstances the mere fact that he does not avail himself of the opportunity of testing the accuracy of the representation made to him will not enable the opposing party to succeed on that ground. B C D

The case that was referred to by counsel for the defendant in his argument, of *Rawlins v. Wickham* (3), is a very strong illustration of the application of that principle, for in that case a person had been deceived and thereby led into a partnership and continued in partnership for four years, and then for the first time discovered the fraud which had been practised upon him, and it was said that at any time, if he had doubted the accuracy of the representation made to him, he might have investigated matters for himself. But the inference that Fry, J., has also drawn, is that to some extent there was an investigation of a most cursory character, and it was that which would not at all have enabled him to have ascertained the truth or the falsity of the representations that had been made. It appears to me, therefore, that, so far as the conclusions arrived at by the learned judge upon consideration of the oral testimony on that second point are concerned, I am unable to agree with him. E F

As regards the written testimony it is all one way. Very different considerations apply to a case in which the testimony before the judge in the court below is written from that in which it is oral. Each of the three judges of the Court of Appeal has just as good an opportunity of judging of the value of written correspondence or written documents as the judge before whom the case is originally brought, and it is for them to consider whether, as far as the written testimony is concerned, they concur in the view taken by the court below. As I have said before, it appears to me that the written testimony is all one way. The invitation clearly was to persons who were professional men in the business of a solicitor, and the suggestion in the first instance was that there was a favourable opening for any such person. The very correspondence which passed between the defendant and the plaintiff informed the plaintiff that the defendant was a gentleman who was seeking to establish himself in the business of a solicitor in some place, to obtain a sufficient business to bring up his family, and particularly, among other things, with a view of introducing one of his own sons into the profession. The plaintiff must have known from the correspondence that the advantages suggested by him in connection with the business which he was himself about to surrender was an influential motive to the defendant in entering into the contract. It is quite true that the contract actually signed was limited to the purchase of the house; but it is impossible to say that the defendant was not solely influenced to enter into the contract, so far as regards the house, by the probability of establishing himself in a remunerative business. On these grounds also I think that the decision of the court below ought to be reversed. G H I

A **LUSH, L.J.**—I entirely agree with my learned brothers as to the propositions of law applicable to this case, which have been laid down by the Master of the Rolls, and, as they have been so clearly and pointedly expressed, I do not think it at all necessary to repeat them, because I have not myself the least qualification to suggest as to those propositions. In one part of the judgment of the learned judge in the court below he appears to hold that, where a false representation has been made and papers are handed to the party to whom it is made, from which, if he chose, he might detect the falsehood, and he does not do so, he is in the same position as if he had done so. I entirely differ from that view, and think what my learned brother said is the correct view of the law—that where a false representation has been made, it lies on the party who makes it to show that, although he made the false representation, the defendant—the other party—did not rely on it. The onus probandi is on him to show that the other party waived it, and relied on his own knowledge. Nothing of that kind appears here.

I regret to say that I cannot follow the learned judge in the inference he draws from the facts which were before him. It is clear that the business represented in the papers was a business not exceeding £200 a year in any one of the three years which those papers referred to; therefore, the learned judge finds, as a matter of fact, that the defendant, although the representation had been made that the business yielded £300 a year, was content to buy a business bringing in only £200 a year. He does not, therefore, though he lays down the proposition of law to which I have referred, decide the case on that proposition. He decided it on the question of fact, that, although the representation had been made, the defendant relied upon the future potential business which the plaintiff held out; that he ceased to rely on the representation; and was content to take the business as one which would suit him. I do not find, from the beginning to the end, any evidence whatever which justifies that conclusion. After looking at the papers produced to him, the defendant said substantially that in no single year had the business come up to £300, or about £300, not even the last year, as to which the representation was made. He wanted to know what would make up the difference, upon which the plaintiff pointed to a number of letters and papers and said: "It is contained in those letters; it is not entered in the books, but it is to be found there." The learned judge says it was the common ground of both parties that in answer to the inquiry from the defendant the plaintiff said; "There was other business which was not entered in those papers," and the plaintiff himself says, in his answers to interrogatories, speaking of that interview: "I produced the said papers to the defendant and stated to him, as the fact was, that the items of business mentioned therein did not represent all the business done for the years 1877, 1878, and 1879, but that I had done other items of business which I had not entered in the said bills." So far, in my judgment, from that sanctioning the idea that the defendant had agreed to accept what appeared in those papers as representing the amount of business done, it is an actual affirmance by the plaintiff of his own representation.

H I am sorry to say that I entirely differ from the conclusion which the learned judge has drawn from those pieces of evidence. On another point the learned judge held what I think was perfectly right, that the contract for the house and for the purchase of the business was one entire contract; the one being the inducement to the other, and the principal subject of that contract between the parties was the partnership, which was to end in the sale of the business. The purchase of the house was only an accessory. I entirely agree with the conclusions which have been arrived at, and that this contract should be rescinded.

Appeal allowed.

Solicitors: *R. Brale; J. Holder.*

[*Reported by FRANK EVANS, ESQ., Barrister-at-Law.*]

CAPITAL AND COUNTIES BANK, LTD. v. HENTY & SON

[HOUSE OF LORDS (Lord Selborne, L.C., Lord Penzance, Lord Blackburn, Lord Watson and Lord Bramwell), November 11, 15, 22, 1881, June 6, 8, July 13, August 1, 1882]

[Reported 7 App. Cas. 741; 52 L.J.Q.B. 282; 47 L.T. 662;
47 J.P. 214; 31 W.R. 157]

Libel—Action—Trial—Question for judge—Whether words complained of capable of being defamatory—Question for jury—Whether words in fact defamatory. Libel—Defamatory words—Words capable of bearing innocent as well as defamatory meaning—Right of plaintiff to succeed with regard to defamatory meaning.

In an action for libel it is for the judge to say whether the words complained of are capable of bearing the defamatory meaning ascribed to them by the innuendo, and, if he takes the view that they are, it is a question for the jury whether the words have the meaning so ascribed to them. The test is whether in the circumstances in which the words were published, and where nothing is alleged to give them an extended sense, reasonable men to whom the words were published would be likely to understand them in a libellous sense. In deciding whether the words are capable of such a meaning the judge ought not to take into account any mere conjectures which a person reading the document might possibly form as to some out of various motives or reasons which might have actuated the writer unless there is something in the document itself, or in other facts properly in evidence, which to a reasonable mind would suggest those particular motives or reasons. Where there are a number of interpretations which can be put on the words complained of the plaintiff cannot succeed on the one interpretation which gives the words a defamatory meaning.

Libel—Defined.

Per LORD BLACKBURN: A libel for which an action will lie is defined to be a written statement published without lawful justification or excuse, calculated to convey to those to whom it is published an imputation on the plaintiffs, injurious to them in their trade, or holding them up to hatred, contempt, or ridicule.

Notes. Applied: *Kimber v. Press Association*, [1893] 1 Q.B. 65. Considered: *Monson v. Madame Tussaud, Ltd.*, [1891-4] All E.R.Rep. 1051. Distinguished: *Nevill v. Fine Art and General Insurance*, [1895-9] All E.R.Rep. 164. Considered: *Empire Typesetting Machine Co. of New York v. Linotype Co.* (1898), 79 L.T. 8; *Frost v. London Joint Stock Bank* (1906), 22 T.L.R. 760; *Hulton & Co. v. Jones*, [1908-10] All E.R.Rep. 29; *Stubbs v. Russell*, [1913] A.C. 386. Applied: *Bendle v. United Kingdom Alliance* (1915), 31 T.L.R. 403. Considered: *Leng v. Langlands* (1916), 114 L.T. 665; *Ware and De Freville v. Motor Trade Association*, [1920] All E.R.Rep. 387; *Lockhart v. Harrison*, [1928] All E.R.Rep. 149; *Cassidy v. Daily Mirror Newspapers, Ltd.*, [1929] All E.R.Rep. 117. Applied: *Tolly v. Fry & Sons, Ltd.*, [1931] All E.R.Rep. 131. Considered: *Turner v. Metro-Goldwyn-Mayer Pictures, Ltd.*, [1950] 1 All E.R. 449. Applied: *Grubb v. Bristol United Press, Ltd.*, [1962] 2 All E.R. 380. Referred to: *New Chile Mining Co. v. Lee, New Chile Mining Co. v. Venezuelan Austin Gold Mining Co.* (1888), 4 T.L.R. 444; *O'Brien v. Salisbury* (1889), 54 J.P. 215; *Baird v. Wallace-James* (1916), 85 L.J.P.C. 193; *Barber & Co., Ltd. v. Deutsche Bank (Berlin) London Agency* (1917), 33 T.L.R. 543; *British Russian Gazette and Trade Outlook, Ltd. v. Associated Newspapers, Ltd.*, *Talbot v. Associated Newspapers, Ltd.*, [1933] 2 K.B. 616; *Hough v. London Express Newspaper, Ltd.*, [1940] 3 All E.R. 31; *English and Scottish Co-operative Properties Mortgage and Investment Society, Ltd. v.*

- A *Odhams Press, Ltd.*, [1940] 1 All E.R. 1; *Hopwood v. Muirson*, [1945] 1 All E.R. 453; *Morris v. Sandess Universal Products*, [1954] 1 All E.R. 47; *Lewis v. Daily Telegraph, Ltd.*, *Lewis v. Associated Newspapers, Ltd.*, [1962] 2 All E.R. 698.

As to definitions of libel and the functions of judge and jury, see 24 HALSBURY'S LAWS (3rd Edn.) 6, 17-29, 107-112; and for cases see 82 DIGEST 10, 17 et seq., 71-75.

B Cases referred to:

- (1) *Woolnoth v. Meadows* (1804), 5 East, 463; 2 Smith, K.B. 28; 102 E.R. 1148; 32 Digest 50, 608.
 (2) *Wood v. Brown* (1815), 6 Taunt. 169; 1 Marsh. 522; 128 E.R. 998; 32 Digest 68, 967.

C

- (3) *Wright v. Clements* (1820), 3 B. & Ald. 503; 106 E.R. 746; 32 Digest 68, 968.
 (4) *Goldstein v. Foss* (1827), 6 B. & C. 154; on appeal, 4 Bing. 489; 1 Moo. & P. 402; 2 Y. & J. 146; 130 E.R. 856, Ex. Ch.; 32 Digest 64, 926.
 (5) *Hearne v. Stowell* (1841), 12 Ad. & El. 719; 4 Per. & Dav. 696; 11 L.J.Q.B. 25; 6 Jur. 458; 32 Digest 73, 1026.

D

- (6) *Capel v. Jones* (1847), 4 C.B. 259; 9 L.T.O.S. 78; 11 Jur. 396; 136 E.R. 505; 32 Digest 26, 162.
 (7) *Blagg v. Sturt* (1846), 10 Q.B. 899; affirmed sub nom. *Sturt v. Blagg* (1847), 10 Q.B. 906; 116 E.R. 348, Ex. Ch.; 32 Digest 72, 1011.
 (8) *Toogood v. Spyring* (1834), 1 Cr. M. & R. 181; 4 Tyr. 582; 3 L.J.Ex. 347; 149 E.R. 1044; 32 Digest 117, 1489.

E

- (9) *Clement v. Fisher* (1827), 7 B. & C. 459; 1 Man. & Ry.K.B. 281; 6 L.J.O.S.K.B. 39; 108 E.R. 794; 32 Digest 15, 55.
 (10) *Parmiter v. Coupland* (1840), 6 M. & W. 105; 9 L.J.Ex. 202; 4 Jur. 701; 151 E.R. 340; 32 Digest 73, 1019.
 (11) *Bromage v. Prosser* (1825), 4 B. & C. 247; 1 C. & P. 673; 6 Dow. & Ry.K.B. 296; 3 L.J.O.S.K.B. 203; 107 E.R. 1051; 32 Digest 154, 1857.

F

- (12) *Whittington v. Gladwin* (1826), 5 B. & C. 180; 2 C. & P. 146; 108 E.R. 67; sub nom. *Whittaker v. Bradley*, 7 Dow. & Ry.K.B. 649; sub nom. *Whittaker v. Bradby*, 4 L.J.O.S.K.B. 125; 32 Digest 35, 315.
 (13) *Haire v. Wilson* (1829), 9 B. & C. 643; 4 Man. & Ry.K.B. 605; 109 E.R. 239; sub nom. *Harris v. Wilson*, 7 L.J.O.S.K.B. 302; 32 Digest 63, 901.
 (14) *Bradlaugh v. R.* (1878), 3 Q.B.D. 607; 26 W.R. 410; sub nom. *R. v. Bradlaugh and Besant*, 48 L.J.M.C. 5; 38 L.T. 118; 42 J.P. 325; 14 Cox, C.C. 68, C.A.; 15 Digest (Repl.) 780, 7328.

G

- (15) *Harris v. Warre* (1879), 4 C.P.D. 125; 48 L.J.Q.B. 310; 40 L.T. 429; 43 J.P. 544; 27 W.R. 461; 32 Digest 69, 971.
 (16) *R. v. Shipley* (1784), 4 Doug.K.B. 73; 21 State Tr. 847; 99 E.R. 774; sub nom. *R. v. Dean of St. Asaph*, 3 Term Rep. 428, n.; 32 Digest 71, 1006.
 (17) *Hart v. Wall* (1877), 2 C.P.D. 146; 46 L.J.Q.B. 227; 25 W.R. 373; 32 Digest 75, 1050.

H

- (18) *Fisher v. Clement* (1830), 10 B. & C. 472; 5 Man. & Ry.K.B. 730; 8 L.J.O.S.K.B. 176; 109 E.R. 526; 32 Digest 63, 902.
 (19) *Mulligan v. Cole* (1875), L.R. 10 Q.B. 549; 44 L.J.Q.B. 153; 33 L.T. 12; 39 J.P. 805; 32 Digest 65, 931.

I Also referred to in argument:

- Hankinson v. Bilby* (1847), 16 M. & W. 442; 2 Car. & Kir. 440; 153 E.R. 1262; 32 Digest 47, 544.
Watkin v. Hall (1868), L.R. 3 Q.B. 396; 9 B. & S. 279; 37 L.J.Q.B. 125; 18 L.T. 561; 32 J.P. 485; 16 W.R. 857; 32 Digest 96, 1272.
Cox v. Lee (1869), L.R. 4 Exch. 284; 38 L.J.Ex. 219; 21 L.T. 178; 32 Digest 72, 1008.
Baylis v. Lawrence (1840), 11 Ad. & El. 920; 3 Per. & Dav. 526; 9 L.J.Q.B. 196; 4 J.P. 443; 4 Jur. 652; 113 E.R. 664; 32 Digest 73, 1020.

Appeal by the plaintiffs in the action from a decision of the Court of Appeal (BRETT and COTTON, L.JJ., THESIGER, L.J., dissenting), reported 5 C.P.D. 514, reversing a decision of the Common Pleas Division (GROVE and DENMAN, JJ.) in favour of the plaintiffs, a firm of bankers, in an action in respect of an alleged libel, which, it was asserted, imputed to them that their cheques were not safe to receive. A

The appellants, the Capital and Counties Bank, were bankers carrying on business in Sussex, Hampshire, Wiltshire, and elsewhere, and the respondents, Henty & Son, were brewers at Chichester. Until 1878 the defendants had allowed their travellers to receive cheques on the different branches of the plaintiffs' bank, which they were in the habit of cashing at the plaintiffs' branch at Chichester. In that year, however, a new manager of the Chichester branch of the plaintiffs' bank declined to cash cheques not drawn on that branch. Messrs. Henty & Son wrote to the manager to complain, stating that if he did not cash the cheques of the bank as before they would send out an order to tenants of their licensed houses not to take such cheques. In answer to that the manager wrote that he should certainly decline to cash any cheques not drawn on his branch of the bank, unless for parties introduced and properly authorised by the firm. He added: "I am quite indifferent to your sending out orders to your tenants not to take our cheques." B
Thereupon Messrs. Henty & Son sent out a circular letter in these terms: C

"Messrs. Henty & Son hereby give notice that they will not receive in payment cheques drawn on any of the branches of the Capital and Counties Bank." D

The bank complained that that letter was published "falsely and maliciously," and meant

"that the plaintiffs were not to be relied upon to meet the cheques drawn on them, and that their position was such that they were not to be trusted to cash the cheques of their customers." E

The defendants denied, stating the circumstances under which the circular came to be written. The case was tried before LORD COLERIDGE, C.J., who, upon evidence of some persons who had seen the circular and said they thought from it that the bank was "shaky," left questions to the jury on which they could not agree, so that they were discharged without giving a verdict. The defendants moved the Common Pleas Division for judgment, on the ground that there was no evidence to support a verdict for the plaintiffs, but GROVE and DENMAN, JJ., refused to accede to the application, and held that the case must go to trial again. The Court of Appeal reversed that decision and from their decision the present appeal was brought. F G

Sir John Holker, Q.C., C. Russell, Q.C., and R. T. Reid for the appellants.

Sir Farrer Herschell, Q.C., Sir Hardinge Giffard, Q.C., and A. L. Smith for the respondents.

Their Lordships took time for consideration.

Aug. 1, 1882. The following opinions were read. H

LORD SELBORNE, L.C.—I have read with interest the able and instructive opinions of those of your Lordships who have endeavoured to ascertain with exactness the respective provinces of judge and jury in a question of libel or no libel, when the alleged libellous meaning is not to be collected, according to ordinary rules of construction, from the mere words which the defendants have used. Into I think inquiry I will not follow them further than to say that the authorities which I think most material are *Woolnoth v. Meadows* (1); *Wood v. Brown* (2); *Wright v. Clements* (3); *Goldstein v. Foss* (4); *Hearne v. Stowell* (5); and *Capel v. Jones* (6). I should willingly have deferred to the experience, learning, and ability of those who have thought the evidence in the present case proper to be left to a jury if the disagreement from them of others not less entitled to respect had not compelled me to trust more than I could have wished to my own judgment. The Court of Appeal has thought that there was no evidence to go to a jury, and I must be I

A satisfied that their judgment was wrong before I can say that it ought to be reversed.

I do not understand any of the learned judges in the courts below to have been of opinion (nor do I think it is the opinion of any of your Lordships) that the question of libel or no libel must always, and necessarily, be left to a jury as to words not in themselves (i.e., in their proper and natural meaning, according to the ordinary rules for the interpretation of written instruments) libellous, without some evidence, either of a libellous purpose on the part of the writer, or of some other extrinsic facts calculated to lead reasonable men to understand them in a libellous sense. I should myself be very sorry if such were the law. In *Sturt v. Blagg* (7), WILDE, C.J., said (10 Q.B. at p. 908):

C "It is the duty of the judge to say whether a publication is capable of the meaning ascribed to it by an innuendo; but when the judge is satisfied of that, it must be left to the jury to say whether the publication has the meaning so ascribed to it."

If the judge, taking into account the manner and the occasion of the publication, and all other facts which are properly in evidence, is not satisfied that the words are capable of the meaning ascribed to them, then it is not his duty to leave the question raised by the innuendo to the jury. In deciding the question whether the words are capable of that meaning, he ought not, in my opinion, to take into account any mere conjectures which a person reading the document might possibly form, as to some out of various motives or reasons which might have actuated the writer, unless there is something in the document itself, or in other facts properly in evidence, which to a reasonable mind would suggest those particular motives or reasons.

E The alleged libel, in the present case, is a printed circular sent through the post by the defendants to certain of their tenants and customers, giving them notice that the defendants would "not receive in payment cheques drawn on any of the branches of the Capital and Counties Bank." The meaning ascribed to this document by the innuendo is

F "that the plaintiffs were not to be relied upon to meet the cheques drawn on them, and that their position was such that they were not to be trusted to cash the cheques of their customers."

C The question is whether there was evidence to be left to the jury in support of that innuendo. From the words, standing by themselves, it appears to me to be impossible to collect such a meaning on any known principle of construction. By construction merely the only conclusion to be arrived at is that they mean exactly what they say, viz., that the defendants had come to a resolution not to receive, in payment of any moneys due, or to become due to them, from the persons to whom that circular was addressed, cheques drawn on any of the branches of the plaintiffs' bank. For such a resolution they might have had various motives and reasons, good, bad, or indifferent. To mention some, which (whether morally right or not) would be remote from any question of libel, the defendants might (as the fact really was) have taken offence at some conduct on the part of the plaintiffs' agents; or they might have found that mode of payment, from some cause or other, inconvenient; or they might have had greater facilities for cashing cheques drawn upon the branches of some other bank; or they might wish, as far as their influence went, to favour some competitors of the plaintiffs in the business of banking. They were under no obligation to give, and they did not give any reason; and it would, in my opinion, be arbitrary, and not reasonable, to imply, from the mere words of the circular, an imputation upon the plaintiffs' credit or solvency.

The test, according to the authorities, is whether, under the circumstances in which the writing was published, reasonable men, to whom the publication was made, would be likely to understand it in a libellous sense. Sometimes, perhaps generally, that test may be satisfied from the mere words of the documents; in

this case I think it is plain that the mere words of the document are not enough for that purpose. What, then, were the circumstances under which and who were the persons to whom this circular was published? In order to consider how they, as reasonable men, ought to be supposed to have understood it, all that had passed between Messrs. Henty and the plaintiffs' manager at Chichester (however material to the actual intention of the defendants) must be disregarded. What had so passed was unknown to the persons to whom the publication was made. Most of those persons were tenants of, and the rest were purchasers of beer from, the defendants. They resided at various places in Sussex and the neighbouring counties. The practice of the defendants had been to collect, from time to time, by their travellers, moneys due to them from those persons, and to accept payment from them (wholly or in part) by cheques on local banks. Among the cheques which, in the ordinary course of business, were likely (or not unlikely) to come into the hands of these persons, and which, therefore, they might be likely (or not unlikely) from time to time to offer in payment to the defendants, some were or might be drawn upon different branches of the plaintiffs' bank, as others were or might be drawn upon different branches of the London and County Bank, both of which had branches at Chichester and at several other places in the neighbouring district of Sussex and Hants. When such persons received an intimation that the defendants would not accept payment from them in cheques drawn upon branches of a particular bank, I cannot see why, as reasonable men, they should infer from it more than was said. It related to the mode of conducting, for the future, a regular course of business between themselves and the writers, as to which it was proper and reasonable (if the creditor had formed such a resolution) that the debtor should be informed of it. It is not, as I understand, disputed that the defendants were entitled to decide for themselves what cheques they would accept or decline to accept in payment from their debtors, or that such a communication from them to their tenants and customers, if made bona fide, was by law privileged.

This being so, I cannot perceive how persons standing in that relation to the defendants (whether one individual only, or few persons, or many) could reasonably draw a libellous inference from the mere fact of their receiving such a communication, unless the words of the circular, taken in their natural sense, conveyed the supposed imputation upon the plaintiffs. The publication was to those persons, and to those only, to whom, if the defendants meant merely what they said, it would naturally be addressed. No evidence was given from which, as it seems to me, a jury could have been justified in concluding that those to whom this circular was sent were intended to disseminate it among others, with whom the defendants had no business relations. On the contrary, there was uncontradicted evidence that the defendants did not send it to all their customers, but only to those whom they thought likely, at some time or other, to offer payment by cheques on the plaintiffs' bank. It seems that some of those who received the circular did, in fact, show it to some strangers; but I cannot think that any such communication by them to strangers, unauthorised by the defendants themselves, could properly be evidence in support of the innuendo. If it had been publicly placarded by the defendants on the walls of Chichester or other towns, or had been advertised by them in newspapers, or sent by them through the post to persons with whom they had no business relations, this might have been evidence of a malicious intention, beyond what was expressed by the mere words of the document; but nothing of that kind was done.

It was said that the defendants, by some other mode of wording the circular, might have prevented mischief. But, if it was actually so worded and so published, as in itself to furnish no reasonable ground for any libellous interpretation, I cannot perceive that they were under any necessity of saying more, to repel an inference which what they had said did not justify. It was suggested that they might have made some distinction between the plaintiffs' branch at Chichester and their other branches. But the offence which they had taken at the conduct of the plaintiffs' manager at Chichester (whether reasonable or not) would have

A made any such exception of the Chichester branch inconsistent with the determination which they had actually formed to have no dealings which they could avoid with that gentleman. I may add that the circular in its actual terms does not seem to extend to the central or head office of the plaintiffs' bank in London. If an exception in favour of the Chichester branch would have prevented any inference adverse to the plaintiffs' credit, why should such an inference be drawn when
 B branches only were mentioned? There was no evidence that any single person to whom the circular was sent by the defendants acted upon it in a manner injurious to the plaintiffs. Mr. Smith, a customer of the plaintiffs, was one of those persons; he came to the manager of the plaintiffs' Landport branch, and produced to him the circular, asking what was the meaning of it, but he did not withdraw or reduce his account with the bank. There was no evidence of any extrinsic fact affecting
 C the reputation or credit of the plaintiffs' bank, at the time which could be connected with the circular so as to give it a meaning to those who read it which it might not otherwise have had.

I cannot but think that, under the old system of pleading, a statement of some extrinsic facts of this nature on the record would have been necessary to support the innuendo, having regard to the absence of any sufficient ground for it in the
 D words of the document; and this for reasons not technical: *Goldstein v. Foss* (4); *Hearne v. Stowell* (5); and *Capel v. Jones* (6). And, although no such matter of inducement need now be stated on the record, it seems to me that, without some evidence of facts which, when connected with the words of the document, would justify the meaning imputed to it, such a case ought not to go to a jury. I did not collect from the argument that the loss which the plaintiffs had suffered in the
 E preceding month, from a defalcation by one of their agents, was sufficient to have in any way affected their reputation or credit, or was relied on by them for that purpose. Their real reliance was upon what afterwards happened—namely, the extraordinary run upon the branches of their bank, which took place during the first and second weeks after the circular was issued. Before the second week the West of England Bank had failed, and its failure had been preceded by certain
 F sinister reports, which found their way into some London newspapers. Some evidence was undoubtedly given which tended to connect rumours, supposed to be founded on the defendants' circular, with the run which took place during the first (at all events) of those two weeks. But such rumours, or any consequences which they may have had, could not properly have been left to a jury as evidence tending to give a libellous meaning to the circular if the publication itself (for which alone
 G the plaintiffs were responsible) was not otherwise proved to be a libel. LORD COLERIDGE, C.J., as I understand him, thought this part of the evidence proper to go to the jury, not for the purpose of proving the innuendo, but only to prove special damage if the circular were found to be a libel. I cannot, however, help thinking that, if the run upon those branches of the plaintiffs' bank, had not happened when it did, there would have been a much more general agreement among the judges
 H before whom this case has come; and, indeed, it is tolerably certain that, in that case, the action would never have been brought.

Apart, therefore, from the facts which bear directly upon the question of the defendants' purpose and intention, but were unknown to the persons who received the circular, I find no evidence that this was a libel proper to be left to a jury. As to those facts (which were not in controversy), it appears to me that evidence of
 I pride, anger, ill-temper, or unreasonableness is an entirely different thing from evidence of an intention (not otherwise proved) to cast imputations upon the credit or solvency of the plaintiffs' bank. I think there was more than enough evidence of pride, anger, ill-temper, and unreasonableness. In the excellent summing-up of LORD COLERIDGE, C.J., there is but one thing said, as to the effect of the evidence, with which I cannot agree, and that is his intimation to the jury that, although nothing which had previously passed might have justified the conclusion that the defendants had a malicious intention, some evidence of such an intention might be derived from their reply to the last letter of Messrs. Stuckey & Co. [the appellants']

solicitors] threatening an action. It seems to me to be impossible justly to draw an inference of that kind from such a reply to such a letter, unless there were other circumstances sufficient to justify it. I should not have thought that any reasonable man who knew all that had passed between the defendants and Mr. Hooper [the appellants' manager at Chichester] could have put upon the circular the construction that an imputation on the plaintiffs credit or solvency was really thereby intended; and, if not, I am unable to understand how the same facts can be evidence in support of the innuendo. The defendants were angry, not indeed without reason, but beyond the bounds of reason; and they determined, as far as possible, to have no dealings with those who had offended them. They stated, openly and frankly, to the plaintiffs' manager what (unless conciliated) they would do, in terms not favourably distinguishable, to my mind, from those of the circular which they afterwards sent out. The answer which they received was not conciliatory, and in it the manager said that he was "quite indifferent as to their sending out orders to their tenants not to cash the bank's cheques." I do not regard this as in the nature of a permission (if the manager could have given it) to the defendants to publish a libel concerning the plaintiffs; but it does seem to me to be strong evidence that the plaintiffs' manager (whom I suppose to have been a reasonable man, and as well capable of comprehending the defendants' meaning at that time as he was afterwards) did not understand the act threatened by the defendants, or the communication proposed to be made by them to their tenants, as implying any imputation upon the credit or solvency of the bank.

If it had been the necessary or legitimate consequence of the action which the defendants took that their circular should be understood, or likely to be understood, by reasonable persons receiving it, in a libellous sense, they must be taken (for all purposes of legal responsibility) as having intended that consequence. But I have already said that I think this was not either the natural sense of, or a reasonable inference from, the words which they used or the act which they did; and the whole evidence appears to me against the supposition that they themselves intended it to convey that meaning. The result is that I think there was no evidence on which a jury could have been justified in finding that the defendants published a libel concerning the plaintiffs. The document not being a libel on the face of it is not shown to be so by any extrinsic evidence proper, in my judgment, to be considered by a jury for that purpose. Before it can be deprived of the privilege which it would undoubtedly possess if bona fide sent to the persons to whom it was addressed for the purpose appearing on the face of it, one of two things is necessary—either that the defendants should be shown to have sent it for some ulterior purpose not covered by that privilege (of which I see no evidence), or it must be shown improperly to bear the libellous meaning imputed to it. These are my reasons for being unable to differ from those of your lordships who are of opinion that the judgment under appeal is right, and that this appeal should be dismissed, with costs; and I shall move your Lordships accordingly.

LORD PENZANCE stated the facts, and continued: The contention of the defendants is that their circular was no more than an honest, innocent and justifiable announcement on their part to their customers that in future they must not expect that they would receive in payment any cheques on the plaintiffs' bank; that they had a right to refuse such cheques if they liked, and had also a right to announce their determination to do so to their customers, so as to prevent their being taken by surprise and put to inconvenience by this departure from their previous practice. If this is the fair conclusion to be drawn from the facts there can be little doubt, I think, but that they are not liable in this action; for, passing by for the moment all questions whether the circular ought to be considered libellous as conveying an imputation on the plaintiffs' credit injurious to them in their trade, the occasion of this circular being published would, upon the above supposition be so clearly a privileged occasion that nothing but proof of express malice would

A sustain the action, and express malice is upon the same supposition obviously excluded.

But the plaintiffs put a very different construction on the facts. In their view the occasion of the circular was not an honest or innocent one, but was invented and contrived out of anger, or petulance and ill-temper, at the manager of the bank presuming to throw any impediment in the way of the defendants' convenience.

B They, therefore, maintain that the circular was not privileged, but malicious, for that it was not a statement

"fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned."

C I use the definition of a privileged communication given by PARKE, B., in *Toogood v. Spyring* (8) (1 Cr.M. & R. at p. 193), which has been cited with approval in several subsequent cases. In a word, the plaintiffs contend that the circumstances of the case were quite sufficient to warrant a conclusion in the minds of the jury that all need for the circular was a mere pretence; that it was not dictated by a real or honest desire to save the defendants' customers inconvenience; but that it was solely conceived and designed in a spirit of petulance, if not actual ill-will, against the plaintiffs, and to let them feel the weight of a threat to which Mr. Hooper, their manager, announced himself to be "indifferent."

E If this is the fair result of the facts, and there was, I think, abundant evidence to justify a jury in so finding if they chose to do so, I confess that I think it puts a different complexion on the whole matter. I cannot doubt that in this aspect of the facts there was no privileged occasion, and, even if there were, there would be, upon the above supposition, what the law calls actual malice. It seems to me, therefore, impossible for your Lordships to decide whether the plaintiffs had a good cause of action without the previous decision of a jury as to the true objects, intentions, and motives of the defendants in the course they pursued, and as to how far, even supposing their original motives and objects to have been innocent, they exceeded either in the language of the circular or in the number of persons to whom they distributed it, the line of conduct which would be justified by those motives, and objects. It is true that one of the defendants said they only sent the circular to persons from whom they thought they were likely to receive the cheques in question; but whether this was the case or not would also be matter, I think, for a jury to determine. Until those matters of fact, and the proper conclusions to be drawn from them are established, I confess that I am at a loss to see how the court below, or your Lordships, can determine the question whether the publication of the circular gave a good cause of action or not.

G The majority of the Court of Appeal appear to have thought, not that these matters of fact were for the court to determine, but that, however they were determined, and whatever conclusions might be drawn from them of actual malicious injury on the part of the defendants, the plaintiffs could have no cause of action; and they have, therefore, refused to send the matter to a jury, and have given judgment for the defendants. I will state as shortly as I can why I consider this to be wrong. For this purpose I must assume for the moment that a jury might have found that this circular was issued, if not with an actual desire to injure the plaintiffs, at least in petulance and anger, and with indifference whether it caused injury to them or not, and that the supposed convenience of the defendants' customers was a mere excuse and blind to justify them in taking a step which would show the plaintiffs that it was not well to defy their threats, and that it would be advisable in future to consult their convenience. I must also assume that the jury might find that the number of people to whom the circular was sent was far larger than any innocent dictates of convenience would warrant. Upon the assumption that either of these conclusions might be arrived at by a jury, it has to be determined whether this action of libel can be maintained.

But here the preliminary question has been raised. Is it for the court or for a jury, upon a given state of facts and circumstances, to say whether the publication complained of is libellous or not? To sustain the judgment now under appeal, which has withdrawn everything from the jury, it is necessary that your Lordships should come to the conclusion that, whatever view may be taken of the facts, it is for the court and not for the jury to determine whether the circular did or did not in its terms amount to an actionable libel. I do not know whether the respondents intended to go so far as to say that the court, without the intervention of a jury, can in all cases determine a publication affirmatively to be a libel; but I do understand them to assert that the court, whatever the jury might think, is at liberty to hold that the publication is not a libel. There is no doubt that in past days, when special pleading was still in full force, it was held to be necessary that the plaintiff should set forth on the face of the record the publication itself, together with such facts as, taken in connection with it, would enable the court to see that he had a cause of action. It is hardly necessary to cite authorities for this, but I may mention *Clement v. Fisher* (9), *Wood v. Brown* (2), *Wright v. Clements* (3). I do not conceive that the principal involved in these decisions went any further than that the court required it to be shown to them on the record, so that a court of error could deal with it if need be, what the publication was, in order that they might judge whether a jury could reasonably, without doing violence to the principles and limits of the law of libel, pronounce the publication to be libellous. In other words, the court required to be satisfied that the matter of the publication might, without doing violence to its language, have such a meaning attached to it, or such a construction put upon it, as to render it libellous, and, subject to this limitation, it devolved upon the jury to say whether it was libellous or not.

This is precisely the view taken of the law by the Court of Queen's Bench in *Blagg v. Sturt* (7), where PARKE, B., left to the jury the question whether "they believed the innuendo as to the meaning of the letter or not." It was contended that he ought not to have done so. LORD DENMAN, C.J., delivering the judgment of the court, said (10 Q.B. at p. 905):

"We are also of opinion that the libel is capable of the meaning imputed by the innuendo; and as the jury have found it to be true, and the judge is not dissatisfied with the verdict, the rule is not granted."

Similar language was used in the Exchequer Chamber in the same case on appeal (*ibid.* at p. 908):

"Undoubtedly it is the duty of the judge to say whether a publication is capable of the meaning ascribed to it by an innuendo: but when the judge is satisfied of that, it must be left to the jury to say whether the publication has the meaning so ascribed to it."

Although special pleading has passed away, I do not consider that the law has been thereby altered, and I look upon the case first quoted, therefore, not as declaring any change in the law on the subject, but as placing in its true light what the law always has been, namely that it is for the court to say whether the publication is fairly capable of a construction which would make it libellous, and for the jury to say whether in fact that construction ought, under the circumstances, to be attributed to it. To go further than this would be to say that the question of libel or no libel is at one and the same time a question for the jury and also for the court, which would surely be an anomaly in English law, and that the question ought to be left to the jury with the proviso that they can only determine it effectively in the negative, for if they determine it in the affirmative their opinion will go for nothing, inasmuch as the court will afterwards determine the same question for themselves without reference to their verdict.

The only other alternative would be that which the Court of Appeal have adopted in this case, namely, not sending the case to a jury at all. This is, in fact, saying that although the plaintiff alleges in his innuendo that the circular in question was

A calculated to give rise, and did give rise, in the minds of those to whom it was addressed, to the inference that the defendants impugned the credit of the plaintiffs' bank, the court will settle for itself, not whether any such inference could reasonably be drawn from it by a jury, but whether any such inference would be drawn from it by persons of the class to which it was addressed, for that is the question, and the opinion of a jury is not needed. I very much doubt whether there is any

B authority for thus dealing with the question of libel. When the cases which have a contrary aspect come to be examined it will be found that they in nowise favour the proposition that the question of libellous construction should be withdrawn from the jury, but establish only that the plaintiff must show on the record such a publication, and such extraneous facts, if any, connected therewith as to leave room for a jury properly to declare it libellous.

C I will shortly refer to two of these cases. In *Goldstein v. Foss* (4) the supposed libel was a publication emanating from a trade protection society, and it all turned upon the use of the words "the said society," which, taken in connection with the context, were thought to convey an ambiguous reference, and so the judgment was arrested, and the plaintiff lost the benefit of his verdict. *Hearne v. Stowell* (5) is of a similar nature. The libel complained of consisted of a charge which the plaintiff alleged had injured him in his character of Roman Catholic priest. The judgment was arrested, because there was no statement on the record informing the court of the conduct which a Roman Catholic priest ought to pursue in imposing penance. It rested wholly upon the proposition that those facts which in the opinion of the court were necessary to establish the libellous character of the publication were not stated on the record, although they might have been, and indeed to some extent were, given in evidence before the jury. I am confirmed in my opinion as to the true bearing of this decision by the comments upon it of the court in *Capel v. Jones* (6).

D

E

I will quit this part of the subject by citing the opinion of PARKE, B., in *Parmiter v. Coupland* (10). He is reported to have said (6 M. & W. at p. 108):

F "A publication without justification or lawful excuse, which is calculated to injure the reputation of another by exposing him to hatred, contempt, or ridicule, is a libel. Whether the particular publication, the subject of inquiry, is of that character, and would be likely to produce that effect, is a question upon which a jury is to exercise their judgment, and pronounce their opinion as a question of fact."

G

The learned judge is here only speaking of libels which affect reputation and character, but I am not aware that those which affect a man's credit in his trade stand upon any different footing. I am, therefore, of opinion that if a publication, either standing alone, or taken in connection with other circumstances, is reasonably capable of a libellous construction, it is for a jury, and not for the court, to say

H whether a libellous construction should be put upon it.

The question being not what a court of law might understand by it, but what inferences the class of people to whom it is addressed would draw from the language used, it is properly and essentially a question of fact, and as such properly devolves upon a jury. I do not mean to assert that the jury is free to draw an inference of defamation whatever the language of the imputed libel may be. The court have

I the right and the duty to hold a check upon the action of the jury in such matters, and to see that the defamatory inference is one which, without doing violence to the language, can be reasonably drawn. But it has no right to go further and reject the defamatory inference because it is not a necessary inference or one which the court itself would draw. There is, I conceive, considerable danger in the court usurping the function of the jury, and by a too narrow criticism of the language of a publication rejecting inferences, which though perhaps not logical, are such as people of illogical minds, who are perhaps the majority, would draw. Then it must be remembered that the question of malice and the question whether certain

language is or is not defamatory are distinct, and whatever is held not to be defamatory is equally not defamatory, though published with the most malicious intentions and objects. It is not difficult for a malicious man to injure his neighbours by carefully selected language, avoiding a direct charge, or anything like a necessary inference of discredit; and if your Lordships should hold the present publication to be innocent, you will, I fear, go far to invite such attempts. A

But, assuming that it is for the court and not for the jury to say whether the circular was libellous, I am, I confess, strongly of opinion that such a question ought to be answered in the affirmative. I doubt whether any man of business could read this circular, and not be led to the conclusion that the defendants had their misgivings as to the plaintiffs' solvency. I do not mean to say that there might not possibly be other reasons for refusing to take any of the plaintiffs' cheques on whatever branch they might be drawn, but the first and obvious reason would be that the defendants doubted if such cheques would be paid. In general mankind do not refuse to take any form of payment in respect of which they feel a confidence that it will, without difficulty, be convertible into money, and provided that a note, or cheque, or security for money, is known by them to be perfectly certain to be easily and promptly convertible into cash, it is quite beyond any experience that I possess to believe that such securities would be refused. It has been said in argument that there might be numerous reasons for refusing to take the plaintiffs' cheques besides the reason that their credit was doubtful, and that it is, therefore, unreasonable to pitch upon this last as the meaning to be conveyed by the defendant's circular. But although this has been said I have not heard any of these reasons stated or suggested, nor have I been able to imagine any of them, except perhaps the extra trouble involved in having to cash cheques on various branches of a country bank; and this interpretation of their meaning is excluded by the fact that the circular equally extends to cheques drawn on the Chichester branch, which there would have been no difficulty or trouble in cashing. But in whatever way the circular was capable of being interpreted, I still think that an imputation on the plaintiffs' credit would be the first and most obvious reason for it which would arise in the mind of anyone reading it. It must always be remembered that the persons to whom it was sent knew no more than the public at large, and had no other key to the meaning of the circular than would have been possessed by the first man in the street who might have read it if it had been posted on the walls of the town. It was admitted that if such a circular as this had been indiscriminately published, as by sticking it on a wall, it would have had the effect of damaging the plaintiffs' credit. B C D E F G

The responsibility for a publication may be affected by the mode in which, and the persons to whom, it is made; but the meaning of the words, and the reasonable inferences to be drawn from them, must be the same however published, and if the meaning and effect of the circular would have been injurious to the plaintiffs' credit if stuck upon a wall, why should it not have the same meaning and the same effect if received by a man in an envelope? I am not at this moment discussing whether the sending of this circular was in fact, under the circumstances, the publication of a libel. I have already said that provided it was done innocently as a matter of business, within the definition given by PARKE, B., in *Toogood v. Spyring* (8), it was a protected communication, and one which, without proof of actual malice, would not sustain this action. But I am assuming the contrary of all this. I am assuming that it was no innocent step taken in the course of business, but a wilful act done without need or necessity, and with intent to punish or injure the plaintiffs, and solely for that purpose, and so published. I am considering the question whether the circular contained imputations damaging to the plaintiffs' credit or not; and in this point of view I am quite unable to perceive why it should carry one meaning to a reader if posted on a wall, and if received by the same reader in an envelope should convey another and different meaning. H I

The innocence and lawfulness of this circular has been sustained in argument by some very ingenious reasoning. Suppose, it is said, that this paper had only

A been sent to one person, would it be libellous? The answer, I think, depends on the motive or object which dictated it; a libel does not require publication to more than one person. But then it is said, surely the defendants had a right to refuse the plaintiffs' cheques, and, if they had a right to do so, why had they not a right to say that they would do so? This mode of argument appears to me to beg the question. Every man has, but for the law of libel, a right to say or write what he pleases. His pen and tongue are his own, and the only law which restrains the use of them is the law of libel and slander. To assert, therefore, that in the case supposed a man has a right to issue a circular of this character is to assert that it would not be a libel if issued, which is the very point that has to be established. There are cases, no doubt, in which, although a man acts maliciously, or with a desire to annoy or injure another, he may not be responsible, because he is only exercising some right that belongs to him, such as erecting on his own land some structure of a kind which he knows will annoy his neighbour, for the sole purpose of effecting that result. Many other cases might be put in connection with positive right, the exercise of which does not cease to be lawful though the motive that dictates and shapes their exercise may be malicious. But the right of publishing statements which are injurious to another is not a right of this kind; it is a right only subject to the limitations of the law of libel, and if it exceed those limitations it becomes an actionable wrong. To say that a man is at liberty maliciously to injure another by a written publication, without any better excuse or occasion for making it than the indulgence of animosity, or passion, and that the injured man is without redress, is to say that the law of libel does not exist. Malice has always been held to be the gist of an action for libel, and the only difference between what is called a privileged occasion and one not so privileged is that the law infers malice in the latter case, while it requires proof of actual malice in the former, but when that proof has been given the right of action is complete whatever the occasion may be. Assuming that an imputation against character or credit in trade is untrue, injury to the plaintiff and malice on the part of the defendant are, in my opinion, the efficient elements of an actionable libel. All this is fully discussed in the judgment of BAYLEY, J., in *Bromage v. Prosser* (11).

F Then again it is said that the circular in terms said nothing about the plaintiffs' credit, and that it would be enlarging the language of it without warrant to construe it in a sense injurious to that credit. But the actual words of a publication are, in my opinion, by no means the limit of the ideas and impressions which they may be calculated to convey. *Woolnoth v. Meadows* (1) affords a good example of this, where it was held that words which not only did not charge a criminal offence, but on the face of them, indeed, repudiated such a charge, were nevertheless libellous as being calculated to convey to the hearers of them a criminal imputation.

"Whatever words have a tendency to hurt, or are calculated to prejudice a man who seeks his livelihood by any trade or business, are actionable":

H said BAYLEY, J., in *Whittaker v. Bradley* (12) (7 Dow. & Ry.K.B. at p. 650). In MR. HOLT's book on LIBEL the following is the second definition given of what constitutes a libel against a private person:

"Libels which have a tendency to injure him in his office, profession, calling, or trade."

I That this "tendency" is the true test of the publication being libellous or not, and not the mere primary meaning of the defendant to be gathered from the words he has used, is, I think, well established by authority. In *Haire v. Wilson* (13) the judge had left it to the jury to say whether the defendant intended to injure the plaintiff. This the court held to be wrong (9 B. & C. at p. 645):

"If the tendency of the publication was injurious to the plaintiff, then the law will presume that the defendant, by publishing it, intended to produce that injury which it was calculated to effect. If it had that tendency no doubt it was a libel":

said LITTLEDALE, J. In that case the intention of the defendant to injure the plaintiff was inferred from "the tendency" of his publication. This case is stronger against the defendant, for the hypothesis upon which I am considering whether the circular is libellous is that the defendant did actually intend to injure the plaintiff. A

It comes to this, therefore, in my opinion, that the only real question which arises in determining whether the language of this circular is libellous is whether it would be calculated to raise in the minds of those to whom it was addressed an imputation against the solvency of the plaintiffs or not. For the reasons I have already given I am of opinion that it is so calculated, and if it properly devolves upon your Lordships to say whether the language of the circular was libellous, I am of opinion that it was so. But this question is, in my view of the law, a question for the jury and not for the court, the language of the circular being capable of the construction which the plaintiffs have put on it in their innuendo. Upon the whole, then, I think this case ought to be again submitted to a jury. As to the language of the circular the question for the jury would be whether, putting such a meaning and construction on it as, in their opinion, would be put on it by the persons to whom it was addressed, an imputation against the plaintiffs' credit would be thereby conveyed; and, if so, they should find the circular to be in its language libellous, it being for the plaintiffs to establish that proposition to their satisfaction. But the main question for them would arise upon the circumstances under which, and the persons to whom, the circular was published. These matters should be left to the jury to enable them to judge and the court to determine whether the occasion was a privileged one or not, as was decided in *Bromage v. Prosser* (11). If the jury should find that the circular was innocently published in discharge of a duty, or as a matter of business within the definition given in *Toogood v. Spyring* (8), the publication would be privileged. The onus of establishing that it was so lies, I think, upon the defendants. A third question, as a matter of law, presents itself, whether, although the occasion was privileged, there was any actual malice on the defendants' part; but in the circumstances of this case that question hardly arises, except as a matter of form, for the considerations which would induce the jury to find the circular to have been issued innocently in discharge of a duty, must practically negative all actual malice in taking that step. I, therefore, think that the judgment of the Court of Appeal should be reversed. B C D E F

LORD BLACKBURN.—On the trial evidence was given on both sides, and the case was left to the jury, who did not agree and were discharged. The plaintiffs desire that the case should go for trial before another jury. The defendants' contention is that they are entitled to judgment on the ground that if the jury had found in favour of the plaintiffs, every circumstance relating to the publication which the evidence could prove, and even though they had found that, in their opinion, the letter was libellous, the court ought to come to the conclusion that the letter published under those circumstances was no libel, and, acting on its own conclusion, give judgment for the defendants, not setting the verdict aside as not satisfactory, but letting it stand, and giving judgment for the defendants notwithstanding the verdict. If this is right it follows that the case ought not to be sent to another jury. The decision of the cause depends first on the question what is the province of the court in an action of libel, and whether, where the writing is such that opinions might differ as to whether it is libel or not, the court can give judgment for the defendant on the ground that, though the jury have found that, in their opinion, the writing is a libel, the court do not think it made out to be a libel. That is a question of great public interest. Secondly, the question is whether, supposing that this can be done, the state of the evidence in this case as to the publication is such that the court ought to come to the conclusion that this is no libel. This is of importance to the parties, but except in so far as it may illustrate the meaning of the first general proposition, it is not of general importance. G H I

I will first state my opinion on the first question. A libel for which an action will lie is defined to be a written statement published without lawful justification

- A or excuse, calculated to convey to those to whom it is published an imputation on the plaintiffs, injurious to them in their trade, or holding them up to hatred, contempt, or ridicule. It must be shown by evidence that there was a writing, and that it was published; and independently of all questions as to privilege, the manner of the publication, and the things relative to which the words are published, which the person publishing knew, or ought to have known, would influence those to whom
- B it was published in putting a meaning on the words, are all material in determining whether the writing is calculated to convey a libellous imputation. There are no words so plain that they may not be published with reference to such circumstances, and to such persons knowing those circumstances, as to convey a meaning very different from that which would be understood from the same words used under different circumstances.
- C I think that from the earliest times it has, by the law of England, been the province of the court to say whether words published in writing were a libel or not; and in order that a court of error might have before it the materials for enabling it to say whether the decision of the court below was right or not, the plaintiff was, by the old rules of pleading, required to place all those materials on which he relied upon the record. The words themselves must have been set out in the declaration
- D or indictment, in order that the court might be able to judge whether they were a libel or not; and this still remains the law: see *Bradlaugh v. R.* (14) and *Harris v. Warre* (15). In construing the words to see whether they are a libel, the court is, where nothing is alleged to give them an extended sense, to put that meaning on them which the words would be understood by ordinary persons to bear, and say whether the words so understood are calculated to convey an injurious imputation.
- E The question is not whether the defendant intended to convey that imputation; for if he without excuse or justification did what he knew, or ought to have known, was calculated to injure the plaintiff, he must be responsible, at least civilly, for its consequences, though his object might have been to injure another person than the plaintiff, or though he might have written in levity only. If there were circumstances relating to the publication which it was alleged caused the words to bear a
- F more extended sense than they would otherwise do, the law was that those must be stated on the record, in order to enable the court to judge whether the words understood with reference to those circumstances bore that more extended sense, or else those circumstances could not be looked at in favour of the plaintiff. The rule of pleading has been altered in that respect, but the law which gave rise to the old mode of pleading has not been altered. It never was disputed that there was much
- G which could only be decided by the jury. Whether the words as published bore the meaning alleged where there was an innuendo, or any libellous imputation where there was no innuendo, was a question which the defendant could raise on the general issue, and the jury must decide that question when raised.

There were, however, a series of decisions, the last and most important of which was the famous case of *R. v. Shipley* (16). The headnote, I think, very accurately

H states what was decided by the majority of the court (4 Doug.K.B. at p. 73):

“On the trial of an indictment for a libel the only questions for the jury are the fact of publication and the truth of the innuendoes. The question of libel or no libel is necessarily a question of law for the sole consideration of the court out of which the record comes, and on which the judge at the trial is not called upon to give his opinion to the jury.”

I WILLES, J., dissented from the reasons given by LORD MANSFIELD, though agreeing in his conclusion that there should be a new trial. It seems to me clear that while LORD MANSFIELD held that the question of libel or no libel was one exclusively for the court, WILLES, J., held that it was also a question for the jury, but he did not hold it to be a question exclusively for the jury.

It is no longer material whether LORD MANSFIELD or WILLES, J., was right in his view of the law as it stood in 1784, for by the Libel Act, 1792, it is enacted by s. 1 what the law shall be in future. The legislature adopted the substance of the

judgment of WILLES, J., and from that time, A.D. 1792, there can be no doubt that A
 a defendant cannot be convicted of libel unless the jury find that the tendency of
 the publication was libellous. But the legislature, passing an enactment in favour
 of defendants, did not intend to put them in a worse position than before,
 nor to make the verdict of a jury conclusive against them. Nor did they enact that
 the judge might not in this, as in other criminal cases, direct the jury to acquit B
 because he thought that the case had failed in law. It would, I think, have been
 very injudicious to do so. And by s. 4, the legislature provided that the defendant
 should still, though found guilty by the jury, have the power to take the opinion
 of the court on the question of law, by moving in arrest of judgment, as before the C
 Act. *R. v. Shipley* (16) was a criminal proceeding at the instance of the Crown,
 and the Act of 1792 is in terms confined to such proceedings. But though, no
 doubt, the court has more power to set aside verdicts in civil cases, there is no D
 reason why the functions of the court and jury should be different in civil proceed-
 ings and in criminal proceedings for a libel. Accordingly, it has been for some
 years generally thought that the law in civil actions for libel was the same as it had
 been expressly enacted it was to be in criminal proceedings for libel. It certainly
 had always been my impression that there was a difference between the position
 of the prosecutor or plaintiff and that of the defendant. The onus always was on D
 the prosecutor or plaintiff to show that the words conveyed the libellous imputation,
 and, if he failed to satisfy that onus, whether he had done so or not being a question
 for the court, the defendant was always entitled to go free. Since the Act of 1792
 at least, however the law may have been before, the prosecutor or plaintiff must
 also satisfy a jury that the words are such, and so published as to convey the libel-
 lous imputation. If the defendant can get either the court or the jury to be in E
 his favour he succeeds. The prosecutor or plaintiff cannot succeed unless he gets
 both the court and the jury to decide for him. It seems to me that when the court
 come to decide whether a particular set of words published under particular circum-
 stances are or are not libellous, they have to decide a very different question from
 that which they have to decide when determining whether another tribunal, whether
 a jury or another set of judges, might not unreasonably hold such words to be F
 libellous. In fact, whenever a verdict has passed against a defendant in a case of
 libel, and judgment has been given in the court below, those who bring their writ
 of error on the ground that there was no libel assert that both the jury and the
 court below have gone wrong, but they are not called upon to say that the words
 were incapable of conveying the libellous imputation; it is enough if they can
 make out to the satisfaction of the court of error that the onus of showing that C
 they do convey such an imputation is not satisfied, and there are numerous cases
 in which, after a verdict for the plaintiff and judgment for him, that judgment has
 been set aside in error.

It was argued that if the words were capable at all of conveying the libellous
 imputations the plaintiff had a right to have the question left to the jury. Only
 two authorities were produced. Some expressions used by WILDE, C.J., in deliver- H
 ing the judgment of the Exchequer Chamber in *Sturt v. Blagg* (7) were cited, but
 I think they do not bear the meaning supposed. No question of this kind was
 before the court. The other case relied on as an authority was *Hart v. Wall* (17),
 where LORD COLERIDGE, C.J., and LINDLEY, J., set aside a nonsuit entered by
 ARCHIBALD, J., after consulting QUAIN, J. I am unable on perusing the report of
 that case to make out what was the meaning the letters were supposed to be capable I
 of bearing which it was held would be libellous. It may be that it was thought
 not only that it was for the jury to find the meaning, and also that they were not
 bound to find for the plaintiff, whatever the court might think, unless they thought
 the publication such that the meaning was calculated to convey a libellous imputa-
 tion, which I think is the law, but also that if the jury found these questions for
 the plaintiff it was conclusive on the court, unless they could see that the words
 were incapable of conveying such an imputation; and if such was the decision in
Hart v. Wall (17) it is an authority for the plaintiffs, and, as far as I know, the

A only one. I think there is authority against it. No one can read the tract the publication of which was the subject of the indictment in *R. v. Shipley* (16), and say that the words were incapable of conveying a suggestion that the people should arm and drill themselves, so as to be prepared by force to resist the government so long as Parliament was managed by a few great lords or wealthy men. Yet the Court of King's Bench unanimously arrested the judgment, which, I think, can only have been on the ground that, though the words were capable of conveying that seditious meaning, the court thought that the prosecution had not satisfied the onus which lay on them to show that they were so published as to be calculated to convey it. I think that subsequent decisions show that this principle has been acted upon.

I do not think it necessary to cite any other cases than *Hearne v. Stowell* (5) and *Goldstein v. Foss* (4) there referred to. *Hearne v. Stowell* (5) was a peculiar case. The alleged libel in that case, in its natural sense, and without any innuendo at all, imputed to the plaintiff conduct which, if believed, would in the opinion of the jury have injured his reputation by exposing him to hatred, contempt, and ridicule, and therefore was a libel. The court took a different view, and acted on their own view, and arrested the judgment. The plaintiff might have brought error, and plausibly enough have asked a court of error to say that they agreed with the jury, and not with the Court of Queen's Bench, but he acquiesced in the judgment.

Goldstein v. Foss (4) contained counts in which the libel stood thus:

"Correspondence 1825. Society of Guardians for the Protection of Trade against Swindlers and Sharpers. I am directed to inform you that the persons under-named, using the firms of Goldstein, Castles & Co., and Benjamin Porter Baker, are reported to this society as improper to be proposed to be balloted for as members thereof."

On this *ABBOTT*, C.J., after pointing out that the innuendo that the plaintiff was a swindler was too large, but that it might under these counts be rejected as surplusage, says (6 B. & C. at p. 159):

"Then is the import of the libel itself such as can be made the subject of an action? There may be fixed arbitrary rules which prevent the election of certain persons as members of the society; persons of a certain age, or certain trades, may be excluded; and there may be so many reasons why a person may be deemed unfit to become a member of the society, without casting any injurious reflection upon him, that I think we cannot possibly say with any degree of certainty that such was the intention with which the alleged libel was published."

I may observe here that I agree with what was argued at the Bar, that *Fisher v. Clement* (18) shows that the real question was not what was the intention with which the libel was published, but what was the tendency of the libel as published, and, consequently, that *ABBOTT*, C.J., if correctly reported, made the same verbal slip in *Goldstein v. Foss* (4) which he afterwards made in *Fisher v. Clement* (18). But, subject to this slight correction, I think that *ABBOTT*, C.J., here states, not only that it was a question for the court whether the publication was shown to be libellous, but correctly states the principle on which the court is to proceed, viz., that unless the plaintiff has so far satisfied the onus which lies on him to show it to be a libel, that the court can with sufficient certainty say that the writing has a libellous tendency, they should not say so. The plaintiff in *Goldstein v. Foss* (4) did not submit to this judgment. He brought error, but the judgment was affirmed.

The Common Law Procedure Act, 1852, s. 61, was intended to remove the difficulties which the plaintiff had in putting a real cause of action on the record with sufficient technical precision. But it was not intended to alter the law, or to deprive the defendant of his right to ask the court to say that words alleged to be a libel, or actionable slander, though found by the jury to be so, were not so in the judgment of the court. It deprived him of his right to move in arrest of judgment, for the materials on which the question whether the words, written or spoken,

were used in the defamatory sense has to be decided are no longer on the record. A But when the proof is complete, and all that can be properly found on that proof in favour of the plaintiff is found for him, the court have, I think, exactly the same power that they had before, and if they are of opinion that, if all which could be found had been put on the record under the old system, the judgment would have been arrested, they should give judgment for the defendant. This was done, and I think rightly done, in *Mulligan v. Cole* (19). B

This brings me to the question on which there has been a difference of opinion among the judges of the Court of Appeal, and on which I have felt, and still feel, great difficulty, namely, whether the evidence was such as would justify a jury in finding that the publication was such, and so made, that the court would not say after verdict for the plaintiff, that they thought it not sufficiently shown to be a libel. There can be no doubt that the defendants were not required to take cheques drawn on this bank on account of any debts due to them, or in any other way whatsoever, and had a right to refuse to do so. No reason was needed to justify such a refusal. Such a refusal could not be made without using words which, whether written or spoken, without sufficient occasion to give rise to a privilege, would be actionable if their tendency would be to cast a doubt on the credit of the bank. C I think, however, that there are so many reasons why a person may refuse to take on account the cheques drawn on a particular bank, that acting in the spirit of what LORD TENTERDEN said in *Goldstein v. Foss* (4) the court could not say that the letter, which in terms goes no farther than merely to state the fact, was libellous as tending to impute a doubt of the credit of the bank. No doubt some people might guess that the refusal was on that ground, but as BRETT, L.J., says, it is unreasonable that when there are a number of good interpretations, the only bad one should be seized on to give a defamatory sense to the document. D E

I do not think it libellous by itself to state the fact; but I quite agree that such a statement might be published in such a way and to such persons as to show that its natural tendency would be to convey an impression that the person refusing to take the cheques on that bank did doubt its credit, and then it would be libellous. Both THESIGER and CORRON, L.JJ., in this case intimate an opinion that any publication so made that it would come to persons who had no concern at all with the defendants' proceedings, but might possibly be interested, as customers of the bank, in considering whether the bank was in good credit, would have a tendency to injure the credit of the bank in the opinion of such persons. I have not been able quite to make up my mind on this, and prefer to point out that the question does not arise. I think if the letter had been sent to only one person, and that person was in the habit of sending many such cheques to the defendants, it could not be said to be libellous. It was sent to a great many persons who were in the habit of sending some, but very few, cheques to the defendants, and the inconvenience which was occasioned by having to keep such cheques till the Saturday was so slight that I cannot but view the conduct of the defendants with moral disapprobation; but unless some good legal reason can be suggested for holding what they did actionable, the judgment should be affirmed. F G H

One more point has to be considered. A publication calculated to convey an actionable imputation is, prima facie, a libel; the law, as it is technically said, implying malice, or, as I should prefer to say, the law being that the person who so publishes is responsible for the natural consequences of his act. But if the occasion is such that there was either a duty, though perhaps only of imperfect obligation, or a right to make the publication, it is said that the occasion rebuts the presumption of malice, but that malice may be proved—or I should prefer to say, that he is not answerable for it, so long as he is acting in compliance with that duty or exercising that right—and the burthen of proof is on those who allege that he was not so acting. In this case, if any customer of Messrs. Henty who had been in the habit of remitting such cheques to them and having them taken on account of his debts had had such cheques returned to him, that customer would have had good reason to complain that this was done. If, therefore, Messrs. Henty had I

- A resolved to take no such cheques in future, there was a moral obligation on them either to tell such a one that the cheques would not be taken in future, or when he brought them to take them, and warn him to bring no more; and the occasion was one which, I think, gave rise both to a duty to their customers and a right in themselves to give the warning, and the occasion was privileged. But I think there was evidence that they did not send the circular because they had resolved to
- B take no cheques, but resolved to take no cheques in order that they might send the circular. If that was found by a jury to be the fact, I think they could not shelter themselves from the consequences of publishing the letter, if it was a libel, by an occasion which they sought. I think, therefore, that the only question is whether there was here evidence from which such facts could be found as, in the opinion of the court, would satisfy the onus which lies on the plaintiffs to show that this publication had a libellous tendency; and as I am of opinion that there was not, I think that the judgment should be affirmed.
- C

- LORD WATSON.**—I am of opinion that the judgment of the Court of Appeal ought to be affirmed. I think it is quite possible that some of the people to whom the circular was sent might suppose that its language was intended to convey to
- D them a quiet hint that the affairs of the bank were not altogether in a satisfactory condition. That, however, is not the meaning of the words of the circular upon any possible construction of them; it is an inference drawn by the reader from the fact notified in the circular, which does not per se constitute a libel. If I were satisfied that an inference injurious to the credit of the bank would naturally and necessarily suggest itself to the mind of any person of average intelligence on
- E reading the circular, I should hold that it had a libellous tendency, although the language used is not in itself libellous. But besides the one injurious inference suggested by the appellants there are many other inferences of an innocent character, which naturally might, and probably would, suggest themselves to any reader of the circular who was not induced to put a malignant construction upon it by some cause such as is not proved to have existed in the case of any one of the
- F persons to whom it was sent. I am accordingly of opinion that, while the language of the circular is, in the sense which I have indicated, capable of suggesting the injurious imputation complained of, the appellants have failed to prove facts and circumstances leading to the conclusion that it must have been so understood by those who received it, or, in other words, have failed to show that it had a libellous tendency. As I have been unable, after carefully considering the authorities bearing
- G on the case, to differ from the law as stated by LORD BLACKBURN, it necessarily follows that, in my opinion, the judgment of the court below is right.

- LORD BRAMWELL.**—In this case the plaintiffs have stated as their cause of action a publication relating to them of the defendants to which they, the plaintiffs, have by innuendo attached a particular meaning, namely, that it imputed to them
- H insolvency in their trade or business. They have proceeded to trial, and have given no evidence in support of their innuendo except such, if any, as is afforded by the publication itself. The Court of Appeal have dealt with the case as if there had been no innuendo, and the case had come before them on demurrer. They have held that the publication is no libel, and have given judgment for the defendants. I have no doubt that it was competent for the court so to deal with
- I the case. Whether they have come to a right conclusion in holding that the publication was no libel may be a question, but that they had jurisdiction and power so to decide there cannot be a doubt. They could not indeed hold that it was a libel, unless expressly referred to them by demurrer; but it is clear that they could hold that it was not a libel, either on demurrer, or formerly on motion in arrest of judgment, or on such a proceeding as that which brought the question before them: *Hearne v. Stowell* (5); *Goldstein v. Foss* (4).

But though they had this power or jurisdiction, it is still for your Lordships to say whether they came to a right conclusion. The alleged libel is a notice sent by

the defendants to their customers that they will not receive in payment cheques drawn on any branches of the plaintiffs' bank. I omit all mention of the innuendo, because no evidence was given in support of it beyond proof of the notice itself. But it is contended for the plaintiffs that the notice proves or shows that the defendants charged that the plaintiffs were insolvent, not to be relied on to meet the cheques drawn on them, and not to be trusted to cash the cheques drawn on them by their customers. No doubt, if it means this, or if this is the inference reasonably to be drawn from it, it is libellous, because it is admitted on all hands that the common expression "meaning" is incorrect and inadequate, for the question is not what the writer of any alleged libel means, but what is the meaning of the words he has used; and more than that, for though the words themselves may be harmless, if a libellous inference may be drawn from them as a natural or necessary consequence they are libellous.

I wish to avoid a definition or the laying down of a rule as much as possible, but I think that what I have said is correct, and that the question in this case is whether such inference is to be drawn here, for the words in themselves are perfectly harmless, they contain nothing of or about the plaintiffs, their character or conduct. All that the words say is that the defendants will not take in payment cheques on them. As to insolvency, the words infer insolvency or they do not. If not there is no libel. If they infer insolvency they infer that and nothing else, or they infer two or more of several things of which insolvency is one—that is to say, that the defendants refuse the cheques for some reason or reasons, of which insolvency may or may not be one. It seems to me impossible to say that they infer insolvency and insolvency only, and that that, and nothing else, was the cause why the defendants refuse to take in payment cheques on the plaintiffs' branches.

If so, two questions remain for consideration: Is insolvency one matter which may be inferred? If it, but many others, may be, is the publication libellous? In the first place, to my mind no one ought to infer from the words an imputation or charge of insolvency. I say this with hesitation, because I think that no one else has said so yet, but I must say that it is strongly confirmed by what counsel for the respondents pointed out. No witness is called who received the circular and acted upon it as imputing insolvency. I do not say that any witness could have been properly asked what he inferred from the circular, but in reference to the damages he might have been asked if he drew his cash from the plaintiffs, and did it because of the circular. Further it is to be remembered that it is admitted that the defendants did not mean to impute insolvency. Fortified by these considerations, I cannot but think that this circular neither charged nor gave rise to the inference of insolvency, and that, therefore, the appeal should be dismissed.

I have now dealt with two out of the three meanings or inferences which may be found in, or drawn from, the circular. I will suppose that I am wrong in thinking that no inference of insolvency can be drawn from it, and will now deal with the third, viz., that the inference to be drawn from the circular was that the defendants, for some reason or reasons, of which the insolvency of the plaintiffs might be one, would not take in payment cheques on the plaintiffs' branches. Is that actionable? I think not. I cannot think that an action lies in such a case. I think the defamer is he who of many inferences chooses a defamatory one. He should inquire what the truth is before judging. No doubt he often will not; but what then? The risk of his not doing so is one which we must run if we live among our fellow-creatures. I do not see how the world's affairs could be conducted if it were not so. Take this case for an example. The defendants had a perfect right to do the thing that they did, namely, refuse to take cheques on the plaintiffs. They had a right to tell their customers. If when each customer came who brought a cheque on the plaintiffs they had refused to take it, they would have done and said what they have done and said now, with this difference, that their customers would have had a right to complain that they were not warned beforehand. But if this circular is a libel, they would have uttered an actionable slander, for an action will lie for words imputing insolvency to a trader. Their

A refusal of the cheque and giving their reasons would be saying that, as it is, they have written.

What then were they to do? If they had said they did not mean to impute insolvency, it would have been argued that it showed that was the natural inference from the letter. If they had said that they had had a difference with the plaintiffs, the same remark might be made, or that that was not the reason. Besides, they were under no obligation to give a reason. Or it might be argued that, even if that were the reason, the legitimate inference, or an inference, was that the plaintiffs conducted their business in a bad or inconvenient way. In short, it seems to me that the defendants had a right to do and say what they did and said; and if people will draw from their doings a possible, for I am now assuming it possible, inference of insolvency in the plaintiffs, it is no fault of the defendants. I have said that the defendants had a right to say and do what they did. By that I did not mean that they had any especial right. All the Queen's subjects have a right to refuse payment by cheques on the plaintiffs' bank, and to say so: or, if I am wrong in giving this right to all the Queen's subjects, at least the defendants had it. I say then that the words are harmless in themselves, and that they do not import or justify the inference of the plaintiffs' insolvency. If I am wrong in this, I say that it is only one of several things which they import, or of which they justify the inference; that no action lies in such a case; that if it would lie against anyone not interested to do and say what the defendants did and said, it does not lie against them who were so interested, and did and said no more than they had a right to do.

In this way the question of privilege arises in a sense. If they had such right it seems to me that their motive is immaterial, and that they might do what they did though out of anger or malice. If I am wrong in the above, and if the inference, or an inference, to be drawn from the words used is the imputation of insolvency to the plaintiffs, and if the action is otherwise maintainable, I think there is no defence on the ground of privilege. I think that follows from the defendants' own contention. They say that they did not believe the plaintiffs to be insolvent, and had no intention to say so, and that if that is the inference to be drawn from their language, their language is wrong. But they have no privilege to use wrong language; they have only a right to say what they believe. It may be that by mistake they have said what they do not believe, but for that mistake they are liable. I am of opinion, however, that for the above reasons they are not liable, and that the plaintiffs have no cause of action, and that the judgment should be affirmed.

G *Appeal dismissed.*

Solicitors: *Nash & Field for Stuckey, Son & Jennings, Brighton; Robinson, Preston & Stow for Roper & Freeland, Chichester.*

[*Reported by C. E. MALDEN, ESQ., Barrister-at-Law.*]

FOAKES v. BEER

[HOUSE OF LORDS (The Earl of Selborne, L.C., Lord Blackburn, Lord Watson and Lord FitzGerald), March 31, April 1, May 16, 1884]

[Reported 9 App. Cas. 605; 54 L.J.Q.B. 130; 51 L.T. 833;
33 W.R. 233]

Accord and Satisfaction—Judgment debt—Payment of smaller sum under agreement between parties—Right of judgment creditor to interest.

The payment, in accordance with an agreement not under seal, of a series of instalments amounting to a total sum less than the amount of a debt does not, in the absence of consideration for the relinquishment of the balance, constitute a satisfaction of the debt.

By s. 17 of the Judgments Act, 1838: "Every judgment debt shall carry interest at the rate of four pounds per centum per annum from the time of entering up the judgment . . . until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment."

The respondent having brought an action against the appellant and obtained judgment for a specific sum, a parol agreement in writing was made between the parties, by which, in consideration of the appellant paying part of the sum on the signing of the agreement and the remainder by equal half-yearly instalments, the respondent undertook not to take any proceedings on the judgment. The appellant paid all the instalments, and after payment of the last the respondent made a claim for interest from the date of the judgment.

Held: under s. 17 of the Act of 1838 interest on the amount of the judgment debt formed part of the debt owed by the appellant to the respondent; the amount paid under the agreement was, therefore, less than the judgment debt, and, in the absence of any consideration given by the appellant to the respondent for relinquishing her claim to interest, the agreement did not prevent the respondent from claiming the interest.

Notes. Distinguished: *Ibberson v. Neck* (1886), 2 T.L.R. 427. Considered: *Bidder v. Bridges* (1887), 37 Ch.D. 406. Applied: *Underwood v. Underwood*, [1894] P. 204; *Vanbergen v. St. Edmunds Properties, Ltd.*, [1933] All E.R.Rep. 488. Referred to: *Hookham v. Mayle* (1906), 22 T.L.R. 241; *Re A Debtor, Ex parte London and County Discount Co.* (1909), 100 L.T. 380; *Hirachand Punamchand v. Temple*, [1911] 2 K.B. 330; *Pennsylvania Co. for Insurances on Lives and Granting Annuities v. Mumford*, [1920] 1 K.B. 314; *Central London Property Trust, Ltd. v. High Trees House, Ltd.*, [1947] K.B. 130.

As to accord and satisfaction, see 8 HALSBURY'S LAWS (3rd Edn.) 206-209; and for cases see 12 DIGEST (Repl.) 496 et seq.

Cases referred to:

- (1) *Pinnel's Case* (1602), 5 Co. Rep. 117a; 77 E.R. 237; sub nom. *Penny v. Core*, Moore, K.B. 677; 12 Digest (Repl.) 516, 3863.
- (2) *Cumber v. Wane* (1721), 1 Stra. 426; 11 Mod. Rep. 342; 93 E.R. 613; 12 Digest (Repl.) 516, 3865.
- (3) *Sibree v. Tripp* (1846), 15 M. & W. 23; 15 L.J.Ex. 318; 153 E.R. 745; 12 Digest (Repl.) 500, 3752.
- (4) *Curlewis v. Clark* (1849), 3 Exch. 375; 6 Dow. & L. 455; 18 L.J.Ex. 144; 154 E.R. 889; 12 Digest (Repl.) 528, 3985.
- (5) *Goddard v. O'Brien* (1882), 9 Q.B.D. 37; 46 L.T. 306; 30 W.R. 549; De Colyar's County Court Cases, 110, D.C.; 12 Digest (Repl.) 528, 3986.
- (6) *Fitch v. Sutton* (1804), 5 East, 230; 102 E.R. 1058; sub. nom. *Fetil v. Sutton*, 1 Smith, K.B. 415; 12 Digest (Repl.) 516, 3867.
- (7) *Down v. Hatcher* (1839), 10 Ad. & El. 121; 2 Per. & Dav. 292; 8 L.J.Q.B. 190; 3 Jur. 651; 113 E.R. 47; 12 Digest (Repl.) 517, 3873.

- A (8) *Cooper v. Parker* (1855), 15 C.B. 822; 24 L.J.C.P. 68; 1 Jur.N.S. 281; 3 W.R. 245.
- (9) *Young v. Rudd* (1695), 1 Ld. Raym. 60; Carth. 347; Comb. 346; 5 Mod. Rep. 86; 12 Mod. Rep. 85; 2 Salk. 627; 91 E.R. 936; 12 Digest (Repl.) 537, 4068.
- B (10) *Thomas v. Heathorn* (1824), 2 B. & C. 477; 3 Dow. & Ry.K.B. 647; 107 E.R. 461; 12 Digest (Repl.) 516, 3869.
- (11) *Adams v. Tapling* (1705), 4 Mod. 88.
- (12) *Heathcote v. Crookshanks* (1787), 2 Term Rep. 24; 100 E.R. 14; 5 Digest (Repl.) 1217, 9784.
- (13) *Norman v. Thompson* (1850), 4 Exch. 755; 19 L.J.Ex. 193; 14 L.T.O.S. 353; 154 E.R. 1420; 5 Digest (Repl.) 1213, 9752.
- C (14) *Hardcastle v. Howard* (1786), cited in 2 Term Rep. at p. 28.
- (15) *Steinman v. Magnus* (1809), 11 East. 390; 2 Camp. 124; 103 E.R. 1055; 5 Digest (Repl.) 1217, 9779.
- (16) *Thorpe v. Thorpe* (1701), 1 Lut. 245; 1 Com. 98; Holt, K.B. 28; 1 Ld. Raym. 235; 12 Mod. Rep. 455; 1 Salk. 171; 125 E.R. 128; 12 Digest (Repl.) 571, 4356.
- D (17) *Drogheda Corpn. v. Fairtlough* (1858), 8 I.C.L.R. 98; 10 Ir. Jur. 318; 12 Digest (Repl.) 520, *1866.

Also referred to in argument:

- Couldery v. Bartrum* (1881), 19 Ch.D. 394; 51 L.J.Ch. 265; 45 L.T. 689; 30 W.R. 141, C.A.; 5 Digest (Repl.) 1203, 9679.
- E *Reynolds v. Pinhowe* (1596), Cro. Eliz. 429; 78 E.R. 669; 12 Digest (Repl.) 520, 3902.
- Wilkinson v. Byers* (1834), 1 Ad. & El. 106; 3 Nev. & M.K.B. 853; 3 L.J.K.B. 144; 110 E.R. 1148; 12 Digest (Repl.) 520, 3907.
- Dixon v. Adams* (1597), Cro. Eliz. 538; Gouldsb. 156; 78 E.R. 785; sub nom. *Adams v. Dixon*, Moore, K.B. 710, Ex. Ch.; 12 Digest (Repl.) 237, 1779.
- F *Richards and Bartlets Case* (1584), 1 Leon. 19; 74 E.R. 17; 12 Digest (Repl.) 516, 3861.
- Goring v. Goring* (1602), Yelv. 11; 80 E.R. 8; 12 Digest (Repl.) 518, 3892.
- Geang v. Swaine* (1687), 1 Lut. 464; 125 E.R. 244; 7 Digest (Repl.) 233, 714.
- Evans v. Power* (1847), 1 Exch. 601; 11 Jur. 1043; 154 E.R. 255; 12 Digest (Repl.) 500, 3753.
- G *McManus v. Bark* (1870), L.R. 5 Exch. 65; 39 L.J.Ex. 65; 21 L.T. 676; 12 Digest (Repl.) 517, 3885.
- Stilk v. Myrick* (1809), 2 Camp. 317; 6 Esp. 129; 170 E.R. 1168, N.P.; 41 Digest 237, 778.
- Harris v. Watson* (1791), Peake, 102; 170 E.R. 94, N.P.; 41 Digest 237, 777.
- H *Newman v. Walters* (1804), 3 Bos. & P. 612; 127 E.R. 330; 41 Digest 839, 7006.
- Chutterbuck v. Coffin* (1842), 3 Man. & G. 842; 1 Dowl.N.S. 479; Car. & M. 273; 4 Scott, N.R. 509; 11 L.J.C.P. 65; 6 Jur. 131; 133 E.R. 1379; 41 Digest 238, 784.
- Harris v. Carter* (1854), 3 E. & B. 559; 2 C.L.R. 1582; 23 L.J.Q.B. 295; 23 L.T.O.S. 66; 18 Jur. 1014; 2 W.R. 409; 118 E.R. 1251; 41 Digest 237, 779.
- I *Lovelace v. Cocket* (1611), 1 Brownl. 47.
- Hawes v. Birch* (1614), 1 Brownl. 71; 123 E.R. 672; 12 Digest (Repl.) 505, 3778.
- Danford v. McAnulty* (1883), 8 App. Cas. 456; 52 L.J.Q.B. 652; 49 L.T. 207; 31 W.R. 817, H.L.; 16 Digest (Repl.) 213, 1031.
- Cooper v. Parker* (1855), 15 C.B. 822; 24 L.J.C.P. 68; 1 Jur.N.S. 281; 3 W.R. 245; 3 C.L.R. 710; 139 E.R. 650, Ex. Ch.; 12 Digest (Repl.) 519, 3896.

Appeal by the defendant in the action from a decision of the Court of Appeal, reported 11 Q.B.D. 221, allowing an appeal from an order of the Queen's Bench Division and directing that judgment be entered for the plaintiff (the present respondent) for £302 19s. 6d. A

On Aug. 11, 1875, the respondent recovered judgment against the appellant in the Court of Exchequer for the sum of £2,077 17s. 2d. for debt and £13 1s. 10d. for costs in an action wherein the respondent was plaintiff and the appellant defendant, and judgment was entered for the sum of £2,090 19s. On Dec. 21, 1876, an agreement in writing was entered into between the respondent and the appellant, as follows: B

"Memorandum of agreement made this twenty-first day of December, 1876, between Julia Beer, of Douglas Villas, High Road, Lee, in the county of Kent, widow, of the one part, and John Weston Foakes, of No. 10, South Street, Grosvenor Square, in the county of Middlesex, M.D., of the other part. Whereas the said John Weston Foakes is indebted to the said Julia Beer and she has obtained a judgment in Her Majesty's High Court of Justice, Exchequer Division, for the sum of £2,090 19s. And whereas the said John Weston Foakes has requested the said Julia Beer to give him time in which to pay such judgment, which she has agreed to do on the following conditions. Now this agreement witnesseth that, in consideration of the said John Weston Foakes paying to the said Julia Beer on the signing of this agreement the sum of £500, the receipt whereof she doth hereby acknowledge, in part satisfaction of the said judgment debt of £2,090 19s., and on condition of his paying to her or her executors, administrators, assigns, or nominee, the sum of £150 on the first day of July and the first day of January or within one calendar month after each of the said days respectively in every year until the whole of the said sum of £2,090 19s. shall have been fully paid and satisfied, the first of such payments to be made on the first day of July next, then she the said Julia Beer hereby undertakes and agrees that she, her executors, administrators, or assigns, will not take any proceedings whatever on the said judgment. As witness the hands of the said parties.—John W. Foakes. Julia Beer." C D E F

At the time of entering into the agreement the appellant paid to the respondent the sum of £500, and subsequently paid various other sums, which amounted to the sum of £2,090 19s.

On July 1, 1882, the respondent applied to the master at chambers, under R.S.C., Ord. 42, r. 19, for leave to issue execution against the appellant for a balance alleged by the respondent to be still due for interest in respect of the judgment debt of £2,090 19s., which the appellant refused to pay [R.S.C., Ord. 42, r. 19, was annulled by R.S.C. (No. 3), 1926]. Upon the hearing of the application, it was ordered by the master that this issue be tried between the respondent and the appellant: "Whether any and what amount is now due upon the said judgment, signed on Aug. 11, 1875, in the late Court of Exchequer of Pleas, for the sum of £2,090 19s." The issue came on for trial before CAVE, J., and a common jury, in Middlesex, on Feb. 22, 1883. G H

At the trial Mr. Mackreth, the respondent's solicitor, was called as a witness for the respondent, and he produced a certified copy of the judgment of Aug. 11, 1875, and an account in writing showing the balance alleged to be due from the appellant to the respondent. The certified copy of the judgment and the account were put in evidence on behalf of the respondent. The agreement of Dec. 21, 1876, was put in evidence, and it was admitted that all the instalments mentioned in the agreement had been paid up to January, 1882, inclusive. It was also admitted that after May 25, 1882, and before July 1, 1882, the appellant paid to the respondent a further sum of £90 19s. The learned judge directed the jury to find that the appellant had paid all the sums which by the said agreement of Dec. 21, 1876, he undertook to pay and within the times therein specified, and I

A stated that he was of opinion that, whether the judgment was satisfied or not, the respondent was not entitled to issue execution on the judgment against the appellant. On Mar. 2, 1883, counsel for the respondent moved for and obtained a rule nisi for a new trial of the said issue. On May 2, 1883, the rule came on for argument in the Queen's Bench Division, before WATKIN WILLIAMS and MATHEW, JJ., who discharged the same. The respondent gave notice of appeal to the Court of Appeal, and on June 23, 1883, the appeal came on for argument before SIR BALIOL BRETT, M.R., and LINDLEY and FRY, L.JJ., when the order now appealed from was made.

Holl, Q.C., and *Winch* for the appellant.

Bompas, Q.C., and *A. B. P. Gaskell* for the respondent.

C Their Lordships took time for consideration.

May 16, 1884. The following opinions were read.

THE EARL OF SELBORNE, L.C.—Upon the construction of the agreement of Dec. 21, 1876, I cannot differ from the conclusion in which both the courts below were agreed. If the operative part could properly be controlled by the recitals, I think there would be much reason to say that the only thing contemplated by the recitals was giving time for payment, without any relinquishment, on the part of the judgment creditor, of any portion of the amount recoverable, whether for principal or interest under the judgment. But the agreement of the judgment creditor which follows the recitals is, that she "will not take any proceedings whatever on the judgment," if a certain condition is fulfilled.

E What is that condition? Payment of the sum of £150 in every half year, "until the whole of the said sum of £2,090 19s.," the aggregate amount of the principal debt and costs, for which judgment had been entered, "shall have been fully paid and satisfied." A particular "sum" is here mentioned, which does not include the interest then due or future interest. Whatever was meant to be payable under this agreement was clearly to be payable by half-yearly instalments

F of £150 each; any other construction must necessarily make the conditional promise nugatory. But to say that the half-yearly payments were to continue till the whole sum of £2,090 19s. "and interest thereon" should have been fully paid and satisfied, would be to introduce very important words into the agreement which are not there, and of which I cannot say that they are necessarily implied. Although, therefore, I may, as indeed I do, very much doubt whether

G the effect of the agreement as a conditional waiver of the interest to which by law she was entitled under the judgment was really present to the mind of the judgment creditor, still I cannot deny that it might have that effect, if capable of being legally enforced.

But the question remains whether the agreement is capable of being legally enforced. Not being under seal, it cannot be legally enforced against the respondent unless she received consideration for it from the appellant, or unless,

H though without consideration, it operates by way of accord and satisfaction, so as to extinguish the claim for interest. What is the consideration? On the face of the agreement none is expressed except a present payment of £500 on account and in part of the larger debt then due and payable by law under the judgment. The appellant did not contract to pay the future instalments of £150 each at

I the times therein mentioned; much less did he give any new security in the shape of negotiable paper, or in any other form. The promise *de futuro* was only that of the respondent, that, if the half-yearly payments of £150 each were regularly paid, she would "take no proceedings whatever on the judgment." No doubt, if the appellant had been under no antecedent obligation to pay the whole debt, his fulfilment of the condition might have imported some consideration on his part for that promise. But he was under that antecedent obligation; and payment at those deferred dates, by the forbearance and indulgence of the creditor, of the residue of the principal debt and costs could not, in my opinion,

be a consideration for the relinquishment of interest and discharge of the judgment unless the payment of the £500 at the time of signing the agreement was such a consideration. A

As to accord and satisfaction, in point of fact there could be no complete satisfaction so long as any future instalment remained payable; and I do not see how any new payments on account could operate in law as a satisfaction ad interim conditionally upon other payments being afterwards duly made, unless there was a consideration sufficient to support the agreement while still unexecuted. Nor was anything in fact done by the respondent in this case, on the receipt of the last payment, which could be tantamount to an acquittance, if the agreement did not previously bind her. The question, therefore, is nakedly raised by this appeal whether your Lordships are now prepared, not only to overrule as contrary to law the doctrine stated by SIR EDWARD COKE to have been laid down by all the judges of the Common Pleas in *Pinnel's Case* (1) (5 Co. Rep. 117 a) in 1602, and repeated in his note to LITTLETON, s. 344 (Co. Litt. 212 b), but to treat a prospective agreement, not under seal, for satisfaction of a debt by a series of payments on account to a total amount less than the whole debt, as binding in law, provided those payments are regularly made, the case not being one of a composition with a common debtor agreed to inter se by several creditors. I prefer so to state the question instead of treating it, as it was put at the Bar, as depending on the authority of *Cumber v. Wane* (2), decided in 1721. B C D

It may well be that distinctions, which in later cases have been held sufficient to exclude the application of that doctrine, existed and were improperly disregarded in *Cumber v. Wane* (2), and yet that the doctrine itself may be law, rightly recognised in *Cumber v. Wane* (2), and not really contradicted by any later authorities; and this appears to me to be the true state of the case. The doctrine itself, as laid down by SIR EDWARD COKE, may have been criticised as questionable in principle by some persons whose opinions are entitled to respect, but it has never been judicially overruled. On the contrary, I think it has always, since the 16th century, been accepted as law. If so, I cannot think that your Lordships would do right if you were now to reverse as erroneous a judgment of the Court of Appeal proceeding upon a doctrine which has been accepted as part of the law of England for 280 years. E F

The doctrine, as stated in *Pinnel's Case* (1) is

"that payment of a lesser sum on the day in satisfaction of a greater cannot be any satisfaction for the whole, because it appears to the judges that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum." G

As stated in COKE ON LITTLETON, 212 b, it is:

"where the condition is for payment of £20, the obligor or feoffor cannot at the time appointed pay a lesser sum in satisfaction of the whole, because it is apparent that a lesser sum of money cannot be a satisfaction of a greater." H

He added, what is beyond controversy, that an acquittance under seal, in full satisfaction of the whole, would, under like circumstances, be valid and binding. The distinction between the effect of a deed under seal and that of an agreement by parol, or by writing not under seal, may seem arbitrary, but is established in our law; nor is it really unreasonable or practically inconvenient that the law should require particular solemnities to give to a gratuitous contract the force of a binding obligation. If the question be, as in the actual state of the law I think it is, whether consideration is or is not given in a case of this kind by the debtor who pays down part of the debt presently due from him, for a promise by the creditor to relinquish, after certain further payments on account, the residue of the debt, I cannot say that I think consideration is given, in the sense in which I have always understood that word as used in our law. It might be, and indeed I think it would be, an improvement in our law, if a release or acquittance of the whole debt on payment of any sum which the creditor might be content to I

- A receive by way of accord and satisfaction, though less than the whole, were held to be generally binding, though not under seal; nor should I be unwilling to see equal force given to a prospective agreement like the present, in writing, though not under seal; but I think it impossible, without refinements which practically alter the sense of the word, to treat such a release or acquittance as supported by any new consideration proceeding from the debtor.
- B All the authorities subsequent to *Cumber v. Wane* (2) which were relied upon by the appellant, such as *Sibree v. Tripp* (3), *Curlewis v. Clark* (4), and *Goddard v. O'Brien* (5), have proceeded upon the distinction that, by giving negotiable paper or otherwise, there had been some new consideration for a new agreement, distinct from mere money payments in or towards discharge of the original liability. I think it unnecessary to go through those cases, or to examine the particular grounds upon which each of them was decided. There are no such facts in the case now before your Lordships. What is called "any benefit, or even any legal possibility of benefit," in MR. SMITH's notes to *Cumber v. Wane* (2) (1 SMITH, L.C., 8th Edn., 366) is not, as I conceive, that sort of benefit which a creditor may derive from getting payment of part of the money due to him from a debtor who might otherwise keep him at arm's length, or possibly become insolvent, but is some independent benefit, actual or contingent, of a kind which in law might be a good and valuable consideration for any other sort of agreement not under seal. My conclusion is that the order appealed from should be affirmed and the appeal dismissed with costs and I so move your Lordships.

- LORD BLACKBURN.**—The first question raised is what was the true construction of the memorandum of agreement made on Dec. 21, 1876. What was it that the parties by that writing agreed to? The appellant contends that they meant that, on payment down of £500, and payment within a month after July 1, and Jan. 1 in each ensuing year of £150 until the sum of £2,090 19s. was paid, the judgment for that sum and interest should be satisfied, for an agreement to take no proceedings on the judgment is equivalent to treating it as satisfied. This construction of the memorandum requires that after the tenth payment of £150 there should be a further payment of £90 19s. made within the next six months. This is the construction which all the courts below have put upon the memorandum. The respondent contends that the true construction is that time was to be given on those conditions for the five years, the judgment being, in default of any one payment, enforceable for whatever was still unpaid with interest from the date the judgment was signed, but that the interest was not intended to be forgiven at all.
- G If this is the true construction of the agreement, the judgment appealed against is right and should be affirmed, whether the reason on which the Court of Appeal founded its judgment was right or not. I am of opinion, however, that the courts below, who on this point were unanimous, put the true construction on the memorandum. I do not think the question free from difficulty. It would have
- H been easy to have expressed in unmistakable words that, on payment down of £500, and punctual payment at the rate of £300 a year till £2,090 19s. was paid, the judgment should not be enforced either for principal or interest; or language might have been used which should equally clearly have expressed that, though time was to be given, interest was to be paid in addition to the instalments. The words actually used are such that I think it is quite possible that the two parties
- I put a different construction on them at the time; but I think the words "till the said sum of £2,090 19s. shall have been fully paid and satisfied" cannot be construed as meaning "till that sum, with interest from the day judgment was signed, shall have been fully paid and satisfied;" nor can the promise "not to take any proceedings whatever on the judgment" be cut down to meaning any proceedings except those necessary to enforce payment of interest.

I think, therefore, that it is necessary to consider the ground on which the Court of Appeal based their judgment, and to say whether the agreement can be enforced. I construe it as accepting and taking £500 in satisfaction of the whole

£2,090 19s., subject to the condition that, unless the balance of the principal debt was paid by the instalments, the whole might be enforced with interest. If instead of £500 in money it had been a horse valued at £500, or a promissory note for £500, the authorities are that it would have been a good satisfaction, but it is said to be otherwise as it was money. This is a question, I think, of difficulty. LORD COKE says (Co. Litt. 212 b):

"Where the condition is for payment of £20, the obligor or feoffor cannot at the time appointed pay a lesser sum in satisfaction of the whole, because it is apparent that a lesser sum of money cannot be a satisfaction of a greater. . . . If the obligor or feoffor pay a lesser sum, either before the day or at another place than is limited by the conditions, and the obligee or feoffee receiveth it, this is a good satisfaction."

For this he cites *Pinnel's Case* (1). That was an action on a bond for £16, conditional for the payment of £8 10s. on Nov. 11, 1600. Plea, that defendant, at plaintiff's request, before the said day, to wit, on Oct. 1, paid to the plaintiff £5 2s. 2d., which the plaintiff accepted in full satisfaction of the £8 10s. The plaintiff had judgment for the insufficient pleading. But, though this was so, LORD COKE reports that it was resolved by the whole Court of Common Pleas,

"that payment of a lesser sum on the day in satisfaction of a greater cannot be any satisfaction for the whole, because it appears to the judges that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum; but the gift of a horse, a hawk, or a robe, etc., in satisfaction is good, for it shall be intended that a horse, hawk, or robe might be more beneficial to the plaintiff than the money in respect of some circumstance, or otherwise the plaintiff would not have accepted of it in satisfaction. But when the whole sum is due, by no intendment the acceptance of a parcel can be a satisfaction to the plaintiff; but in the case at Bar it was resolved that the payment and acceptance of parcel before the day in satisfaction of the whole would be a good satisfaction in regard of circumstance of time; for peradventure parcel of it before the day would be more beneficial to him than the whole at the day, and the value of the satisfaction is not material; so if I am bound in £20 to pay you £10 at Westminster, and you request me to pay £5 at the day at York, and you will accept it in full satisfaction for the whole £10, it is a good satisfaction for the whole, for the expenses to pay it at York is sufficient satisfaction."

There are two things here resolved. First, that where a matter paid and accepted in satisfaction of a debt certain might by any possibility be more beneficial to the creditor than his debt, the court will not inquire into the adequacy of the consideration. If the creditor, without any fraud, accepted it in satisfaction when it was not a sufficient satisfaction, it was his own fault; and that payment before the day might be more beneficial, and consequently that the plea was in substance good; and this must have been decided in the case. There is a second point stated to have been resolved, namely,

"that payment of a lesser sum on the day cannot be any satisfaction of the whole, because it appears to the judges that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum."

This was certainly not necessary for the decision of the case; but, though the resolution of the Court of Common Pleas was only a dictum, it seems to me clear that LORD COKE deliberately adopted the dictum, and the great weight of his authority makes it necessary to be cautious before saying that what he deliberately adopted as law was a mistake, and though I cannot find that in any subsequent case this dictum has been made the ground of the decision, except in *Fitch v. Sutton* (6), as to which I shall make some remarks later, and in *Down v. Hatcher* (7), as to which PARKE, B., in *Cooper v. Parker* (8) said, "Whenever the question may arise

A as to whether *Down v. Hatcher* (7) is good law, I should have a great deal to say against it," yet there certainly are cases in which great judges have treated the dictum in *Pinnel's Case* (1) as good law.

For instance, in *Sibree v. Tripp* (3), PARKE, B., says (15 M. & W. at p. 33):

B "It is clear that if the claim be a liquidated and ascertained sum, payment of part cannot be satisfaction of the whole, although it may, under certain circumstances, be evidence of a gift of the remainder."

ALDERSON, B., in the same case says (*ibid.* at pp. 37, 38):

C "It is undoubtedly true that payment of a portion of a liquidated demand, in the same manner as the whole liquidated demand ought to be paid, is payment only in part, because it is not one bargain but two, viz., payment of part, and an agreement without consideration to give up the residue. The courts might very well have held the contrary, and have left the matter to the agreement of the parties, but undoubtedly the law is so settled."

D After such strong expressions of opinion, I doubt much whether any judge sitting in a court of first instance would be justified in treating the question as open. But, as this has very seldom, if at all, been the ground of the decision, even in a court of first instance, and certainly never been the ground of a decision in the Court of Exchequer Chamber, still less in this House, I did think it open to your Lordships' House to re-consider this question. Notwithstanding the very high authority of LORD COKE, I think it is not the fact that to accept prompt payment of a part only of a liquidated demand can never be more beneficial than to insist on payment of the whole. And if it be not the fact, it cannot be apparent to the judges.

E I will first examine the authorities. If a defendant pleaded the general issue the plaintiff could join issue at once, and, if the case was not defended, get his verdict at the next assizes; but by pleading a special plea the plaintiff was obliged to reply, and the defendant often caused the plaintiff, merely by the delay occasioned by replying, to lose an assize. If the application was one to which he could demur he made this sure. Strangely enough it seems long to have been thought that, if the defendant kept within reasonable bounds, neither he nor his lawyers were to blame in getting time in this way, by a sham plea that a chattel was given and accepted in satisfaction of the debt. The recognised forms were giving and accepting in satisfaction a beaver hat (*Young v. Rudd* (9)) or a pipe of wine (CHITTY ON PLEADINGS (7th edn.), vol. 3, p. 92). All this is now antiquated. But while it continued to be the practice, pleas founded on the first part of the resolution in *Pinnel's Case* (1) were very common, and that law was perfectly trite. No one supposed for a moment that a beaver hat was really given and accepted, but everyone knew that the law was that, if it was really given and accepted, it was a good satisfaction. But special pleas founded on the other resolution in *Pinnel's Case* (1), on what I have ventured to call the dictum, were certainly not common.

II I doubt whether a real defence of this sort was ever specially pleaded. When there really was a question whether a debt was satisfied by payment of a smaller sum the defendant pleaded the general issue, and, if it was proved to the satisfaction of the jury that a smaller sum had been paid and accepted in satisfaction of a greater, if objection was raised the jury might perhaps, as suggested by HOLROYD, J., in *Thomas v. Heathorn* (10), find that the circumstances were such that the legal effect was to be as if the whole was paid down, and a portion thrown back as a god's-penny. This, however, seems to me to be an unsatisfactory and artificial way of avoiding the effect of the dictum, and it could not be applied to such an agreement as that now before this House. For whatever reason it was, I know of no case in which the question was raised whether a payment of a lesser sum could be satisfaction of a liquidated demand, from *Pinnel's Case* (1) down to *Cumber v. Wane* (2) in a period of 119 years.

I In *Adams v. Tapling* (11), where the plea was bad for many other reasons, it is reported to have been said by the court that,

"in covenant, where the damages are uncertain, and to be recovered, as in this case, a lesser thing may be done in satisfaction, and there accord and satisfaction is a good plea."

No doubt this is one of the cases which PARKE, B., would have cited in support of his opinion that *Down v. Hatcher* (7) was not good law. The court are said to have gone on to recognise the dictum in *Pinnel's Case* (1), or at least not to dissent from it, but it was not the ground of their decision. In every other reported case which I have seen the question arose on a demurrer to a replication to what was obviously a sham or dilatory plea.

Some doubt has been made as to what the pleadings in *Cumber v. Wane* (2) really were. I have obtained the record [Queen's Bench (Plea side) Plea Roll, 5 Geo. 1, Trinity, ro. 173]. The plea is that after the promises aforesaid, and before the issuing of the writ, it was agreed between the said George and Edward Cumber that he, the said George,

"daret eidem Edwardo Cumber quamdā notam in script vocatam 'a promissory note' manu propria ipsius Georgii subscript pr. solucon eidem Edwardo Cumber vel ordini quique librarum,"

fourteen days after date, in full satisfaction and exoneration of the premises and promises, which said note in writing the said George then gave to the said Edward Cumber, and the said Edward Cumber then and there received from the said George the said note in full satisfaction and discharge of the premises and promises. The replication is that

"the said George did not give to him Edward any note in writing called a promissory note with the hand of him George subscribed for the payment to him Edward or his order of £5 fourteen days after date in full satisfaction and discharge of the premises and promises."

To this there is a demurrer and judgment in the Common Pleas for the plaintiff "that the replication was good in law." The reporter, oddly enough, says (1 Stra. 426) that there was "an immaterial replication." The effect of the replication is to put in issue the substance of the defence, namely the giving in satisfaction (*Young v. Rudd* (9)), and certainly that was not immaterial. But for some reason, I do not stop to inquire what, PRATT, C.J., prefers to base the judgment, affirming that of the Common Pleas, on the supposed badness of the plea rather than on the sufficiency of the replication. It is impossible to doubt that the note, which it is averred in the plea was given in satisfaction, was a negotiable note; and, therefore, this case is in direct conflict with *Sibree v. Tripp* (3).

Two cases require to be carefully considered. The first is *Heathcote v. Crookshanks* (12). The plea there pleaded would, I think, now be held perfectly good: see *Norman v. Thompson* (13), but BULLER, J., seems to have thought otherwise. He says (2 Term Rep. at p. 28):

"Thirdly it was said that all the creditors were bound by this agreement to forbear, but that is not stated by the plea. It is only alleged that they agreed to take a certain proportion, but that is a *nudum pactum* unless they had afterwards accepted it. In the case in which *Cumber v. Wane* (2) was denied to be law (*Hardcastle v. Howard* (14)) the party actually accepted. But, as the plaintiff in the present case refused to take less than the whole demand, the plea is clearly bad."

That decision goes entirely on the ground that accord without satisfaction is not a good plea. I do not think it can be fairly said that BULLER, J., meant, by saying "that is a *nudum pactum* unless they had afterwards accepted it," to express an opinion that, if the dividend had been accepted, it would have been a good satisfaction. But he certainly expressed no opinion the other way. In *Fitch v. Sutton* (6) not only did the plaintiff not accept the payment of the dividend in satisfaction, but refused to accept it at all unless the defendant promised to pay him the balance when of ability, and the defendant assented, and made the promise

A required, so that but for the fact that other creditors were parties to the composition there could have been no defence. There was no point of pleading in that case, the whole being open under the general issue.

In *Steinman v. Magnus* (15) it was pretty well admitted by LORD ELLENBOROUGH, C.J., that the decision in *Fitch v. Sutton* (6) would have been the other way if they had understood the evidence as the reporter did. But though this misapprehension
B of the judges as to the facts, and the absence of any acceptance of the dividend, greatly weaken the weight of *Fitch v. Sutton* (6), still it remains that LORD ELLENBOROUGH, a very great judge indeed, did, however hasty or unnecessary it may have been to express such an opinion, say (5 East, at p. 232):

C "It is impossible to contend that acceptance of £17 10s. is an extinguishment of a debt of £50. There must be some consideration for the relinquishment of the residue; something collateral to show a possibility of benefit to the party relinquishing his further claim, otherwise the agreement is nudum pactum. But the mere promise to pay the rest when of ability put the plaintiff in no better condition than he was before. It was expressly determined in *Cumber v. Wane* (2) that acceptance of a security for a lesser sum cannot be pleaded in satisfaction of a similar security for a greater; and though that case was said
D by me in argument in *Heathcote v. Crookshanks* (12) to have been denied to be law, and in confirmation of that BULLER, J., afterwards referred to a case stated to be that of *Hardcastle v. Howard* (14), yet I cannot find any case of that sort, and none has been now referred to. On the contrary, the decision in *Cumber v. Wane* (2) is directly supported by the authority of *Pinnel's Case* (1), which never appears to have been questioned."

E I must observe that, whether *Cumber v. Wane* (2) was or was not denied to be law in *Hardcastle v. Howard* (14), it certainly was denied to be law in *Sibree v. Tripp* (3); and that, though it is quite true that *Pinnel's Case* (1), as far as regards the point actually raised in the case, has not only never been questioned, but often
F assented to, I am not aware that in any case before *Fitch v. Sutton* (6), unless it be *Cumber v. Wane* (2), has that part of it which I venture to call the dictum ever been acted upon; and, as I have pointed out, had it not been for the composition with other creditors, there could have been no defence in *Fitch v. Sutton* (6), whether the dictum in *Pinnel's Case* (1) was right or wrong. Still this is an authority, and I have no doubt that it was on the ground of this authority, and the adhesion of BAYLEY, J., to it in *Thomas v. Heathorn* (10), that PARKE and
G ALDERSON, BB., expressed themselves as they did in the passages which I have cited from *Sibree v. Tripp* (3). I think that their expressions justify MR. J. W. SMITH in laying it down, as he does in his note to *Cumber v. Wane* (2) (1 SMITH, L.C., 2nd Edn.), that

H "a liquidated and undisputed money demand, of which the day of payment is passed, not founded upon a bill of exchange or promissory note, cannot, even with the consent of the creditor, be discharged by mere payment by the debtor of a smaller amount in money in the same manner as he was bound to pay the whole."

I am inclined to think that this was settled in a court of the first instance. I think, however, that it was originally a mistake.

I What principally weighs with me in thinking that LORD COKE made a mistake of fact is my conviction that all men of business, whether merchants or tradesmen, do every day recognise and act on the ground that prompt payment of a part of their demand may be more beneficial to them than it would be to insist on their rights and enforce payment of the whole. Even where the debtor is perfectly solvent, and sure to pay at last, this often is so. Where the credit of the debtor is doubtful it must be more so. I had persuaded myself that there was no such long-continued action on this dictum as to render it improper in this House to re-consider the question. I had written my reasons for so thinking; but, as they were not

satisfactory to the other noble and learned Lords who heard the case, I do not now repeat them nor persist in them. I assent to the judgment proposed, though it is not that which I had originally thought proper. A

LORD WATSON.—I am of opinion that the judgment of the Court of Appeal ought to be affirmed. I regret that I have been unable to adopt that construction of the memorandum of agreement which has commended itself to your Lordships as well as to the judges of the Court of Appeal. It appears to me that the respondent did not intend to pass, and did not pass, from her legal claim for interest on the judgment debt due to her from the appellant. She undertakes not to take proceedings on the judgment provided the stipulated terms instalments are regularly paid, "until the whole of the said sum of £2,090 19s. shall have been fully paid and satisfied." But these words, "the said sum," ought, in my opinion, to be construed as referring to the sum of £2,090 19s. previously described as being contained in a judgment of Her Majesty's High Court of Justice, and, therefore, bearing interest *ex lege*. The whole context of the memorandum appears to me to be consistent with this view, and to point strongly to the inference that there was no agreement, or even proposal, that the respondent should make any abatement of her legal claims, or do more than give her debtor time, on the conditions expressed, "to pay such judgment." I must assume, however, that I have wrongly construed the memorandum of agreement, and that its language imports that the respondent was to abstain from taking proceedings on the judgment if and when instalments to the amount of £2,090 19s. had been duly and regularly paid. Upon that assumption I am still of opinion that the respondent ought to prevail, on the simple ground that on that view of the memorandum her agreement to abate part of her claim was *nudum pactum*, for which the appellant gave no legal consideration, I do not think it necessary to consider whether it would still be open to this House, if so advised, to overrule the doctrine of *Cumber v. Wane* (2) and *Pinnel's Case* (1), because I am not prepared to disturb that doctrine. Nor do I think it necessary to occupy the time of the House with a detailed explanation of the considerations which have led me to that result, seeing that I concur in the judgment of the Lord Chancellor, and also in the opinion about to be delivered by LORD FITZGERALD, which I have had the advantage of reading. B C D E F

LORD FITZGERALD.—The first question is as to the true construction of the memorandum of agreement of Dec. 21, 1876, and I express my opinion upon it with the greatest diffidence. My excuse for expressing my opinion upon it is that I feel rather strongly on the point. G

The memorandum is, it may be observed, unilateral, for Dr. Foakes by it assumes no obligation. The first recital is that Mrs. Beer had obtained a judgment against Dr. Foakes for a sum of £2,090 19s. The judgment would not at common law *per se* entitle the plaintiff to interest, but s. 17 of the Judgments Act, 1838, provides: H

"Every judgment debt shall carry interest at four pounds per centum per annum from the time of entering up the judgment . . . until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment." I

This right to interest is different from interest arising on contract, or which a jury may give as damages, or may withhold. It is a clear statutory right, arising immediately on entering up the judgment, and continuing until the judgment debt is fully paid. The position of the parties at the date of the agreement then was that Dr. Foakes owed Mrs. Beer the principal sum of £2,090 19s. recovered by a judgment which carried interest at 4 per cent., arising *de die in diem* as a statutory right, and then—that is, at the time of the agreement—amounting to £113 16s. 2d. The agreement then contains this recital: J

"And whereas the said J. W. Foakes has requested the said Julia Beer to give him time in which to pay such judgment, which she has agreed to do on the following conditions."

A He does not ask for any remission of any portion of his obligation, he solicits only time for payment, and she agrees to give him that time and no more. It seems to me clear and free from doubt that "such judgment" in this recital would, if there was no more to guide us, mean the judgment debt with its statutable interest at 4 per cent. The language of the recital and of the whole agreement seems to be that of the defendant's solicitor, as we find in the evidence of Mr. Mackreth [plaintiff's solicitor] this statement: "The agreement was prepared by Smith and sent to me, and I approved of it on behalf of Mrs. Beer."

B Returning to the language of the agreement, it is remarkable that Dr. Foakes undertakes by it no obligation whatever; he does not bind himself to pay any instalment to her or to her "nominee," and it was not necessary that he should, for I can entertain no doubt that, if what is called the "condition" for payment of the instalments had not been fulfilled, then Mrs. Beer could have enforced the whole residue of her demand for principal and the interest which had accrued, by execution on the judgment. Dr. Foakes enters into no obligation to pay to her "nominee," and this seems to displace in fact the foundation of the judgment of the Divisional Court, where WATKIN WILLIAMS, J., said:

D "The doctrine is that an agreement to pay a less sum in satisfaction of a debt is without consideration. The English law forbids such an agreement. That is the law in its naked simplicity. But I think a very little departure from the mere agreement to pay a less sum will make the agreement good. If the creditor says, 'You owe me a large sum of money, I am willing to accede to your request for time, but you must enter into an agreement in writing, at your expense,' as it would be, 'and you shall pay the money to me or
E to any person I may name, at my election,' that is enough I think to make this agreement not a nudum pactum."

There is no such thing in the agreement here. MATHEW, J., adds:

F "It is noticeable that the agreement is framed so that it casts an obligation which would not otherwise have existed. The agreement to pay the creditor's nominee renders it a document available as a security."

It would seem, to me at least, that the terms of the agreement had never been properly conveyed to the minds of the judges, for in fact Dr. Foakes assumed no greater obligation than the law imposed on him in respect of the judgment. The expressed condition is the payment to Mrs. Beer "of the sum of £500 in part satisfaction of the said judgment debt of £2,090 19s."; and again I should repeat here that the last words would mean the debt and the right to interest which it carried, if there is nothing subsequent to impose a different meaning. The term "satisfaction" is specially applicable to a judgment. You could not in former times simply plead payment to a scire facias on a judgment; the plea should show satisfaction. The judgment would not be satisfied on the payment of the £2,090 19s., but only on payment of that sum and the interest. The agreement then provides as a condition for the payment of the instalments of £150 "until the whole of the said sum of £2,090 19s. shall have been fully paid and satisfied." The whole difficulty arises on this passage. If in place of using the word "sum" it had used "judgment" or "judgment debt," in my opinion there could have been but one construction, namely, that "judgment" or "judgment debt" meant the principal sum of £2,090 19s., with interest at 4 per cent.

I Having regard to what the parties were at, why should we not read "the said sum of £2,090 19s." by the light of the antecedent parts of the same agreement as meaning "the said judgment for £2,090 19s.," and thus do full and complete justice, and not deprive Mrs. Beer of about £350 as justly due to her as the £2,090 19s., and which it is to me manifest she never intended, and was never asked, to relinquish? There is a special recital indicating what the parties intended, namely, "time on certain conditions," but without a word as to relinquishing any part of the plaintiff's demand, and if the subsequent words are more general, we

shall limit and qualify them by the special language of the recital. Dr. Foakes did not ask for any remission; he asked for time, and for time alone, and we ought to assume that when his solicitor prepared and furnished the memorandum of agreement, he did not intend by its language that any part of Mrs. Beer's demand was to be released. Mr. Mackreth says that in the course of negotiations "interest was never mentioned at all in reference to that agreement." She adopted the language of the memorandum, and it became hers, but was it such as to lead Dr. Foakes to understand that Mrs. Beer agreed, on performance of the condition, to give up her claim to interest? A B

I think we ought not to adopt such a conclusion. There are many authorities for the proposition that you may limit the general words of release by the antecedent recitals, so as to effectuate that alone which was within the intention of the parties. I might refer to a number of cases; for example, *Thorpe v. Thorpe* (16), C where it was said,

"where there are general words only in a release they shall be taken most strongly against the releasor, but where there is a particular recital and general words follow, there the general words shall be qualified by the special words."

Applying that rule to the present case, you may limit the general words at the conclusion of the memorandum to the giving of time alone; that is to say, if "judgment debt of £2,090 19s." means the sum of £2,090 19s. and nothing more, then that Mrs. Beer agrees to give time for the payment of the principal debt of £2,090 19s. by the instalments and at the time indicated, and that pending that arrangement she would "not take any proceedings whatever on the said judgment." This would give effect to every word and leave the interest untouched, which, if the principal is to be paid by instalments, could not well be ascertained until the time had been reached for the payment of the last instalment. There is nothing in the memorandum, it should be observed, to prevent Dr. Foakes from coming in at any time and discharging the whole principal before the instalments became payable. Upon the construction of the memorandum I am of opinion that the judgment of the Court of Appeal should be affirmed. D E F

The second question now presents itself, but with my views on the first it is not actually necessary for me to express any opinion upon it, but it seems more satisfactory that I should do so. Assuming that I have fallen into error in interpreting the agreement, and that it is to be read that if Dr. Foakes should pay the actual sum of £2,090 19s. by instalments according to the condition she would relinquish her statutable debt for interest and not issue execution on the judgment to recover it, is such an agreement nudum pactum, and incapable, therefore, of being enforced? I have listened with much interest to the opinion of LORD BLACKBURN, who has gone, as usual to the very foundation, and I regret that I have been unable to assist him in overturning the resolution of the Court of Common Pleas as reported by LORD COKE in *Pinnel's Case* (1) or in expunging from the books the infinitesimal remains of *Cumber v. Wane* (2). It seems to me doubtful whether the question arises which he has presented, namely, whether payment of part of a debt ascertained by judgment can be a satisfaction of the whole? In the case before us the whole of the £2,090 19s., the principal of the judgment, has been paid to the last farthing. The interpretation put by the judges of the courts below, and adopted by the Lord Chancellor and LORD BLACKBURN, on the memorandum, seems to me to divide it, in effect, into two stipulations, the first being that, if Dr. Foakes should pay down £500 and the remainder of the actual sum of £2,090 19s. in the manner prescribed, Mrs. Beer would so accept it, and pending the payments would take no proceedings on the judgment, and the second being that, if the £2,090 19s. should be paid in the manner indicated, she would relinquish her claim for interest, and would not take any proceedings whatever on the judgment to enforce that interest. G H I

The question is whether there is any sufficient legal consideration for the relinquishment of the debt for interest. I am clearly of opinion that there is not.

A LORD BLACKBURN has shown us very clearly that the resolution in *Pinnel's Case* (1) was not necessary for the decision of that case, and that the principle on which it seems to rest does not appear to have been made the foundation of any subsequent decision of the Exchequer Chamber or of this House; and further, that some of the distinctions which have been engrafted on it make the rule itself absurd. But it seems to me that it is not the rule which is absurd, but some of those distinctions, emanating from the anxiety of judges to limit the operation of a rule which they considered often worked injustice. That resolution in *Pinnel's Case* (1) has never been overruled; for 282 years it seems to have been adopted by our judges. During the whole of that period it seems to have been understood and taken to be part of our law that the payment of part of a debt then due and payable cannot alone be the foundation of a parol satisfaction and discharge of the residue, as it brings no advantage to the creditor, and there is no consideration moving from the debtor, who has done no more than partially to perform his obligation. Though it may not have been made the subject of actual decision, yet we find that every judge in this country who has had occasion to deal with the proposition states the law to be so.

C In Ireland it has always been so received, and in *Drogheda Corpn. v. Fairtlough* (17) LEFROY, C.J., thus expresses himself, and I may say that his language is entitled to very considerable weight. That very learned judge thus states the law :

"There is also a failure of evidence of the consideration for the contract to remove the rule of the common law that payment of a less sum cannot be a satisfaction of a greater liquidated sum, unless there is some further advantage accompanying the payment."

E In another part of his judgment he puts the proposition thus :

"The payment merely of a less sum, not being in pursuance of any contract by deed, cannot by the common law be deemed to be a satisfaction of a greater liquidated sum, but the law will allow the payment of a smaller sum to be a satisfaction of a greater liquidated sum if there be any collateral advantage, however small, to the creditor attending the transaction."

F The question did arise directly in that case, but the plea failed in other points, and it was not necessary, therefore, actually to decide it. I refer to it as showing how a judge of great experience considered the law to stand. I am not aware of any decision that controverts this position, and the textbooks uniformly present it thus: that "the payment of part of a liquidated and ascertained sum is in law no satisfaction of the whole."

G The proposition itself is but a part of a rule of our law which governs many of the daily relations of life, *nuda pactio obligationem non parit*. And again the law says that *nudum pactum est ubi nulla subest causa præter conventionem*. I should hesitate before coming to a decision which might be a serious inroad on that rule, but I concur with my noble and learned friend that it would have been wiser and better if the resolution in *Pinnel's Case* (1) had never been come to, and there had been no occasion for the long list of decisions supporting composition with a creditor on the rather artificial consideration of the mutual consent of other creditors. We find the law to have been accepted as stated for a great length of time, and I apprehend that it is not now within our province to overturn it. The short question then is, in relation to a judgment debt payable immediately on which the creditor is entitled to have execution: Is the payment by the debtor of a part a sufficient consideration to support a parol agreement by the judgment creditor not to take any proceedings whatever on the judgment for the residue? In my opinion, it is not, and I think, therefore, that the judgment of the Court of Appeal should be affirmed.

Appeal dismissed.

Solicitors: *W. H. Hudson; Mackreth, Bramall & White.*

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

Re KNIGHT. Ex Parte ISHERWOOD

[COURT OF APPEAL (Sir George Jessel, M.R., Cotton and Bowen, L.JJ.), December 7, 1882]

[Reported 22 Ch.D. 384; 52 L.J.Ch. 370; 48 L.T. 398; 31 W.R. 442]

Bankruptcy—Disclaimer—Lease—Conditions of granting leave to disclaim—Benefit to bankrupt's estate accruing through trustee's possession of demised property—Contemplation of beneficial occupation.

In giving leave to a trustee in bankruptcy to disclaim a lease belonging to the bankrupt, the court will only order the trustee, as a condition of granting leave, to pay the landlord compensation for the use and occupation of the demised property where some special circumstances exist, e.g., where the trustee has got a pecuniary benefit for the bankrupt's estate by keeping possession of the demised property, or where the occupation was contemplated as likely to produce a benefit.

Notes. The right of a trustee in bankruptcy to disclaim a lease held by the bankrupt is now dealt with in s. 54 (3) of the Bankruptcy Act, 1914: see 2 HALSBURY'S STATUTES (2nd Edn.) 321.

Followed: *Re Bushell, Ex parte Izard* (1883), 23 Ch.D. 115. Extended: *Re Whitton, Ex parte Arnal* (1883), 24 Ch.D. 26. Followed: *Re Salkeld, Ex parte Good* (1884), 13 Q.B.D. 731. Referred to: *Portman Building Society v. Young*, [1951] 1 All E.R. 191; *Steyning and Littlehampton Building Society v. Wilson*, [1951] 2 All E.R. 452.

As to disclaimer, see 2 HALSBURY'S LAWS (3rd Edn.) 457-463; and for cases see 5 DIGEST (Repl.) 1006 et seq.

Cases referred to:

- (1) *Re Knight, Ex parte Voisey* (1882), 21 Ch.D. 442; 52 L.J.Ch. 121; 47 L.T. 362; 31 W.R. 19, C.A.; 5 Digest (Repl.) 1032, 8344.
- (2) *Re Turner, Ex parte Ladbury* (1881), 17 Ch.D. 532; 50 L.J.Ch. 838; 45 L.T. 5, C.A.; 5 Digest (Repl.) 1010, 8152.

Also referred to in argument:

Titterton v. Cooper (1882), 9 Q.B.D. 473; 51 L.J.Q.B. 472; 46 L.T. 870; 30 W.R. 866, C.A.; 5 Digest (Repl.) 1004, 8098.

Appeal by the West Derby and Everton Perpetual Benefit Building Society from a decision of BACON, C.J., in bankruptcy.

In August, 1875, John Knight, a manure manufacturer at Farnworth, Lancashire, and a member of the West Derby and Everton Perpetual Benefit Building Society, in which he held 750 shares, received an advance from the society of £7,500, which, according to the rules of the society, was to be repaid with interest at 7 per cent. per annum by monthly instalments of £71 17s. 6d. each, each instalment being payable at a monthly meeting of the society, held on the second Wednesday in the month. By a mortgage dated Aug. 3, 1875, Knight, in consideration of the advance, granted his freehold manufactory, with certain machinery and fixtures therein, to the trustees of the building society, subject to a proviso for entering up a receipt for the moneys secured by the deed upon due performance of the rules of the society. It was by the said indenture provided and declared that, in case the mortgagor should at any time thereafter neglect or refuse, for three monthly meetings of the society, to pay all subscriptions, interest, fines, and other moneys, or in the event of the mortgagor becoming bankrupt, the mortgagees might enter into possession or receipt of the rents and profits of the hereditaments, and sell and dispose of the same. And for better securing the payments which by rules of the society ought to be made by the mortgagor, it was thereby agreed and declared that, if the mortgagees should at any time, by virtue thereof, or of the rules of the society, become entitled to the possession or receipt of the rents, and the mortgagor, his

A executors, administrators, or assigns, should then or afterwards be in occupation of the whole or part of the premises, he or they should during such occupation be tenant thereof from month to month to the mortgagees at a clear monthly rent of such a sum as should be equal in amount to the moneys that ought to be paid monthly by him or them for subscriptions, interest, fines, and other moneys under the rules, and that such tenancy should commence on the day up to which such
B subscriptions, etc., should have been paid, and that the rent for the period intervening between the time of such commencement of tenancy and the day on which the mortgagees were entitled to enter into possession should be payable and paid on such last-mentioned day, and that the monthly rent due upon and subsequently to such last-mentioned day should become due monthly in advance, and should be payable at the place, on the day, and during the hours, where and when the
C monthly meetings of the society should be held; the first payment to become due on the day when the mortgagees should first be entitled to possession or receipt of rents. All moneys received as rent were to be accepted in or towards satisfaction of the subscriptions, interest, fines, and moneys then in arrear or payable under the rules or the mortgage, so far as the moneys received should extend. It was also provided that the mortgagees might, after giving fourteen days' previous
D notice of their intention so to do, enter upon and take possession of the property, and determine the tenancy. Upon Oct. 12, 1881, a memorandum of further charge to secure an additional advance of £1,600 was endorsed upon the said mortgage deed, whereby the monthly subscriptions were raised to £87 4s. 2d. Neither the mortgage deed nor the memorandum was registered under the Bills of Sale Acts.

On Dec. 2, 1881, Knight having been in default at three monthly meetings,
E and being in occupation of the mortgaged property, a distress was levied on behalf of the society upon the debtor's property for £664 14s., in respect of rent or subscriptions and other payments due and in arrear. On the same day a bankruptcy petition was filed against the debtor, based upon an act of bankruptcy committed on Nov. 26. He was adjudicated a bankrupt on Dec. 5 in the Liverpool County Court, and at the first meeting of the creditors, on Dec. 31, Lewis Voisey
F and Thomas Hayes Sheen were appointed trustees, and entered into possession of the mortgaged property.

On Jan. 11, 1882, another distress for rent or subscriptions was levied by the trustees of the society for £255 15s. 5d. By an agreement of Jan. 14, entered into between the trustees of the society and the trustees in bankruptcy, it was provided that the stock-in-trade, which had been seized by the trustees of the society under
G their distresses, should be sold under the direction of the two sets of trustees, without prejudice to the rights of any of the parties, and that the net proceeds should be paid into the Adelphi Bank at Liverpool, in the joint names of both sets of trustees. Within fourteen days after the money should have been paid into the bank the trustees of the bankruptcy were to give up all claim to it, or to take steps to establish their claim, and prosecute the same with all due diligence. In the
H event of their not making any claim within the fourteen days, they were to do all things in their power to facilitate the payment out of the money to trustees of the society. It was further provided:

"Nothing herein contained, nor any delay which has taken, or will take place, shall in any way prejudice the trustees of the building society."

I The stock-in-trade was, accordingly, sold, and the proceeds, amounting to £1,774, paid into the bank in the joint names.

On Feb. 9 a third distress was levied by the society for £127 10s. 4d., a further sum due to them by Knight. On Mar. 21, on the application of the trustees in the bankruptcy, the county court judge made an order declaring the attornment clause and the distresses levied under it void as against them. On May 8 the Chief Judge, on appeal, reversed the decision of the county court judge, and held that the distresses were valid; and on July 20 his decision was affirmed by the Court of Appeal; *Re Knight, Ex parte Voisey* (1). On May 15 the society levied a fourth

distress for £375 17s. 6d., which sum had become due to them from Knight since the last distress. A

On May 18 another agreement was entered into between the two sets of trustees, by which it was provided that the loose effects at the bankrupt's works, which the trustees in the bankruptcy had advertised for sale, and which had been distrained upon by the society, should be sold by the trustees of the bankruptcy, and the proceeds paid into the bank in the joint names, as provided in the former agreement, B

"and that the moneys now and hereafter to be in the said bank shall be applied in payment of the distresses issued by the building society . . . so far as such distresses are not held void, and that the men in possession under the building society's distress shall withdraw from possession. Provided always, that nothing contained in this agreement shall prevent the bankrupt's trustees contesting the validity of the last distress if they shall be so advised." C

The loose effects were then sold, and the proceeds paid into the bank in the joint names.

On Aug. 16, 1882, the trustees in bankruptcy gave notice that they should apply to the county court on Aug. 25 for an order giving them leave to disclaim the tenancy created by the attornment clause upon such terms as to the court might seem just. This application was heard by the judge on Aug. 25. The building society contended that, as a condition of obtaining leave to disclaim, the trustees in bankruptcy ought to be ordered to pay to the society all the monthly payments of rent (including fines) which had accrued due under the terms of the mortgage deed from the date of the adjudication down to the date of the disclaimer. Leave to disclaim was given in the terms expressed in the following declaration contained in the order which was drawn up and dated Oct. 13, 1882: D

"It is declared that the trustees of the society are entitled to be paid the sum of £664 (being the amount of the monthly rent under the attornment clause distrained for on Dec. 2, 1881) and are entitled to be paid as and for the monthly rent under the attornment clause the sum of £87 4s. 2d. per month (being the amount of the monthly subscriptions payable to the society by the bankrupt under the provisions of the mortgage and further charge) commencing from the last rent comprised in the distress made on Dec. 2, 1881, and ending on Aug. 25, 1882 (the rent current on the last-mentioned day to be apportioned to that day), together with the fines payable by the rules of the society, such fines to run until the proceeds of the sales held in pursuance of the agreements of Jan. 14 and May 18, 1882, were from time to time paid into the bank." E F

It was ordered that the account of the monthly rent should be taken by the registrar of the court, who should certify the amount payable to the trustees of the society, and that the registrar should also tax and allow the costs of the trustees of the society of and incident to the distresses. And it was ordered that the amount so certified to be payable to the trustees of the society, and allowed them for costs of the distresses, should be paid to the trustees of the society out of the moneys paid into the bank under the two agreements. It was further ordered that, if those moneys should be insufficient to satisfy the payments thereinbefore directed, the deficiency should be paid by the trustees of the bankrupt out of the estate of the bankrupt, and that, if the moneys paid into the bank should be more than sufficient, the surplus should be paid out to the trustees of the bankrupt as part of his estate. The registrar afterwards certified that the amount payable to the society for monthly rent under the terms of the order was £1,581 2s. 3d. The total amount of the four distresses was £1,423 8s. 3d. The bankrupt's trustees had been in possession of the mortgaged property until July 10, 1882, but it did not appear that the estate of the bankrupt had derived any benefit from their occupation. H I

A On appeal to BACON, C.J., the building society contended that they ought to have been allowed the fines payable under the society's rules, not merely until the payments into the bank in the joint names, but until the date of actual payment to the society, and also that the monthly rent should be paid to the society down to the date when the disclaimer was executed by the bankrupt's trustees. The appeal was heard in November, 1882, and BACON, C.J., affirmed the decision of the county court judge. The building society appealed to the Court of Appeal.

Horton Smith, Q.C., and J. E. Linklater for the building society.

Winslow, Q.C., and Birrell for the bankrupt's trustees.

C **SIR GEORGE JESSEL, M.R.**—Whether the building society have or have not got more than they are entitled to I will not say. I am quite satisfied that they have got at least as much as they are entitled to, and that is all that it is necessary for us to decide.

D Rule 28 of the Bankruptcy Rules, 1871, cannot mean that in every case of disclaimer the disclaimer shall not be executed or take effect unless the landlord is put in the same position up to the date of its execution as if no disclaimer had been executed, because s. 23 of the Bankruptcy Act, 1869, says that the disclaimer shall relate back to the date of the adjudication [but see now s. 54 (2) of the Bankruptcy Act, 1914, which provides that the disclaimer shall operate as from the date of disclaimer]. Therefore, if the rule applies, it enables the court to impose terms on the trustee only when a special case is made out. In *Re Turner, Ex parte Ladbury* (2) a special case was made out, the exact extent of which I do not know. It appears by the report of the case in the *LAW TIMES*, which as far as I can judge is the best report of the three I have looked at, viz., the *LAW REPORTS*, the *LAW JOURNAL REPORTS*, and the *LAW TIMES REPORTS*, that the trustee had kept possession of the demised property which was supposed to be of considerable value and of some value over and above an equitable mortgage upon it; that he had sold the equity of redemption for a considerable sum; that the purchaser was unable to complete his contract and had forfeited part of his deposit in order to be let off his bargain; and that the sum so forfeited had gone to increase the bankrupt's estate. It also appears that the landlord had been kept out of possession, how I do not know. Whether there was no proviso for re-entry or some clause to hinder the re-entry does not appear. That being so, it was held, not that the landlord was entitled to his rent up to the date of the disclaimer, but that he was entitled to some compensation for the use and occupation of the property by the trustee during the time he was kept out of the estate, and in the opinion of the Court of Appeal the compensation which had been awarded him by the registrar was not too much. That is all that is decided in *Ex parte Ladbury* (2). If that is so, we are only following *Ex parte Ladbury* (2) in saying that the landlord must make out some special case. I am not going to limit it to such a case as *Ex parte Ladbury* (2), that is, to a case where a trustee has got a pecuniary benefit for the bankrupt's estate by keeping possession of the demised property. There may be other cases, and I wish, so far as I can, not to fetter the court by laying down any definite limit as to the nature of the cases in which terms ought to be imposed on the trustee; but that there must be something special I am quite clear.

1 That being so, what have we here? In the first place, the relation between the parties is not the ordinary relation of landlord and tenant, but it is the ordinary relation of mortgagee and mortgagor. The nature of that relation is well known. In equity the mortgagor was owner of the estate, and the mortgagee was only entitled to a charge upon it (I am speaking roughly); at law the mortgagee was the legal owner of the estate (I am now speaking of freehold estates), and the mortgagor was what was called "tenant at will," a very peculiar kind of tenancy. That was the legal relationship between the parties. The relation in equity was totally different. In an ordinary case, there being no rent reserved, the tenant at will did not pay any rent, and was not liable to pay any, but you might superadd to that legal relationship an express agreement for a tenancy, as was done in the present

case, in which a monthly tenancy was created at a monthly rent. That, no doubt, altered the legal relation between the parties, but it did not alter the equitable relation. The rent, if paid, was in equity paid on account of principal and interest; and if it exceeded the interest it would go in reduction of the principal. It was the subject-matter of account between the mortgagee and mortgagor. Therefore, in equity, the mortgagee remained only a chargee, and the mortgagor remained the owner of the estate, notwithstanding this variation in the ordinary legal relation between them. That is the true position of the parties.

We have in this case a reservation to the mortgagees of a right to take possession after fourteen days' notice. When the mortgagees took possession there was a change in the relation of the parties at equity as well as at law. At law the mortgagees became the owners in possession, and in equity they became mortgagees in possession, entitled to certain rights as regards possession, and subject to certain liabilities. The mortgagor became bankrupt. Then the mortgagees said: "We claim our rent." We must look to what the rent really was, because here again there is a great distinction between the case of the ordinary landlord and tenant, when the rent is what is agreed upon between the parties as the sum of money fairly payable for the occupation of the demised property, and what I will call a fancy rent—that is, a rent fixed, not with regard to what the tenant can afford to pay, or ought to pay, for the occupation of the property, but a rent fixed with regard to the amount payable for interest on a mortgage debt, or, as in the present case, the mortgagees being a building society, for the interest and fines. In an ordinary case, where the rent fixed by the attornment clause really represents the interest on the mortgage debt, it may not be a tenth of the annual value of the property. But here, if the mortgagor was in default, and the fines were added, it would be much more.

On looking at the report of the case when it was before the court on a previous occasion, *Re Knight, Ex parte Voisey* (1), it seems that the rent in that event would certainly amount to the full value of the property, and perhaps to something more, though not so much more as to lead the court to think that it was not intended to be a bona fide rent. It is plain, therefore, that if the rent is more than the value of the property, and it is fixed, not with regard to that value, but with regard to other circumstances, viz., in order to secure by distress the due payment of interest and fines, the keeping of the mortgagees out of possession does not inflict upon them any injury equivalent to the amount of the rent reserved. Then, again, in the present case, the mortgagees were not kept out of possession; they could have entered at any time after fourteen days' notice. The remaining out of possession was a voluntary abstinence on their part, because they thought it would be for their advantage to distrain for a sum larger than they could obtain by letting the property to a tenant. Therefore, whether you consider the real relation between the parties, it not being the ordinary one of landlord and tenant, or whether you consider the circumstance that the mortgagees might have taken possession at the moment after fourteen days' notice, it does not appear to me that they have suffered any special injury. On the contrary, by the terms of the order of the county court, they appear to have obtained a very considerable benefit by being allowed to distrain after the bankruptcy on the goods of the bankrupt for the amount reserved to them as rent.

That being so, I can see no reason whatever for imposing further terms on the trustee than those imposed by that order, which amounted in substance to this, that the trustees are to pay all the rent for which distresses were levied, and something more. Under these circumstances, I think the building society are not entitled to complain of the order, and the appeal must be dismissed.

COTTON, L.J.—I am of the same opinion. The complaint made by the building society is that under the power given to the court by r. 28, to impose terms on the trustee in a bankruptcy, when he applies for leave to disclaim a lease of the bankrupt, the court ought to have given the society more than they have got under

A the present order. The argument was carried to a very great length, and I should hardly have thought it necessary to deal with the case but for the fact that it was contended that when there was an application for leave to disclaim, the trustee ought to be put under the terms of paying the whole of the rent reserved by the lease which he disclaimed up to the date of the execution of the disclaimer. That would be entirely contrary to the provisions of the Act. The Act, by throwing back the effect of the disclaimer to the date of the adjudication [but see now s. 54 (2) of the Act of 1914, mentioned *supra*], relieves the trustee, as from the date of the adjudication, from the consequences of the lease having vested in him. To say that in every case when a trustee applies for leave to disclaim a lease he should be put on the terms of paying the rent, as if the disclaimer took effect only from the date of its execution, would be to vary and repeal the Act.

C In certain cases the court has, and in my opinion rightly, put the trustee so coming for leave to disclaim under terms. Where the lease vests in him as trustee, he becomes personally liable for the rent, with a right to go against the bankrupt's estate for indemnity. When he has disclaimed the lease, then it has been held that the landlord's rights under the lease as against the trustee of the estate of the bankrupt are gone, and that he cannot sue the trustee for the use and occupation of the property. It has been held that the trustee cannot be sued as a trespasser, and under special circumstances it is, in my opinion, right that he should be put under the terms of making some payment to the landlord when he comes to ask for leave to deprive the landlord, as from the date of the adjudication, of the legal rights given to him by the lease, which is to be disclaimed or put an end to as from that date, the landlord having, except under r. 28, and by means of the right to prove given to him by s. 23, no remedy in respect of the trustee's use and occupation of the property, nor any right to treat the trustee as a trespasser.

E I think it is not necessary that we should in any way narrow the circumstances under which the court may impose terms on the trustee beyond saying that there must be special circumstances. The Master of the Rolls has already said he does not intend to restrict the power to cases like *Ex parte Ladbury* (2), in which terms were properly imposed, because the trustee had made a profit by the property. In any case, what the trustee will have to pay is not the profit which he has made, or the rent according to the lease, but, in determining what he ought to pay, regard must be had to two things, whether the occupation has either produced a benefit to the bankrupt's estate, or was contemplated as likely to produce a benefit, and to the circumstance that, in consequence of the disclaimer relating back to the date of the adjudication, the owner of the estate is in the interval between the adjudication and the execution of the disclaimer in the position that he has been lawfully kept out of the use of his property by virtue of the operation of the lease, and cannot after the disclaimer bring any action against the person who without his consent has been in the occupation of the property.

G These things ought to be taken into consideration. But taking the present case H simply as one of landlord and tenant, I cannot see that any special case has been made out by the building society to show that the sums which have been allowed them for the rent reserved under the attornment clause are not amply sufficient, even if the property were treated as theirs from the date of the adjudication, to compensate them for their property having been in the occupation of persons against whom they can make no claim, except under the power given to the court by r. 28. I There, in my opinion, is the entire foundation for imposing any terms on the trustee, or for the landlord's claim to have any payment made to him. I do not suggest that it was wrong to give the society what they have got. There was the agreement between the parties as to the mode of dealing with the distress, and certainly at present I do not see that this was done away with by the disclaimer. The whole ground of giving the landlord on such an application a right to receive something from the trustee in bankruptcy is that, from the effect of the disclaimer, he, the owner of the property, has been from the date of the adjudication in such a position that, though he has been kept out of his property, and it has been in the

possession of another, he has no remedy at law or in equity for the purpose of A recovering compensation. But in the present case the position of the parties was, not that the building society were by the effect of the disclaimer as from the date of the adjudication the owners of property of which they were not in occupation, but that the trustees, as the owners of the equity of redemption, were in possession of their own property, and, therefore, it cannot be said that leave to disclaim ought not to be given, or that any terms should be imposed upon the trustees. The B ground on which terms are imposed are that since the date from which the disclaimer takes effect the possession has been contrary to the title. Here the possession has been in accordance with the title. I cannot see how the society, who have not been kept out of their property, because they might have taken possession when they pleased, can say that the court ought to give them, in addition to what has been already given, any compensation in order to justify the trustees in getting C that relief which they ask.

BOWEN, L.J.—I entertain a very clear opinion to the same effect, but I do not wish to add anything to what has been already said. It seems to me that the law could not be put more clearly than it has been by the Master of the Rolls and COTTON, L.J.

Solicitors: *H. B. Priest* for *J. P. Harris & Gorst*, Liverpool; *Paterson, Snow & Bloxam* for *Brook & Morris*, Liverpool.

[Reported by *W. C. Biss, Esq., Barrister-at-Law.*]

DAWKINS v. ANTROBUS AND OTHERS

[COURT OF APPEAL (James, Brett and Cotton, L.JJ.), February 1, 1881]

[Reported 17 Ch.D. 615; 44 L.T. 557; 29 W.R. 511]

Club—Expulsion of member—Resolution of general meeting of members—Expulsion in accordance with rules and bona fide—Power of court to interfere.

The court has no right to sit as a court of appeal from the decision of the members of a club duly assembled and acting according to the rules, provided that in arriving at that decision the principles of natural justice were observed, e.g., where a member had been expelled from the club under a rule providing for the expulsion of a member guilty of conduct injurious to the character and interests of the club, that the member in question had been given proper notice of the meeting and an opportunity to attend it and be heard, and that the charges had been made against him, and the proceedings conducted, bona fide, fairly, and in the honest exercise of the powers given to the meeting by the rules of the club. These conditions having been fulfilled, the court had no right to consider whether or not what was done by the meeting was right or whether or not what was decided was reasonable.

Notes. Considered: *Lambert v. Addison* (1882), 46 L.T. 20. Followed: *Young v. Ladies' Imperial Club*, [1920] 1 K.B. 81. Considered: *Lamberton v. Thorpe* (1929), 141 L.T. 638; *Lec v. Showmen's Guild of Great Britain*, [1952] 1 All E.R. 1175. Referred to: *Baird v. Wells* (1890), 59 L.J.Ch. 673; *Hope v. I'Anson and Weatherby* (1901), 18 T.L.R. 201; *Gray v. Allison* (1909), 25 T.L.R. 531; *Kelly v. National Society of Operative Printers*, [1914-15] All E.R.Rep. 576; *Maclean v. The Workers Union*, [1929] All E.R.Rep. 468; *Chapman v. Ellesmere*, [1932] All E.R.Rep. 221; *Russell v. Duke of Norfolk*, [1949] 1 All E.R. 109; *Abbott v. Sullivan*, [1952] 1 All E.R. 226.

A As to the expulsion of a member from a club, see 5 HALSBURY'S LAWS (3rd Edn.) 262-265; and for cases see 8 DIGEST (Repl.) 655-660.

Cases referred to :

(1) *Inderwick v. Snell* (1850), 2 Mac. & G. 216; 2 H. & Tw. 412; 19 L.J.Ch. 542; 14 Jur. 727; 42 E.R. 83; 9 Digest (Repl.) 552, 3650.

B (2) *Labouchere v. Earl of Wharncliffe* (1879), 13 Ch.D. 346; 41 L.T. 638; 28 W.R. 367; 8 Digest (Repl.) 655, 30.

Also referred to in argument :

Fisher v. Keane (1878), 11 Ch.D. 353; 49 L.J.Ch. 11; 41 L.T. 335; 8 Digest (Repl.) 656, 36.

C *R. v. Saddlers' Co.* (1863), 10 H.L.Cas. 404; 32 L.J.Q.B. 337; 9 L.T. 60; 28 J.P. 36; 9 Jur.N.S. 1081; 11 W.R. 1004; 11 E.R. 1083, H.L.; 8 Digest (Repl.) 656, 34.

Hayman v. Rugby School (Governors) (1874), L.R. 18 Eq. 28; 43 L.J.Ch. 884; 80 L.T. 217; 22 W.R. 587; 19 Digest (Repl.) 659, 346.

Hopkinson v. Marquis of Exeter (1867), L.R. 5 Eq. 63; 37 L.J.Ch. 173; 17 L.T. 368; 32 J.P. 195; 16 W.R. 266; 8 Digest (Repl.) 659, 49.

D *Blisset v. Daniel* (1853), 10 Hare, 493; 1 Eq. Rep. 484; 18 Jur. 122; 1 W.R. 529; 68 E.R. 1022; 36 Digest (Repl.) 609, 1703.

Appeal by the plaintiff, Col. Dawkins, from a decision of SIR GEORGE JESSEL, M.R., dismissing an action brought by the plaintiff for a declaration that a resolution expelling him from a club, of which the defendants were also members, was invalid and of no effect, and for an injunction.

E The rules of a club provided that, in case the conduct of any member, either in or out of the club-house, should, in the opinion of the committee, or of any twenty members of the club who should certify the same in writing, be injurious to the character and interests of the club, the committee should be empowered (if they deemed it expedient) to recommend such member to resign, and, if the member so recommended should not comply within a month from the date of such communication being addressed to him, the committee should then call a general meeting of the members, and, if a majority of two-thirds of that meeting agreed by ballot to the expulsion of such member, his name should be erased from the list, and he should forfeit all right or claim upon the property of the club. The plaintiff, a member of the club, sent a pamphlet which reflected on the conduct of a Col. (now Lieut.-Gen.) Stephenson, also a member of the club, to the colonel at his official address, the pamphlet being enclosed in a cover on which was printed: "Dishonourable conduct of Col. Stephenson." This being brought to the attention of the committee, they called upon the plaintiff to resign, being of opinion that his conduct was injurious to the character and interests of the club. He not having resigned, a general meeting was duly called, at which the requisite majority voted in favour of his expulsion.

H *Oswald and Sidney Phipson* for the plaintiff.

Sir Henry James, Q.C., Davey, Q.C., and Crossley, Q.C., for the defendants, were not called on to argue.

JAMES, L.J.—I think it may not be undesirable in dealing with this case, as general principles are involved in it, to refer to a decision of the Lords Commissioners of the year 1850, in *Inderwick v. Snell* (1). They were dealing, not with a club, but with a joint-stock company. The considerations which influenced them seem to me equally useful for the purpose of determining how courts of law should deal with institutions like this.

They say (2 Mac. & G. at p. 221):

"The 27th clause of the deed provides 'that an extraordinary general meeting, specially called for the purpose, may remove from his office any director or auditor for negligence, misconduct in office, or any other reasonable cause'."

The argument for the appellant rested on the allegation that the general cause of removal referred to in the clause being expressed to be reasonable, prevents the power referred to from being a power to remove at pleasure arbitrarily or capriciously, and made it requisite that the proceeding for exercising the power should be in its nature judicial, and that the reasonable cause should be such as a court of justice would consider good and sufficient. If this argument could be sustained, all proceedings at such meetings would be subject to the review of the courts of justice, which would have to inquire whether the cause of removal which was charged was, in their view, reasonable, whether the charges were bona fide brought forward, whether they were substantiated by such evidence as the nature of the case required, and whether the conclusion was come to upon a due consideration of the charge and evidence.

"But the deed is silent as to these matters, and the question is whether any such power of control in the courts of justice is to be inferred from the words 'reasonable cause' contained in the 27th clause; whether the expression 'reasonable cause' contained in such a deed of a trading partnership can be held to be such a cause as upon investigation in a court of justice must be held to be bona fide, founded on sufficient evidence, and just; or whether it ought not to be held to mean such cause as in the opinion of the shareholders duly assembled shall be deemed reasonable. We think the latter is the true construction and effect of the deed. In a moral point of view, no doubt, every charge of a cause of removal ought to be made bona fide, substantiated by sufficient evidence, and determined on a due consideration of the charge and evidence; and those who act on other principles may be guilty of a moral offence; they may be very unjust, and those who (being present at the meeting) are innocently misled by the statements made to them have no doubt a just right to complain that they have been led to concur in an unjust act. But the question is whether by this deed the shareholders duly assembled at a general meeting might not, or had not, a right to remove a director for a cause which they thought reasonable, without its being incumbent upon them to prove to this or any other court of justice that the charge was true and the decision just, or that the case was substantiated after a due consideration of the evidence and charge.

"We cannot take upon ourselves to say that, in the case of a trading partnership like this, this court has, upon such a clause in the deed of partnership, jurisdiction or authority to determine whether, by the unfounded speech of any supporter of the charge, the shareholders present may not have been misled or unduly influenced. All such meetings are liable to be misled by false or erroneous statements, and the amount of error or injustice thereby occasioned can rarely, if ever, be appreciated. This court might inquire whether the meeting was regularly held, and in case of fraud clearly proved might perhaps interfere with the acts done; but supposing the meeting to be regularly convened and held, the shareholders assembled at such meeting may exercise the powers given them by the deed. The effect of speeches and representations cannot be estimated, and for those who think themselves aggrieved by such representations, or think the conclusion unreasonable, it would seem that the only remedy is present defence by stating the truth and demanding time for investigation and proof, or the calling of another meeting, at which the whole matter may be re-considered. The plaintiff, objecting to this meeting, and considering it illegal, protested against it, but abstained from attending, and therefore made no answer or defence to, and required no proof of, the charges made against them. The adoption of this course was unfortunate, but does not afford any grounds for the interference of this court."

The commissioners went on to say that they believed the charges to be unfounded, but that they would not interfere.

A Reading "club" for "trading partnership," I apprehend that every word of that judgment is applicable to the present case. We have no right to sit as a court of appeal from the decision of the members of a club duly assembled. All we have to consider is whether the notice was or was not given according to the rules; whether the meeting was properly convened, and whether the meeting, if properly convened, has come to the conclusion that this gentleman ought to be expelled,

B having before it the fact that the committee had, upon investigation of the matter, come to the conclusion, and expressed the opinion, that his conduct was such as to entitle them to call upon him to resign. The object of calling the meeting was to sit in review upon the opinion of the committee, and the member, if he does not choose to resign, has a right, by the rules, to have the matter brought before the general meeting. The matter was brought before the general meeting,

C the committee having come to the conclusion upon the matters before them that his conduct was such as was likely to be injurious to the character and interests of the club. What they said was: "We think that sending an envelope, with a very offensive superscription, by one member of the club to another member of the club, is a character of misconduct likely to be injurious." Unless we can say that their conduct in holding that such conduct would be injurious to the character

D and interests of the club is so manifestly absurd and so manifestly idle that it can only have been a false pretence to cover something else, and, therefore, was fraudulently put forward for the purpose of giving effect to some preconceived notion of removing him without just cause, for which conclusion I can see no ground or foundation whatever (and I am far from thinking that the charge, based upon the envelope is idle), I say, with all deference—and I am going further

E than I ought, because the matter is not before us—I am satisfied I should have come to the same conclusion as the general meeting. I can conceive nothing more injurious to the character and interests of a club than the sending through the post by one member of a club an open envelope with those charges upon it. I do not say anything about the pamphlet, but the thing, to my mind, that reasonably led them upon such an insulting act to the conclusion at which they arrived

F was the sending the envelope by one member of the club to another, and it is not for me to say the committee were not well warranted in coming to the conclusion they did.

The next question to be decided is: Did they give the plaintiff notice? It appears to me they gave him ample notice. He does not deny that he sent the letter. The committee and the meeting gave him every opportunity of saying

G anything he chose to say to the committee or to the meeting, and he could have said: "Notwithstanding I did that, do you think it is a case for expulsion?" According to my view, he had the most ample opportunity of taking the opinion of the general assembly of the members duly convened, who were the real judges, supposing they did not act corruptly or fraudulently, of whether or not that rule ought to be applied. I am, therefore, of opinion that the decision of the Master of

H the Rolls ought to be affirmed.

BRETT, L.J.—I think we ought to take great care that this court does not, by successive decisions, usurp an authority in these cases for which it has no colour in point of law. In my opinion, there is some danger that the courts will undertake to act as courts of appeal against the decisions of members of clubs, whereas

I the court has no right or authority whatever to sit in appeal upon them at all. The only question which a court can properly consider is whether the members of the club, under such circumstances, have acted *ultra vires* or not, and it seems to me the only questions which a court can properly entertain for that purpose are whether anything has been done which is contrary to natural justice, although it is within the rules of a club—in other words, whether the rules of the club are contrary to natural justice; secondly, whether a person, who has not condoned the matter, has been acted against contrary to the rules of the club; and, thirdly, whether the decision of the club has been come to *bona fide* or not. Unless one

of those charges can be made out by those who come before the court, the court has no power to interfere with what has been done. The court has no right, in my opinion, to consider whether what was done was right or not, or even, as a substantive question, whether what was decided was reasonable or not. The only question is whether it was done bona fide.

Is it true to say that an element, in considering whether a matter has been done in good faith, is to question whether what has been done is beyond all reason? That is evidence of want of good faith, but, even where that exists, it is not a necessary conclusion that there has been want of good faith, for, even after having come to the conclusion that a decision was wholly unreasonable, one might be convinced aliunde that, nevertheless, there was no malice—that what was done was done in good faith. The mere proof that it was contrary to reason is no cause or sufficient ground why the court should interfere. It is like the case of a malicious prosecution, where, if there is a want of reasonable and probable cause, that is evidence to go to the jury to support the other necessary allegation that there was malice in fact; but then the jury are told: “Even though I tell you there was a want of reasonable and probable cause, you must consider and decide for yourselves whether, besides that, there was not malice in fact.” In such cases, unless they find that there was also malice in fact, the propositions before them are not made out. So, in this case, even though I had been of opinion that the decision was wholly beyond reason, yet, considering the circumstances which are in evidence, and the persons against whom the charge is made, and the absolute absence of any evidence of indirect motive—even if I thought the decision were absolutely unreasonable—I should have declined to find that it was contrary to good faith, and should, therefore, have been of opinion that there was no ground for the interference of the court.

The first question then is whether there was anything contrary to natural justice? If a decision had been come to depriving a gentleman of his position on such a charge as must be made out here—namely, that he had been guilty of conduct injurious to the character and interests of the club—in my opinion, there would be a denial of natural justice, if such a decision had been arrived at without his having an opportunity of being heard. In my opinion, the charge made against the plaintiff, from beginning to end, was that he had sent an envelope through the public post to an officer in command of a regiment, on the outside of which envelope were the words, “Dishonourable conduct of Colonel Stephenson.” It is true that the fact of the pamphlet being inside was mentioned, and that would have been a charge in other cases, and a very fair charge in my opinion; but in this case that was not the material charge, the substance of the charge from beginning to end being the sending of the envelope. In the first letter he is informed: “We are told that you have sent an envelope; we want you to answer whether that is true or not.” The plaintiff does not answer, but says: “I request you to inform the committee that I decline to give any reply.” They do not take that as conclusive, but they enter upon the inquiry. They have a letter with his own handwriting before them; they do that which was lawful and legitimate; they compare the letter with the handwriting on the envelope to Col. Stephenson, and they say: “We come to the conclusion that it is your handwriting.” They do more. They send a letter to the plaintiff to say that they have come to a conclusion—*prima facie*, no doubt, and that, having done this, they wish to know whether the plaintiff will give any explanation. He says: “I deny your jurisdiction to ask me.” That is telling them he will not be a party to their inquiry. It is refusing to give any explanation. It is a direct refusal to go before them even. After that, it seems to me, he had ample opportunity of explaining that which was in terms told to him to be a charge against him. There was no want of natural justice. It was said that he had not ample opportunity of giving an explanation before the general meeting. I do not agree with that. It seems to me that before the general meeting as to the sending of that envelope he had an

A opportunity of giving an explanation if he chose. He was not shut out from it, and he declined to give any explanation whatever.

It was urged that this matter was not carried out according to the rules, and the first ground taken was that the rule was a void rule, because the rule had not been properly passed. I agree with the Master of the Rolls entirely in his reasoning that the rule was a properly passed rule. Then it was said that this was not done according to the rule because it was said the rule had been acted upon in a sense of being applied to matters which had occurred before it was passed. It was not so applied. It is quite true the rule ought not to be applied to matters which happened before the rule was passed. It was only applied to a matter which had happened after it was passed. It was said that there was malice in fact, and that the Master of the Rolls was wrong in holding that there was no malice in fact. That was put upon two grounds. It was suggested—it seems to me wantonly, improperly, and indefensibly—by insinuation, and not by direct attack, that the defendants allowed themselves to be actuated by subservience to higher authority, and that they came to a conclusion which they did not believe to be true, because they were authorities at the Horse Guards. All I can say is that there is not the slightest evidence to support such a suggestion. If such a suggestion had been made before me, where it would have been my duty to consider whether such question should have been asked of a jury, I should have said there is not a semblance of such evidence, and, therefore, those who have instructed counsel to make such a suggestion have done that which is contrary to every known sense of propriety.

Then it was said that there was a want of reason in the decision, and that the Master of the Rolls ought to have determined that there was malice in fact. It seems to me that raises this proposition: Can the court say that no reasonable men could have come to the decision? In my opinion, reasonable men could come to such a conclusion. Therefore, I see no grounds for saying that this is not a reasonable decision. I say further that if I had thought it an unreasonable decision I should have declined to come to the conclusion that there was any malice or want of good faith in those who arrived at it.

COTTON, L.J.—What we have to consider is what were the legal grounds considered by the committee, and ultimately by the general meeting? It is substantially the action of the general meeting that is impeached. The questions are whether the action of the committee and of the general meeting was authorised by any rule, that is to say, in form: Was it within the terms of the rule? Was it irregular? If those questions are answered in favour of the plaintiff, whether it has been made out to the court that the proceedings were bona fide in the honest exercise of the powers given by the rule, or malicious and fraudulent. We are not here to sit as a court of appeal from the decision of the committee or of the general meeting. We are not here to say whether we might have arrived at such a conclusion or not. Whether the decision was erroneous or not can only be taken into consideration on the question whether their opinion is so absurd, or evidently wrong, as to afford evidence that their action was not bona fide, but was malicious, or capricious, or proceeding from something other than a fair and honest exercise of the powers given by the rule.

I will consider shortly whether this rule is a valid and binding rule. Rule 13 of the original rules recognises the power to make any alteration in the standing rules of the club, but it has been urged that that does not justify such a rule as this, under which the action of the committee and the general meeting has been taken in expelling a member. But then we must consider, together with r. 13, r. 27 which provides: "No proposition affecting the general interests of the club shall be brought forward at a general meeting" unless there are certain things done. That shows, upon the construction of these rules, that rules affecting the general interests of the club might be passed, even although there was no such rule existing in the original rules, because it puts restrictions upon the mode in which

these new rules are to be framed. In my opinion, therefore, having regard to r. 13, the club had power to pass this rule. Then it was said that r. 26 of the new rules was irregular, and not in accordance with natural justice. The first point was that that new rule was not retrospective. The real meaning of that objection was that r. 26 did not apply to those who were old members of the club. That, in other words, was raising the first objection over again, that the rule was only passed as to future members. If they chose to submit to a rule already passed providing that they should be liable to expulsion if they did certain things, I do not see how any question could be raised as to the validity of that rule, to which the new members voluntarily submitted themselves. When a new rule is added to the rules of a club it is intended to apply, not only to those who come in subsequently and submit to it, but also to those already in the club. When by the voice of the majority of the meeting it is said: "This shall in future be one of the rules of the club," it must equally apply, not only to future members, but to all members of the club, whether those members come in afterwards or not. In my opinion, that objection fails.

The other objection is as to the alleged irregularity or unfairness in carrying on these proceedings under this rule. It is said that the plaintiff was not summoned to appear before the committee. He was told the committee desired to know what explanation he had to give. He objected to the right of the committee to go into the charge, and to appear before them, and said: "I will not appear before you to justify what I have done." It is true the committee did say, and, in my opinion, rightly: "We do not go into the truth of the charges you made against Col. Stephenson. Irrespective of the truth of those charges, come before us, if you can, and justify that with which you are particularly charged, the sending to him, at his orderly room, a pamphlet with this envelope." This decided, and, in my opinion, rightly, that the question was not the truth of the charges made in the pamphlet, but whether the sending a pamphlet or envelope with this superscription to a fellow member of the club, to an officer in command of a regiment or a brigade, to the orderly room, was or was not a matter affecting injuriously the character and interests of the club. In my opinion, that objection cannot prevail.

Then it was said that there was no finding by the general meeting that the conduct of the plaintiff, which the committee, within the rule, found to be injurious, was injurious to the character and interests of the club. In form there was not, but we are dealing with matter of substance, and the substance of the finding of the general meeting was that, if the plaintiff did not retire, he ought to be expelled. That involved two things—first, that his conduct in this matter was injurious to the character and interests of the club, and, secondly, that being his offence, that the circumstances required he should be expelled. Of course, they could not expel him without finding that his conduct was injurious to the character and interests of the club. They might, under the circumstances, say: "Notwithstanding that is so, there are certain reasons, which we think it unnecessary to refer to, which entitle us to impose upon you the extreme penalty of expelling you from the club." When the matter came before the general meeting, it was an appeal to that meeting from the resolution arrived at by the committee, which they, the committee, had no power to enforce, and the general meeting could not help them to enforce it unless they were satisfied that the only ground upon which the committee had power to proceed was established to the satisfaction of the general meeting. Here I should refer to what was said by SIR GEORGE JESSEL, M.R., in *Labouchere v. Earl of Wharnccliffe* (2) as to the resolution not having been put happily, or in a proper way. I must disclaim, on behalf of this court, the right to go into such matters as that, because what was done was in substance in accordance with the rule. If it was a fair and honest exercise of the power conferred by the rule, we have no right to interfere with the exercise of the power simply because something was not put in the formal way that might have been required upon demurrer. It might have been suggested that the question was:

A "Will you vote for the committee?" But here it was put: "Do you support, as right, the opinion of the committee or not?" In my opinion, that suggested ground fails.

The substantial question remains—namely, whether it has been made out that what was done was not within the rule, that it was not in the exercise of the power of the rule, and that it was done not bona fide or honestly, but maliciously, or so as to amount to a denial of natural justice. The only suggested denial of natural justice was the not summoning the plaintiff, or giving him an opportunity of being heard. But as regards this last question there is no evidence whatever. With the exception of certain matters, which I shall refer to presently, the only evidence in support of the grave allegation made against the committee and the members attending the general meeting was the affidavit of the plaintiff, that he believed certain motives had actuated one and the other. That is not evidence at all. If there had been no other facts to raise a prima facie case against them, they could not have been charged with what was stated by the plaintiff, simply because they did not come forward to meet that by evidence in denial.

I have heard only two facts which were said to raise the prima facie case. One was that there was a presumption that all the members of the club would support the committee, and the other was a charge made by the statement of claim in terms (which ought not, I think, to have been there) that, from the position of some of the members of the committee, it was to be presumed they acted unfairly and dishonestly. It is contended that there is a presumption which will prevent this being considered as a fair decision, that members of the club will support their committee, and that these rules cannot be acted upon. I cannot accede to the suggestion that members of a club, or any body of gentlemen, will support their committee (which they have elected) at the expense of truth and honesty. When they have a matter like this before them, I am satisfied that they will consider the matter fairly, and not arrive at a foregone conclusion at which the committee had previously arrived. There is the other matter. It is a charge of a gross character to suggest that any officers of the army should come to the conclusion at which they did because they held official relations with the persons in dispute with the plaintiff. That charge is utterly unwarrantable, and, in my opinion, raises no such presumption as that which the plaintiff seeks to draw from it.

There is, therefore, no evidence of anything to raise the probability that this conclusion of the committee and of the general meeting was arrived at unfairly and dishonestly; and the two facts which were relied upon in argument, in my opinion, do not raise the slightest tittle of a prima facie case against either the committee or the general meeting. In my opinion, there is no ground for asking the court to interfere with the decision arrived at by those bodies.

Appeal dismissed.

H Solicitors: *Guscotte, Wadham & Dawe; Nicholl, Manisty & Co.*

[*Reported by FRANK EVANS, ESQ., Barrister-at-Law.*]

LONDON, BRIGHTON AND SOUTH COAST RAIL. CO. v. TRUMAN AND OTHERS

[HOUSE OF LORDS (Lord Halsbury, L.C., the Earl of Selborne, Lord Blackburn and Lord FitzGerald), July 16, 17, 21, December 17, 1885]

[Reported 11 App. Cas. 45; 55 L.J.Ch. 354; 54 L.T. 250;
50 J.P. 388; 34 W.R. 657]

Railway—Nuisance—Land purchased by agreement—Use for cattle yard.

A railway company were empowered by their special Act to carry cattle, and also (in addition to lands purchased compulsorily) to purchase by agreement, "any lands not exceeding in the whole fifty acres . . . in such places as shall be deemed eligible, for the purpose of making and providing additional stations, yards, wharfs, waiting, loading, and unloading places, warehouses, and other buildings and conveniences for receiving, depositing, loading, or keeping any cattle . . . conveyed or intended to be conveyed on the said railway, or for making convenient roads or ways thereto." They were also empowered to sell the additional lands and purchase other land which they should deem more eligible for their purposes. The company bought land by agreement near one of their stations, and used it for a dock or yard in connection with their cattle traffic. The occupiers of neighbouring houses brought an action in nuisance against the company for an injunction. It was admitted that there was no negligence on the part of the company in the conduct of the cattle traffic.

Held: the purpose for which the land had been acquired was expressly authorised by the Act as incidental and necessary to the authorised use of the railway for cattle traffic; the company were not bound to choose a site more convenient to other persons; accordingly, the plaintiffs were not entitled to an injunction.

R. v. Pease (1) (1832), 4 B. & Ad. 30, approved.

Metropolitan Asylum District Managers v. Hill (2) (1881), post, distinguished.

Notes. Considered: *National Telephone Co. v. Baker*, [1893] 2 Ch. 186. Distinguished: *Rapier v. London Tramways Co.*, [1891-4] All E.R.Rep. 204. Considered: *Canadian Pacific Rail. Co. v. Parke*, [1899] A.C. 535. Distinguished: *Jordeson v. Sutton, Southcoates and Drypool Gas Co.*, [1899] 2 Ch. 217. Considered: *Batcheller v. Tunbridge Wells Gas. Co.* (1901), 65 J.P. 680; *Rattée v. Norwich Electric Tramways Co.* (1902), 18 T.L.R. 562; *A.-G. v. Dorchester Corp.* (1905), 93 L.T. 290. Distinguished: *English v. Metropolitan Water Board*, [1907] 1 K.B. 588. Explained: *R. v. Brighton Corp.*, *Ex parte Shoosmith* (1907), 96 L.T. 762. Referred to: *Evans v. Manchester, Sheffield and Lincolnshire Rail. Co.* (1887), 36 Ch.D. 626; *A.-G. v. Metropolitan Rail. Co.*, [1894] 1 Q.B. 384; *Goldberg v. Liverpool Corp.* (1900), 82 L.T. 362; *East Fremantle Corp. v. Annois*. [1900-3] All E.R.Rep. 73; *Westminster Corp. v. London and North Western Rail. Co.*, [1905] A.C. 426; *Demerara Electric Co. v. White*, [1907] A.C. 330; *McClelland v. Manchester Corp.*, [1911-13] All E.R.Rep. 562; *Manchester Corp. v. Farnworth*, [1929] All E.R.Rep. 90; *Dormer v. Newcastle-upon-Tyne Corp.*, [1940] 1 All E.R. 219; *Sellwood v. London, Midland and Scottish Rail. Co.* (1946), 175 L.T. 366.

As to right to compensation, see 10 HALSBURY'S LAWS (3rd Edn.) 6; as to purposes for which land may be taken, see *ibid.* 26-27; as to power to cause injury in exercise of statutory powers, see 19 HALSBURY'S LAWS (3rd Edn.) 309-312, 31 HALSBURY'S LAWS (3rd Edn.) 472-473; as to defences to nuisance, see 19 HALSBURY'S LAWS (3rd Edn.) 163-166. For cases see 11 DIGEST (Repl.) 121; 36 DIGEST (Repl.) 324.

Cases referred to:

(1) *R. v. Pease* (1832), 4 B. & Ad. 30; 1 Nev. & M.K.B. 690; 1 Nev. & M.M.C. 535; 2 L.J.M. 26; 110 E.R. 366; 38 Digest (Repl.) 39, 205.

- A (2) *Metropolitan Asylum District Managers v. Hill* (1881), post; 6 App. Cas. 193; 50 L.J.Q.B. 353; 44 L.T. 653; 45 J.P. 664; 29 W.R. 617, H.L.; 36 Digest (Repl.) 846, 868.
- (3) *Hammersmith and City Rail. Co. v. Brand* (1869), L.R. 4 H.L. 171; 38 L.J.Q.B. 265; 21 L.T. 238; 34 J.P. 36; 18 W.R. 12, H.L.; 11 Digest (Repl.) 106, 29.
- B (4) *Vaughan v. Taff Vale Rail. Co.* (1860), 5 H. & N. 679; 29 L.J.Ex. 247; 2 L.T. 394; 24 J.P. 453; 6 Jur.N.S. 899; 8 W.R. 549; 157 E.R. 1351, Ex. Ch.; 36 Digest (Repl.) 6, 8.
- (5) *Sturges v. Bridgman* (1879), 11 Ch.D. 852; 48 L.J.Ch. 785; 41 L.T. 219; 43 J.P. 716; 28 W.R. 200, C.A.; 36 Digest (Repl.) 251, 32.

C **Appeal** from a decision of the Court of Appeal (BAGGALLAY, BOWEN and FRY, L.JJ.), reported 29 Ch.D. 89, affirming a decision of NORTH, J., reported 25 Ch.D. 423.

The respondents, Joseph Truman and others, brought an action against the appellant company, the London, Brighton and South Coast Railway Co., for an injunction and damages for a nuisance caused by the use of a piece of land adjoining Croydon station, as a cattle dock or yard, for the purposes of the cattle traffic of the company. The company had purchased the land by auction under power given by s. 82 of the London and Brighton Railway Company Act, 1837.

Rigby, Q.C., and *Ingle Joyce* for the appellants.
W. Barber, Q.C., and *Alexander Young* for the respondents.

E Their Lordships took time for consideration.

Dec. 17, 1885. The following opinions were read.

LORD HALSBURY, L.C.—In this case the plaintiff, Joseph Truman, the occupier of a house in Lansdowne Road, Croydon, and certain other co-plaintiffs, occupiers of houses in the vicinity, complain of the defendants, that in the year 1881 the defendants erected certain cattle-pens, a cattle dock or yard, and have from that time to the bringing of the action used them for sheep, calves, and cattle, daily and nightly, for the purpose of their being loaded and unloaded, and have thereby caused great annoyance to the plaintiffs, and have substantially interfered with their comfort and enjoyment in the occupation of their houses. NORTH, J., before whom the action was tried, found that these allegations were established by the evidence, and the Court of Appeal was of opinion that that finding of fact was supported by the evidence. Neither the statement of claim nor any finding by the judge suggests that the defendants were guilty of any negligence in the use of the cattle-pens and dockyard, as distinguished from the selection of its site, and the whole question turns on the right of the railway company to select and use that site, although its use may involve a nuisance to the neighbouring proprietors.

H That question must depend upon the authority which Parliament has granted to the railway company. The ground upon which NORTH, J., has proceeded in that respect, supported by the Court of Appeal, although for different reasons, has been that, it being competent to the company to select another site more convenient and less injurious to the plaintiffs, they have selected a site which has caused the injury of which the plaintiffs complain. It cannot now be doubted that a railway company constituted for the purpose of carrying passengers, or goods or cattle, are protected in the use of the functions with which Parliament has entrusted them, if the use they make of those functions necessarily involves the creation of what would otherwise be a nuisance at common law. Ever since *R. v. Pease* (1), in 1832, it has been established so firmly by repeated decisions that that proposition is no longer within the region of controversy, and if these cattle-pens and dockyard had been within the original limits of deviation, or what was equivalent to the limits of deviation in modern Acts when the line was first authorised, and had been erected within those limits, I do not understand that any of the judges would have

doubted that the company were acting within their powers, and were protected upon the principle I have stated above. For reasons which I will presently give, I think the same question which arises now might with equal plausibility have been urged in that case. A

But I pass on to consider the distinctions which are supposed to take this case out of the general principle to which reference has been made. The original Act was passed in 1837, and in 1881 the cattle-pens and dockyard were erected and used, I do not stay to inquire whether they were selected with a due regard to the public convenience. In the view I take that is an immaterial question, because I think, if the company were acting under their statutory authority, the absolute discretion of selecting the site was in them; if they were not, they would, like any other persons guilty of a nuisance, be liable to be restrained from a continuance of it. B
It seems to have been contemplated by the legislature when passing the Act of 1837 that it might become necessary, as time went on, to enable the company to provide additional stations and yards for receiving, loading, or keeping cattle, and for that purpose it enacted that, in addition to the lands authorised to be taken expressly, the company for such purposes might acquire other land, but restricted this power of purchase in several important particulars. The whole amount must not exceed 50 acres; it could only be taken by voluntary contract; and, as a matter of physical necessity, it could only be taken when it could be used in connection with, and as auxiliary to, the railway authorised by the Act. C D

I believe the whole question must turn on the effect to be given to s. 82 of the Act of 1837, which creates this flexible machinery for providing additional accommodation. It seems hardly to admit of argument that the statute intended such additional accommodation, when provided, to form part of and to be used with the railway, and, if so, to share the immunity which the railway, in its original construction, would have enjoyed from actions levelled at its use. It would be strange indeed if the legislature could be supposed to have authorised the railway to commit a nuisance up to a certain point, to have provided machinery for extending the railway and its use beyond that point, and yet to have allowed the further user to be open to an action to restrain its use. As I have said, the very same question which is now urged might with equal force have been urged against the original formation of the lines, and indeed was urged, though without effect, in *R. v. Pease* (1). The limits of deviation give to the company a discretion as to where they will fix their line, and in *R. v. Pease* (1) it was pointed out that the line might have been made within the limits of the company's powers so many yards from the highway as very much to diminish the nuisance to the traffic which, in that case, was the main subject of complaint. That argument, however, was disregarded, and in none of the cases, so far as I am aware, has it ever been revived, though in many cases, conspicuously in *Hammersmith and City Rail. Co. v. Brand* (3), it might have been very plausibly urged that a few feet further off would sensibly have diminished the vibration. But, in truth, it would be impossible to apply such a principle; the old notion of people losing their rights of complaint because they come to a nuisance has been long since exploded. Suppose the alternative site suggested in this place to have been taken. There may be at present no adjoining owners to Fairfield who would be disturbed in their occupation by the establishment of a cattle-dock there, but hereafter houses may be built, and, unless some new principle of law is to excuse the railway company from liability for the existence of the nuisance, I am at a loss to understand why the future neighbours of Fairfield will not have as good a right to restrain the company as the present occupiers of Lansdowne Road. It may not be immaterial to observe that s. 82 is equally applicable to passenger stations as to cattle-pens, and I can quite imagine that the establishment of a passenger station might be a real annoyance to a neighbour previously free from the noise involved in such an establishment. If the argument addressed to us is sound as to cattle-pens, it would be equally applicable to the creation of a new passenger station. E F G H I

A NORTH, J., and BAGGALLAY, L.J., expressly based their judgment upon the decision of your Lordships' House in *Metropolitan Asylum District Managers v. Hill* (2), and it is a little singular to observe that the very phrases which some of your Lordships used in that case to distinguish the Acts of Parliament, which your Lordships were then construing, from the class of Acts now under review, are relied upon as justifying the proposition that the decision of that case must govern the present. I think it is enough, in discussing that case, to say that the ground of the decision was one which distinguished it from the present by reason of the very nature of the enactment which was then under discussion. The Railway Acts, treated as a well-known and recognised class of legislation, were expressly and carefully distinguished from the permissive character of the legislation which your Lordships were then construing. Broadly stated, the distinction taken amounted to this, that a smallpox hospital might be built and maintained if it could be done without creating a nuisance; whereas the Railway Acts were assumed to establish the proposition that the railway might be made and used whether a nuisance were created or not. I am, therefore, of opinion that the order appealed from ought to be reversed, the order of NORTH, J., discharged, the judgment entered for the defendants, and that the respondents should pay the costs both here and below.

D
THE EARL OF SELBORNE.—This was an action for an injunction and damages brought by the respondents against the appellants for a nuisance alleged to be caused to the respondents and their families by the appellants bringing cattle and other animals to their cattle dock, yard, and pens, situate on a certain piece of ground adjoining the Lansdowne Road, at Croydon (on the opposite side of which the respondents' houses are situate), and keeping such animals there, or in trucks on the adjoining rails. It is found, as the result of the facts in evidence, that there is a cause of action, unless the use made by the appellants of this land is authorised by their Acts; and also that there is no cause of action on the ground of negligence in the manner of doing what is authorised, if that use of the land is in fact authorised, so as to bring the case within the principle of *R. v. Pease* (1), *Vaughan v. Taff Vale Rail. Co.* (4), *Hammersmith and City Rail. Co. v. Brand* (3). The question, therefore, is whether it does or does not fall within that principle? The land, whether originally within the compulsory powers of the London and Brighton Railway Co. (whom the appellants represent) or not, was not acquired under those powers or during their continuance. It was considered in the courts below (and in this respect I see no reason to differ from them) to have been purchased by agreement under a power given by s. 82 of the London and Brighton Railway Act, 1837. The compulsory powers of the company expired in 1839, and this land was purchased at a sale by auction in 1851. If it could be made out (as was contended on the part of the respondents) that the powers of the company to purchase lands by agreement, whether under s. 82 or otherwise, were limited in point of duration to ten years by s. 124, or to seven years by s. 129 of the Act, it would, in my opinion, follow that, as there would be no statutory authority for the acquisition, so there could be none for the use of this land for any of the purposes of the railway. But I think it would be doing great violence to the language of those sections to put any such construction upon either of them. The purchase, therefore, was not unauthorised, though it could only be made (as it was made) by agreement.

I
What, then, were the purposes for which, by s. 82, the company was empowered to purchase, "in such places as should be deemed eligible," lands not exceeding in the whole fifty acres—in addition to those otherwise authorised? The company had express power under s. 198 to convey upon their railway in carriages propelled by locomotive engines or otherwise (*inter alia*), "all such cattle and other animals as should be offered to them for that purpose"; and the purposes expressed in s. 82 were,

"making and providing additional stations, yards, wharfs, waiting, loading, and unloading places, warehouses, buildings, and conveniences for receiving, depositing, loading, or keeping any cattle, or any goods, articles, matters, or things, conveyed or intended to be conveyed upon the railway."

The purpose, therefore, for which the land now in question is used by the company is one expressly authorised by the section under which it was acquired; and it is a purpose incidental and necessary to the authorised use of the railway itself for the general cattle traffic of the undertaking. If the authority is not such as to bring that use within the principle on which *R. v. Pease* (1) and the other cases to which I have referred were decided, I do not see how it could have been different if the complaint had been of a nuisance by the noise of locomotive engines or trains passing over the same land, which might have frightened horses and caused accidents in the Lansdowne Road. I understood counsel for the respondents to admit, as a necessary result of the principle of his argument, that this also would have been an actionable nuisance, and not within the ruling of *R. v. Pease* (1). That argument depended upon a distinction between lands taken under compulsory powers, and those taken under a merely enabling power, when the particular lands to be purchased were not absolutely, or within certain limits, defined.

It was not disputed that, if this land could have been, and had actually been, taken under the compulsory powers of the Act of 1837, or by agreement while those compulsory powers were existing and applicable to it, its use for the purposes complained of by the respondents would have been under statutory authority, and therefore not actionable. But the application of the same rule is denied as to land purchased by agreement under s. 82. Why so? It would seem, at first sight, that when land has been actually acquired under parliamentary authority by a railway company, and is used for the purpose, or for one of the purposes for which the power so to acquire it is expressly given, that use is as completely authorised and in exactly the same way (the purpose being incidental to the general traffic of the company on their line) as if it had been acquired under any compulsory power. And although no exact site or local limits may be prescribed by the terms of the authority for the acquisition of that land, yet, being directly subsidiary to the general traffic of the line, it follows from the very nature of the purposes authorised that it must be land contiguous to the railway or some of its stations, the local situation of the whole line of railway being within certain limits of deviation defined by the Act. The land to be purchased for these purposes may be "in such places as shall be" (i.e., by the company) "deemed eligible," but these can only be places (in the case of cattle and other animals) suitable in point of position for "receiving, depositing, loading, or keeping cattle, etc., conveyed or intended to be conveyed upon the railway." When acquired it must become part of the railway and its appurtenances in exactly the same way as if similar loading and unloading places had been made upon lands taken when the railway was first made, whether by compulsion or by agreement. It would be (as it seems to me) inconsistent and unreasonable to suppose that the legislature intended land so acquired for such purposes to be separated as to the legal conditions of its tenure and use for those purposes from the rest of the undertaking with which it would have become incorporated, and as to which the rule that what is authorised is not actionable is acknowledged to prevail.

It was urged that the company, having an option as to place, were bound to exercise it so that no adjoining landowner (or I suppose any other person) should suffer detriment from the subsequent use of the land for the authorised purposes. If it were the duty of the company in deciding upon the eligibility of the place to be governed by such considerations, they might be placed in very great difficulty. For even if any place could be found where no person would be liable to suffer detriment from the establishment of loading and unloading places for cattle near his land, it is obvious that the other considerations relative to the convenience of the company's traffic which the legislature must primarily have had in view, might

A have to be disregarded. The natural (and to the company and the public the most convenient) places for receiving and discharging cattle traffic to and from a railway must be in connection with or in proximity to stations at or near market towns or other populous places; certainly not in fields remote from any human habitations. But even if the company were to establish a cattle-station at a distance from any human habitation, it seems possible from *Sturges v. Bridgman* (5) that the law of nuisance might still pursue them there (unless protected from it on the principle of *R. v. Pease* (1)) in the event of an adjoining landowner afterwards thinking fit to build a house upon his own property. If it is the duty of a company, when they have any option, to select land (for the authorised purposes of their undertaking) so situated that its use for those purposes may not be detrimental, or may be as little detrimental as possible to any adjoining landowner, I am unable to see why it should make any difference whether all the land as to which they have so to exercise their choice is situated within prescribed limits, and subject to compulsory powers or not. In *R. v. Pease* (1) that argument was advanced (no doubt as to land within prescribed limits of deviation and under compulsory powers) without success.

I doubt much whether the order now under appeal would have been made if it had not been supposed in the courts below that the principle of *Metropolitan Asylum District Managers v. Hill* (2) was applicable to the case of all land purchased otherwise than under compulsory powers, or within prescribed and definite local limits. With that opinion I am unable to agree. In that case the establishment of a small-pox hospital within certain local limits was not specially authorised, as the construction of the London and Brighton Railway, for the purpose (among other things) of the loading, carriage, and unloading of cattle and other animals was here. If it had been I do not think that this House would have considered the case of any adjacent land in a situation not defined, which the board might have been authorised to purchase by agreement for the enlargement, as they might think desirable, of the hospital premises different from that of the site of the hospital itself. In that case no use of any land which must necessarily be a nuisance at common law was authorised; it was not shown to be impossible that lands might be acquired in such a situation and of such extent as to enable a smallpox hospital (if required by the poor law board) to be erected upon them without being a nuisance to adjoining land. Here there can be no question that the legislature has authorised acts to be done for the necessary and ordinary purposes of the railway traffic (e.g., such as those complained of in *R. v. Pease* (1)) which would be nuisances at common law, but which being so authorised are not actionable. In that case there were no compulsory powers; here there are the compulsory powers usually given to railway companies; and the land in question, though not acquired under those powers, was acquired for purposes expressly authorised, being ejusdem generis with those for which the compulsory powers were given, and was to be used in connection with and as subsidiary to the railway and other works executed under those powers. In that case there were no provisions for any compensation for any damages or injury to any persons under any circumstances. Here there are, the line being drawn, as is usual in Railway Acts, between lands taken or injuriously affected by the construction of the works (which are subjects of compensation) and lands which, or persons who, may suffer some subsequent detriment or annoyance from the authorised use of the railway and works when constructed, so that if the question had been one of compensation the respondents would not be within the line. In all these points, as it seems to me, the present case is not similar to, but is in direct contrast with *Metropolitan Asylum District Managers v. Hill* (2).

I am, for these reasons, of opinion that the order appealed from ought to be reversed, and the order of NORTH, J., discharged, and judgment in the action entered for the defendants, appellants here. No sufficient cause, that I can see, has been shown why the costs, both here and below, should not follow the event. Whatever has been paid by the appellants to the respondents under the order of NORTH, J., ought, of course, to be repaid.

LORD BLACKBURN.—This is an appeal against an order of the Court of Appeal affirming a judgment of NORTH, J., of Dec. 17, 1883, which was in favour of the plaintiffs below for damages for nuisance, and ordering that the defendant company be perpetually restrained

“from bringing cattle, calves, sheep, and other animals, to their cattle dock, yard, and pens, in the pleadings mentioned, and keeping such animals there, or in trucks on the adjoining rails, in such manner as to cause or be a nuisance and annoyance to the plaintiffs, or any of them.”

I take the following statement of the facts from the judgment of NORTH, J. :

“In the year 1851 the defendant company purchased a piece of land, between two and a half and three acres, lying to the west of their line between the station and Lansdowne Road. The purchase was doubtless made rather with a view to future requirements than for the present purposes of the company, as for many years the land so acquired, or a portion of it, was used as gardens for the servants of the company. The company are authorised by their Acts to be, and have from the first been, carriers of cattle. To give facilities for the receiving and loading and unloading thereof, certain structures called cattle banks, or cattle docks and pens, are found necessary, and in the early days of the railway these structures were erected on each side of the line very near to the general passenger station. These were found inconvenient, and about the year 1862 they were done away with, and a new cattle-bank was erected. In the year 1881 a new state of things arose. The town and neighbourhood of Croydon had increased enormously. It was the only place in the district where a cattle market was held, and the cattle trade had been very quickly and greatly developed. The accommodation at the old cattle-bank had become wholly insufficient. It was incapable of extension on that site; the site too had become dangerous by reason of the extension of the goods yard and sidings in its immediate neighbourhood, and the increased difficulty of getting cattle from the cattle-bank to the public road across the obstructions, and by the route used also for carriages and foot passengers. In addition to this, the requirements of the Privy Council with respect to the moving of cattle made further accommodation indispensable, and rendered a larger space for the purpose of this traffic imperatively necessary. To meet these requirements the company in the year 1881 devoted the piece of land I have mentioned to the purposes of their cattle traffic, and upon it they placed five or six new lines of railway sidings, and beyond this constructed what are called in the pleadings a cattle dock or yard, and cattle-pens, with an opening therefrom into Lansdowne Road, through which all the cattle traffic has been carried since these new arrangements were completed. I may add that this was all done by the company in consultation with, and with the full concurrence of, the local authority and the Privy Council. The plaintiffs allege that these new works by the company are a nuisance, and seek to have them restrained by injunction.”

I think no attempt was made to deny that this statement was accurate, and I read it at length because it has an important bearing on the question whether what I shall presently show is, in my opinion, the ratio decidendi of NORTH, J., can be supported. It is not disputed that the appellants have, since 1881, caused what would be an actionable nuisance entitling the respondents to an action, and an injunction against the appellants, unless the appellants could show statutable authority to use locomotive power to propel trains, and to carry cattle in those trains, and unload them on this land, without liability to an injunction against the proper exercise of those powers, though they might injuriously affect their neighbours.

The appellants relied on the Act of 1837, and more particularly ss. 82 and 129 of that Act, as giving them such powers. And, in my opinion, the principal question is, whether the true construction of that Act does or does not give such powers.

A I do not think there can be any doubt that, if on the true construction of a statute it appears to be the intention of the legislature that powers should be exercised, the proper exercise of which may occasion a nuisance to the owners of neighbouring land, and that this should be free from liability to an action for damages, or an injunction to prevent the continued proper exercise of those powers, effect must be given to the intention of the legislature. No doubt, when compensation is not
B given to those interested in the neighbouring land, this is as against them harsh legislation. But I think the construction of ordinary Railway Acts is now fixed. And whether they should have originally been construed so or not, I agree with what is said by NORTH, J. :

C “Now it is clearly settled that the power to take defined lands compulsorily, and to make a line of railway thereon and to use locomotives upon that line, entitled a company to run locomotives thereon, notwithstanding that in so doing they cause what in the absence of such power would be an actionable nuisance, provided always that they are not guilty of negligence: see *R. v. Pease* (1); *Hammersmith and City Rail. Co. v. Brand* (3). The same section which enables the company to use locomotives also gives them the power to convey cattle and other animals; and this power to carry must necessarily,
D without the assistance of s. 82, include the right to load and unload them; and it seems to me to follow that the company have the same right to load and unload, and to carry and convey cattle, as they have to use locomotives, and that they are as free in the one case as in the other from liability to be sued for causing thereby annoyance to their neighbours, provided always that negligence is absent.”

E The Act of 1837 is such a Railway Act, but s. 82, it is said, is not subject to the same construction as the rest of the Act. I do not think that any one of the judges below expresses any doubt that, if the cattle dock, yard, and pens and rails had been laid down on the line within the limits within which there was originally power to take land compulsorily, it must (on the construction now to be put on
F Railway Acts) be held to have been the intention of the legislature to authorise the use of them free from action or injunction for the proper use of their powers on the part of those neighbouring owners who suffered annoyance to such an extent as would, but for the statutory authority given to the company, have entitled those owners to an injunction. But this only extends to the proper use of those statutable powers. I do not think that, if the company failed either in the fulfilment of the
G common law duty of taking proper care in the management of the traffic, which is what is in common language called negligence, or neglected any duty that on the construction of the whole Act it appears was cast upon them, which in a more technical sense is also included in the word negligence, they are freed from an injunction. It was not contended by the counsel for the appellants that the dock-
H yard, pens, and rails, against the use of which the injunction was granted, had been erected under the general powers of the Act; they relied entirely on s. 82. Nor did they contend that s. 82 in any way freed them from liability to an injunction if they were guilty of negligence either in its more limited or in its more extended sense; they denied that any negligence in the popular sense was proved. NORTH, J., says expressly that, “the charges of negligence fail,” and no attempt was made, either in the Court of Appeal or at your Lordships’ Bar, to show that
I this finding of fact was wrong. The respondents, both in the court below and at your Lordships’ Bar, argued that the power given by s. 82 had expired before 1851, as well as the general powers. If this had been so there would have been an end of the question. But I agree with all the judges below, and I believe with the Lords who heard this argument, that this is not correct.

I think it is now convenient to inquire what the true construction of s. 82 is. I think it must be read along with the rest of the Act of 1837. It conferred a power on the original company and their successors, to whom their powers are transferred, to contract with any person “for the purchase of any lands not exceeding in

the whole fifty acres, in addition to the lands authorised to be taken," and, as they may by s. 83 sell those lands and purchase others, this power may be exercised from time to time. The land is to be purchased in "such place as shall be deemed eligible," so that the choice of the locality is left to the company; there is no restriction as to where it may be, further than that the nature of things requires that it should be near enough to the line to be used for the purposes to which the company were to apply it. Those are enumerated:

"for the purpose of making and providing [inter alia] additional stations, yards, waiting, loading, and unloading places . . . and conveniences for receiving, depositing, and loading or keeping any cattle . . . conveyed, or intended to be conveyed upon the railway . . . which the said company shall judge requisite."

It seems to me impossible to read the statement which I have read without coming to the conclusion that the company did on very sufficient grounds bona fide judge it requisite that there should be further conveniences for carrying cattle, and bona fide think the spot eligible, and I think the true construction of s. 82 is that the legislature intended them to be judges of this. I cannot doubt (on the construction of the whole Act) that, if there is a sufficient indication in the body of the Act of 1837 of the intention of the legislature that locomotive power and cattle traffic might be carried on free from injunction, if properly carried on, or, as is said, without negligence, on land acquired under the general powers of the Act of 1837, there is also an indication of intention that they may be so carried free from injunction on land acquired for that purpose under s. 82. I entirely agree with the reasoning of the noble and learned Earl on this point, and I do not repeat it. It is, however, no doubt the fact that under s. 82 the company are not bound to purchase any land, nor to apply it to any of the purposes mentioned, until they "judge it requisite," and even when they do judge it requisite, they are not bound to apply any specific piece of land to those purposes, nor even a piece of land in any specific place; it is in such place as "shall be deemed eligible" by the company. FRY, L.J., seems to think that the continuing power of choice makes it wrong to put a construction on the Act of 1837 giving on the land acquired under s. 82 the same powers as I think it is not disputed were given by the body of the Act on the other lands. If that is the ground of his decision I am unable to agree with him.

Much reference was made below to the opinions delivered in this House in *Metropolitan Asylum District Managers v. Hill* (2). BAGGALLAY, L.J., seems to think that principles were there laid down which made it impossible to put the construction on s. 82 which I think ought to be put on it. I do not think that NORTH, J., went quite so far, and I think that BOWEN, L.J., dissented from that view. He says:

"In construing Railway Acts I do not think that we should be entitled to lay down a hard and fast line between the way in which the companies may exercise their powers upon lands taken by compulsion and the way in which they may exercise them upon land taken by agreement. It seems to me that, in this very case, by s. 82 the intention of the legislature was as fully expressed that the company should carry out on the fifty acres of land to be purchased the objects for which such land was authorised to be purchased as that it should carry out its general objects on the lands which it was empowered to purchase compulsorily. It is true that the absence of all intention to interfere with private rights in an Act of Parliament does not put an end to all controversy upon the right to commit a nuisance, and in *Metropolitan Asylum District Managers v. Hill* (2) there was not to be found in the Act any element of compulsion, or any indication of an intention to interfere with private rights. I do not, however, think that the absence of one particular indication of an intention to interfere with private rights, or the presence of any one indication of such an intention is necessarily decisive."

A I prefer to adopt this language as my own to attempting to express the same idea in other words.

NORTH, J., says :

B "The plaintiff's counsel endeavoured to show that there was another site called Fairfield, at least as, if not more, eligible; but, if the onus of proof of any such matter were on them, they failed to establish it. I have no doubt that the directors have selected the site which they in the bona fide exercise of their discretion considered most advantageous to their shareholders in the first place, and possibly also to the trade and public in the second."

C He quotes a passage in LORD WATSON's opinion in *Metropolitan Asylum District Managers v. Hill* (2), and then says :

D "In the present case it is pleaded that the company were guilty of negligence in selecting a place for their cattle yard and pens which was not suitable for the purpose. The fact that a nuisance is proved to exist without any negligence in the mode of conducting the business there shows that the place is not suitable for the purpose. [In this I cannot agree.] To justify this it would, according to LORD WATSON's view, be necessary for the company to prove, in addition to an imperative direction to erect such yard and pens somewhere within defined limits, the impossibility of erecting them anywhere else within those limits without their being a nuisance to anyone. The onus of proving this would be on the defendants, and they have not proved it, nor even given any evidence upon the subject."

E I quite agree that, if the true construction of the Act of 1837, including s. 82, is to impose on the company an obligation to prove this, they have not proved it. But I cannot agree that any such obligation is imposed upon them. That would in effect deprive the directors of all discretion. I do not think that any principle having this effect was laid down by LORD WATSON or any other Lord in *Metropolitan Asylum District Managers v. Hill* (2). I understand the passage cited as giving LORD WATSON's reasons for construing the Act then before the House has not given any power to do any act interfering with the rights of others against their will, on the ground, as is said by BOWEN, L.J., in the passage I have cited,

F "that there was not to be found in the Act any element of compulsion or any indication of an intention to interfere with private rights."

G I do not think that it is shown that there was any onus cast on the company to give any such evidence as is suggested. I think it is not consistent with their having any power at all given them by s. 82 and that a construction which imposed that duty would render the section nugatory.

I, therefore, come to the conclusion that the order proposed by the noble and learned Earl, whose opinion I have seen, is right.

H LORD FITZGERALD concurred.

Appeal allowed.

Solicitors : Norton, Rose, Norton & Co.; John Holmes & Son.

[Reported by C. E. MALDEN, Esq., Barrister-at-Law.]

NIELSEN & CO. v. WAIT, JAMES & CO.

[COURT OF APPEAL (Lord Esher, M.R., Cotton and Lindley, L.JJ.), November 3, 1885]

[Reported 16 Q.B.D. 67; 55 L.J.Q.B. 87; 54 L.T. 344;
34 W.R. 33; 2 T.L.R. 34; 5 Asp.M.L.C. 533]

Shipping—Carriage of goods by sea—Cargo—Discharge—Time for discharging—Need to lighten ship before proceeding to port—Custom—Reasonableness.

By a charterparty it was agreed that the plaintiffs' steamship should proceed to Cronstadt, load a full cargo of grain, and proceed to London, or to a good and safe port in the Bristol Channel as ordered, "or so near thereto as she may safely get at all times of tide, and always afloat, and deliver the same on being paid freight." "Eight running days, Sundays excepted, to be allowed the merchants, if the ship be not sooner despatched, for loading and discharging the steamer, and ten days on demurrage if required over and above the laying days, at £25 per day." The steamer occupied six days at Cronstadt in loading a cargo of 4,325 quarters of wheat, and was ordered to Gloucester for discharge. She arrived at Sharpness Dock, in the Bristol Channel, on Nov. 13. Sharpness Dock was within the port of Gloucester, and about seventeen miles from the basin, which was within the city of Gloucester, where grain cargoes were usually discharged if the burthen of the ship would admit, access to the city basin being attained by a ship canal. The steamer was ready to commence her discharge on Nov. 13, but could not get nearer to Gloucester than Sharpness until part of her cargo was discharged. On Nov. 14 and 15 the defendants took delivery of 1,585 quarters at Sharpness, and then required the master to take the steamer through the canal to the basin to complete the discharge. The master proceeded under protest, and arrived in the basin on Nov. 17. On Nov. 18 the discharge was completed, and the vessel arrived back at Sharpness on Nov. 19. In an action for demurrage a custom of the port of Gloucester was proved that the customary place for discharging grain cargoes was at the basin within the city, that when vessels with grain cargoes destined for Gloucester were of too heavy a burthen to go up the canal they were lightened at Sharpness, and that during the discharge at Sharpness of so much of the cargo as was necessary to enable the vessel to proceed by the canal to the basin the lay days counted, but that the time occupied by going up the canal to the basin and by returning to Sharpness was not counted.

Held: the custom was reasonable and not inconsistent with the express terms of the charterparty as to "running days," and, therefore, the time occupied by the vessel in going from Sharpness to the basin and in returning ought to be excluded from the lay days; accordingly the plaintiffs were entitled to one day's demurrage only.

Notes. Distinguished: *Reynolds v. Tomlinson*, [1896] 1 Q.B. 586. Considered: *Alvion Steamship Corp'n. of Panama v. Galban Lobo Trading Co. S.A. of Havana*, [1955] 1 All E.R. 457. Referred to: *The Alne Holme* (1893), 62 L.J.P. 51; *The Katy*, [1895] P. 56; *Carlton Steamship v. Castle Mail Packets Co.* (1898), 78 L.T. 661; *British and Mexican Shipping Co. v. Lockett*, [1911] 1 K.B. 264; *Hall Bros. Steamship Co. v. R. and W. Paul, Ltd.*, [1914-15] All E.R.Rep. 234; *Hain Steamship Co. v. Sociedad Anonima Comercial de Exportacion e Importacion*, [1934] All E.R.Rep. 776.

As to port customs, see 11 HALSBURY'S LAWS (3rd Edn.) 195, 208-210, as to construction of terms relating to time, see 35 HALSBURY'S LAWS (3rd Edn.) 308, 310, as to what amounts to arrival, see *ibid.* 444, as to place of discharge, see *ibid.* 257, 446-447, 463-464. For cases see 41 DIGEST 527.

A Case referred to :

(1) *Brown v. Johnson* (1842), 10 M. & W. 331; 11 L.J.Ex. 373; 152 E.R. 497; 41 Digest 568, 3926.

Also referred to in argument :

Caffarini v. Walker (1876), I.R. 10 C.L. 250; 41 Digest 571, n.

M'Intosh v. Sinclair (1877), I.R. 11 C.L. 456; 41 Digest 570, 3939i.

B **Appeal** from a decision of POLLOCK, B., in an action tried by him with a special jury.

C The plaintiffs, owners of the steamship *St. Hilda*, claimed against the defendants, consignees of a grain cargo carried from Cronstadt to the port of Gloucester, a balance for freight and demurrage. The question between the parties was as to the number of lay days which were to be allowed to the defendants for discharging at the port of Gloucester. The plaintiffs claimed four days demurrage beyond the lay days, while the defendants admitted only one day, in respect of which they tendered before action, and paid into court the amount claimed for that day. The *St. Hilda*, a vessel of 495 tons net register, was by a charterparty made in London on Oct. 7, 1882, chartered by the plaintiffs to Messrs. Scaramanga & Co., a firm of London merchants. The charterparty provided that the steamer should proceed to Cronstadt, or so near thereto as she might safely get, and there load, always afloat, a full cargo of wheat or other grain, and therewith proceed to London, or to a good and safe port on the east coast of England, the English or Bristol Channel, or to certain other ports,

E "or so near thereto as she may safely get at all times of tide and always afloat, and deliver the same on being paid freight."

The charterparty after naming the freights payable at the different ports, continued :

F "The freight to be paid on loading and right delivery of the cargo in cash; eight running days, Sundays excepted, are to be allowed the said merchants, if the ship be not sooner despatched for loading and discharging the said steamer, and ten days on demurrage if required over and above the said laying days, at £25 sterling per day."

G The *St. Hilda* proceeded to Cronstadt, and there loaded a cargo of 4,325 quarters of wheat in bulk. A bill of lading, signed by the master and delivered to Scaramanga & Co., provided for the delivery of the cargo to them or their assigns "on paying freight for the said goods and all other conditions as per charterparty." There was endorsed on the charterparty, "six running days, Sundays excepted, expended in loading the cargo"; and further, "Capt. Robinson is hereby directed to proceed with steamship *St. Hilda* and her present cargo to Gloucester, Bristol Channel, for discharge." The steamer arrived at Sharpness Dock in the Bristol Channel, at 11 o'clock a.m. on Nov. 13, 1882. Sharpness Dock was within the port of Gloucester, and about seventeen miles from the basin, which was within the city of Gloucester, where grain cargoes were usually discharged if the burthen of the ship would admit, access from Sharpness Dock to the city basin being attained by the Berkeley ship canal. On Nov. 13, 1882, the steamer was cleared at the Custom House, and lay at Sharpness ready to commence the discharge and delivery of the cargo to the defendants, who were the holders of the bill of lading, but she could not get nearer to Gloucester than Sharpness unless a considerable portion of her cargo was first discharged at Sharpness. On Nov. 14 and 15 the defendants discharged and took delivery into lighters of 1,585 quarters, and then required the master to take the steamer through the canal to a discharging berth within the basin at Gloucester, and adjoining the defendants' warehouse. On Nov. 16 the captain proceeded under protest for the basin, and arrived on Nov. 17. On Nov. 18 the residue of the cargo, 2,740 quarters, was discharged by the defendants, and on the same day she commenced her return to Sharpness, where she arrived on the afternoon of Nov. 19. The plaintiffs claimed to reckon six days for detention at the port of discharge, making two lay days and four on

demurrage, and for this they claimed to be allowed not only for the two days occupied in unloading at Sharpness and the one day unloading at Gloucester basin, but also for the two days occupied in proceeding from Sharpness to the basin, and the one day occupied in returning. The defendants contended that the two days occupied in going from Sharpness to the basin and the one day occupied in returning ought to be excluded, and they allowed only for the two days occupied in discharging at Sharpness and the one day at Gloucester basin, which, with the six days occupied by the loading at Cronstadt, would leave only one day on demurrage, for which they had paid the amount claimed into court.

At the trial before POLLOCK, B., and a special jury the above facts were admitted and no evidence was called on behalf of the plaintiffs. Two witnesses, corn merchants of long experience in Gloucester, were called on behalf of the defendants to prove the custom of the port of Gloucester with respect to the delivery of grain cargoes out of ships of too large a burthen to come up the canal without some portion of their cargo being discharged at the entrance. The custom as stated by them was as follows: That the customary place for discharging grain cargoes had always been at the basin within the city, and that they had never known a vessel refuse to go there; that when vessels with grain cargoes destined for Gloucester were of too heavy a burthen to come up the canal they were lightened at Sharpness; that during the discharge at Sharpness of so much of the cargo as it was necessary to discharge in order to enable the vessel to proceed by the canal to Gloucester basin the lay days counted, but that the time occupied by coming up the canal to discharge at Gloucester basin and by returning to Sharpness was not counted. They cited individual cases in which the question had arisen between a shipowner and the consignee, and in which after some dispute the shipowner had given way and accepted an amount of demurrage based on this custom. This evidence was not disputed by the plaintiff's counsel, and POLLOCK, B., found the custom proved. It was agreed that the jury should be discharged, and that the judge alone should deal with the case. POLLOCK, B., held the custom reasonable, and that it was not inconsistent with the terms of the charterparty, and that therefore the plaintiffs were entitled only to the one day's demurrage, which had been paid into court. He, therefore, gave a verdict and judgment for the defendants. The plaintiffs appealed.

John Edge and Meek for the plaintiffs.

H. Mathews, Q.C., and *A. T. Lawrence* for the defendants, were not called on to argue.

LORD ESHER, M.R.—The question which arises is whether the shipowner in this case is entitled to charge the charterers or the consignees of the cargo—it matters not which—for two days during which the vessel was proceeding from Sharpness along the canal to the basin of the harbour within the city of Gloucester, and also for one day during which the vessel was returning between those places. By the terms of the charterparty, the vessel was to load in a foreign port, and, being loaded with a grain cargo, was to proceed at the choice of the charterer to a good and safe port on the east coast of England, to London, or to a port in the English Channel, or in the Bristol Channel. Until, therefore, the charterer had exercised his choice, and had ordered the vessel to her destination, it would not be known to what port she was to proceed. The vessel was ordered to Gloucester, which is undoubtedly a Bristol Channel port, being upon a navigable river which flows down to the Bristol Channel.

When in a charterparty, as in this one, a large choice of ports is given, to any one of which the vessel may be ordered to proceed, no one can tell the exact circumstances in which the vessel may be placed until it is known to what port she will be ordered; because the general rule governing the delivery of cargoes is that the vessel must proceed to the port to which she is ordered, and must there deliver at that port her cargo, according to the usual course of delivery at that port of such a cargo as she carries. The exact circumstances, therefore, in which the

A vessel may be placed will vary in various ports. Her owners cannot deliver her cargo at any place in the port as they may think fit, neither can the charterers order her to any place in the port to which they may think fit; her owners in this particular may not gratify their own whim and pleasure, nor are they bound by the whim and pleasure of the charterers, but they are bound and entitled to deliver the cargo at the port in one part of the port—namely, at that place in the port where such cargoes are usually delivered. That being the general rule, I have no doubt that, if it were shown that at a particular port the usual mode of unloading a particular cargo was to unload one-half or any proportion at one place in the port, and to unload the remainder at another place in the port, then the usual place of delivery of that cargo in that port would be at both those places. The shipowner would be bound and entitled to deliver the cargo in that way, unless some other stipulation had been made between him and the charterer as to the mode of unloading the ship.

I come to the clause as to lay days, which is a very common clause in charterparties—a clause as common as charterparties themselves. Some stipulation has to be made about the time to be occupied in loading and unloading the cargo; that time is fixed either expressly or impliedly—it may be fixed expressly by the parties, or fixed impliedly as a reasonable time by law. If it is fixed by the parties, they do it in this way: they allow a certain number of days during which the vessel is to be at the disposal of the charterers to load and unload her, and during which he is not to be called on to pay for the use of the ship; those days are the lay days. A lay days clause, therefore, is always a stipulation in the charterparty in favour of the charterer. Upon that stipulation a further stipulation is commonly engrafted dealing with demurrage days. Those are days beyond the lay days, during which the charterparty provides that the charterer shall pay a fixed sum for the use of the ship, if he keeps her doing nothing for the purpose of loading or unloading her for a certain number of days after the lay days are over. That stipulation is also in favour of the charterer, because instead of being involved in any dispute about the amount he has to pay for keeping the vessel idle, the sum to be paid per day during the demurrage days is fixed by the charterparty. If the charterer keeps the vessel idle beyond the demurrage days, the amount to be paid is a question of damages, and he does not know what he will have to pay until the amount has been settled by a tribunal or by agreement. In this case we have to deal with lay days.

Lay days are described in charterparties in various different ways, and may be stipulated for and calculated in various different manners. They may be, and sometimes are, described as days of so many working hours; then the number of days is fixed, and the number of hours per day during which the work is to proceed is also fixed. They may be described as so many "working days." In that case they will depend in some degree upon the port in which the vessel may be at her loading and discharge. "Working days" are not the same in every port in England even, and "working days" in foreign ports differ from working days in English ports. By custom, if not by law, English working days do not include Sundays, and in some foreign ports working days may include Sundays. Again, in some foreign ports, working days may not include saints' days, while such days would be working days in England. If by the custom of any particular port certain days in the year are holidays, so that by the custom no work is done in that port on those days, then the term "working days" in the charterparty does not at that port include those days. In an English port "working days" do not include Sundays and Christmas Days and some other days well known as holidays. "Working days," then, in a charterparty means days on which, at the port according to the custom of the port, work is done in loading and unloading ships, and in no case at an English port do they include Sundays. Merchants and shipowners have thought that there was something unsatisfactory in the use of the term "working days," and that lay days ought to be counted irrespective of the customs of different nations and different ports, and that the charterer must take

the risk of whether or not work is done on Sundays and holidays at the various ports in which the chartered vessel may be. A

They have, therefore, introduced a new term into charterparties—namely, “running days.” That phrase is used to distinguish the days from working days. If “days” are spoken of in a charterparty, they are distinguished from “working days,” because, *prima facie*, “days” means all day and every day, and includes Sundays and holidays; but it is possible that disputes might arise about the meaning of the term “days” in such a connection, and it is to obviate any such difficulty that this term “running days” has been issued. That is a nautical term, and it can be at once seen what it means. What is the run of a ship? It is a phrase well known. One speaks of the number of days it will take a ship to “run” from the Indies to England, and “running days” are those days on which a ship is running. What are those? Why, all day and every day, day and night. That is as plain as possible the meaning of the term. “Running days” are those days during which, if the vessel were at sea, she would be running on her voyage—that is, every day and all day. In *Brown v. Johnson* (1) LORD ABINGER pointed out that, in point of truth, “days” and “running days” mean the same thing; because, if so many days for loading and unloading a vessel are spoken of in a charterparty, they include not only working days, but every day, including Sundays and holidays, and consequently it comes to pass that “days” and “running days” really mean the same thing. B C D

Having come to that conclusion, it now remains to consider in what manner the lay days—not “running days”—are to be calculated. They must begin as soon as the ship is at her berth in the usual place of delivery, and must go on from then consecutively. They must go on consecutively, not because the charterparty in terms says so, but because it is to be taken as a necessary implication that the parties intend that, as soon as the vessel begins to unload, the unloading is to proceed uninterruptedly upon consecutive days, neither party at his option taking a holiday. If the phrase “working days” is used, that consecutiveness is spoilt, for the reasons which I have already explained. “Running days” means, as I have said, the same thing as days, and, when the lay days are provided for as “running days,” the work must go on from day to day, every day being counted. A charterparty might provide that the lay days should be so many “running days” except Sundays, in which case the meaning would be that every day was to be counted except Sundays, those days being taken out by the express exception contained in the charterparty. E F

Now comes the question, Is the term “running days” in a charterparty contradicted by proof of a custom existing at a particular port that at that port certain intermediate days—such as Sundays, for instance—are to be taken out? It does not seem to me that there is any contradiction. It is only an explanation of how at that port the “running days” are to be calculated; they are not to be, as they ordinarily would be, consecutive, if the custom is to the contrary. I cannot see that such a custom contradicts any express or implied stipulation in the charterparty, and if it does not do so then the custom may be proved. In this case I think it cannot be denied that the custom was proved. The judge heard the evidence of two witnesses upon it, was satisfied with that evidence, and found that the custom was proved. That custom was, after all, a custom of a very limited kind, and was this: that when a vessel arrives at the port of Gloucester with a grain cargo (the custom does not apply to all cargoes), and is so heavily laden that she cannot go up the canal from Sharpness to the basin of Gloucester within the city, the shipowner has the right to call upon the charterer to be present at Sharpness to take delivery, not of all the cargo, but of so much thereof as will so lighten the vessel that she shall be able to pass up the canal to Gloucester basin; the time occupied in unloading thus much of the cargo at Sharpness counting as part of the lay days. The vessel then passes up the canal and delivers the remainder of her cargo in the basin and returns to Sharpness, the time occupied in going and returning not being counted as part of the lay days. I think the G H I

A custom assumes that Sharpness is within the port of Gloucester, because, if that were not so, by what right would the shipowner include the time occupied in unloading at Sharpness in the lay days? And for all the purposes of this case I treat Sharpness as being within the port of Gloucester.

What does the custom come to? It only comes to this: that at the port of Gloucester there are two usual places of discharge for grain cargo—the one at Sharpness where the ship discharges enough to enable her to pass up the canal; and the other at the basin at Gloucester, where the discharge is completed. If there was no custom, the lay days would of course begin at the beginning of the delivery at Sharpness, and would, if “days” or “running days” were provided for, go on consecutively from day to day. But the custom adds this term: that for the time occupied by the traversing of the canal—which is, be it remembered, a removal of the vessel within the limits of the port—lay days are not to be counted, and that out of the “running days” such an intermediate time is to be deducted. I cannot see that such a custom contradicts anything contained in the charterparty, and, so far from being an unreasonable custom, it seems to me to be a most reasonable one, and one calculated to do accurate justice between shipowner and charterer, having regard to the circumstances of the port. I think, therefore, that the judgment of POLLOCK, B., was right, and that this appeal must be dismissed. I think the judgment of LORD ABINGER in *Brown v. Johnson* (1) is an express authority that such a custom as this is admissible, and that, if proved to exist in fact, it modifies the charterparty.

COTTON, L.J.—I am of the same opinion. A custom was found by the judge to have been proved to this effect: that when vessels with grain cargoes come to discharge at the port of Gloucester, but are too heavily laden to go up the canal, they discharge at Sharpness so much of their cargo as is necessary to lighten them to enable them to go up the canal; that the days occupied in this discharge are counted among the lay days provided for by the charterparty, but that the lay days are interrupted while the vessel is going up the canal, and begin again when she arrives at the usual place of discharge in the basin of Gloucester. That was the custom found by the judge, and, although the evidence of the witnesses who proved the custom has been criticised, I see nothing which would justify us in saying that the judge was wrong in finding the custom to be that which he has stated. That seems to me a reasonable custom, and a custom which takes into account the interests both of the shipowner and of the charterer, and provides reasonably for each of those interests.

The main point argued was that this custom is inconsistent with the express terms of the charterparty, and of course that objection, if it could be made out, would be fatal. A custom when proved only modifies that which, in the absence of any custom, would be the consequence of the contract between the parties. It modifies their legal rights under the instrument, there being no express provision in the instrument with reference to the matter; but where the instrument itself deals with the subject-matter of the custom in a way contrary to the custom, then the rights of the parties are determined by the instrument. It is said that this charterparty provides eight running days for loading and unloading the cargo, that running days mean consecutive days, and that, therefore, the custom which breaks into the consecutive days is inconsistent with the express provisions of the charterparty. I think the fallacy of that argument is this: that “running days” means consecutive days. It may be true that, in the absence of any custom, running days would be consecutive days, but that is not conclusive. What we have to consider is whether the phrase “running days” is an express stipulation that the days shall be consecutive. I think it is not. I think the phrase “eight running days” will not, in the ordinary use of the English language, bear that meaning: “eight days running” might have done so, but I think “eight running days” has a different meaning. It may be that the consequence of using the term “running days” will, in the absence of custom, be that the days will be

consecutive; but nothing has been quoted to show us that "running days" must necessarily mean "consecutive" days. A

I think the language used by LORD ABINGER in *Brown v. Johnson* (1) is quite contrary to the plaintiffs' contention. He says:

"With respect to the days, I think the word 'days' and 'running days' mean the same thing—namely, consecutive days—unless there be some particular custom." B

But he cannot mean that it is the same as if "consecutive days" had been expressly stipulated for, because, if "running" was the same as "consecutive," no custom could interfere to make the days not consecutive.

I think, therefore, that there is nothing in the express terms of this contract to prevent the custom from being introduced and proved, and, as it was introduced and proved, in my opinion the judgment of the learned judge was quite right. I am of opinion that the days spent in going up the canal and returning are not to be included in counting the lay days allowed for the discharge of the cargo. I am, therefore, of opinion that the appeal must be dismissed. C

LINDLEY, L.J.—I am of the same opinion. I think, upon the evidence, the custom was proved. The main point argued was that, taking the custom as proved, it was inconsistent with the terms of this charterparty, and cannot affect the question now in dispute between these parties. To reduce the argument of the plaintiffs to the smallest possible compass, it is this: that "running days" in this charterparty means and ought to be read as "consecutive days." Let me say, in the first place, that if the word "consecutive" is substituted for the word "running," the clause becomes wholly insensible, because it would follow that the time spent in loading, unloading, and in calling for orders at Elsinore, is all to be spent upon consecutive days. That is wholly impossible, and, therefore, the one word cannot, at any rate, be substituted for the other. Then it is urged that "running days" have been held to mean consecutive days. How does the custom bear upon that proposition? The custom is that the time which is necessarily consumed in going up the canal from Sharpness to Gloucester and in returning is not treated as part of the time for unloading. During that time the cargo is certainly not physically being discharged, and the custom of the port says that that time is not to be reckoned as part of the time allowed for the discharge. By the charterparty a fixed number of days are allowed for loading and for discharge. Looked at in that way, it appears to me that the custom is in strict conformity with the terms of the charterparty, and in no way inconsistent with it. I need not say anything more about the authorities. I think it is plain that "running days" means all days and every day, whether they are working days at the particular port or not. I think, therefore, that the judgment of POLLOCK, B., was right, and that this appeal must be dismissed. D E F G

Appeal dismissed. H

Solicitors: *Turnbull, Tilly & Mousir*, for *Turnbull & Tilly*, West Hartlepool; *Edward Doyle & Sons*, for *Taynton & Sons*, Gloucester.

[Reported by A. A. HOPKINS, Esq., Barrister-at-Law.]

JACOBS, MARCUS & CO. v. CRÉDIT LYONNAIS

[COURT OF APPEAL (Sir Baliol Brett, M.R., and Bowen, L.J.), November 9, 1883, February 23, 1884]

[Reported 12 Q.B.D. 589; 53 L.J.Q.B. 156; 50 L.T. 194;
32 W.R. 761]

Conflict of Laws—Contract to be partly performed abroad—Incorporation of foreign law—Determination by construction of contract—Intention of parties—Subject-matter and circumstances of contract.

What is to be the law by which a contract or any part of it is to be governed or applied, and the extent to which foreign law is to be incorporated in it, must always be a matter of the construction of the contract as read by the light of the subject-matter and the surrounding circumstances. Certain presumptions or rules in this respect have been laid down by judicial writers of different countries and accepted by the courts, based on common sense, business convenience, and the comity of nations, but these are only presumptions or prima facie rules which are capable of being displaced wherever the clear intention of the parties can be gathered from the document itself and from the nature of the transaction. The broad rule is that the law of the country where the contract is made presumably governs the nature, the obligation, and the interpretation of it, unless the contrary appears to be the express intention of the parties. Even where a contract made in England is to be performed abroad the parties may still have desired that their liabilities and obligations shall be governed by English law; or it may be that they intended to incorporate the foreign law to regulate the method and manner of performance abroad without altering any of the incidents which attach to the contract according to English law.

By a contract made in London between the plaintiffs, esparto merchants trading in London, and the defendants, a banking company, also carrying on business in London, the defendants agreed to supply certain quantities of Algerian esparto from time to time to the plaintiffs in England, the esparto to be prepared in Algeria for transportation to England. Owing to military operations and other causes in Algeria, the defendants were prevented from performing the contract, and, in defence to an action by the plaintiffs for breach of the contract, they pleaded force majeure under the French CIVIL CODE, the law prevailing in Algeria.

Held: the mere fact that the contract was partly to be performed abroad did not put an end to the inference, based on the true construction of the contract, that it remained an English contract between English merchants and was to be construed according to English law, with all the incidents which English law attached to the non-performance of such a contract; accordingly, the plaintiffs were entitled to succeed.

Notes. Considered: *Crosland v. Wrigley* (1895), 73 L.T. 60. Applied: *South African Breweries v. King*, [1899] 2 Ch. 173. Distinguished: *Ertel Bieber v. Rio Tinto Co.*, *Dynamit Act. v. Rio Tinto Co.*, *Vereinigte Königs Act. v. Rio Tinto Co.* (1918), 87 L.J.K.B. 531. Applied: *Blackburn Bobbin Co. v. Allen*, [1918] 1 K.B. 540. Distinguished: *Indian and General Investment Trust Corp. v. Borax Consolidated*, [1918-19] All E.R.Rep. 346. Considered: *Ralli Bros. v. Compania Naviera Sota y Aznar*, [1920] All E.R.Rep. 427. Considered: *Vita Food Products, Incorporated v. Unus Shipping Co.*, [1939] 1 All E.R. 513. Referred to: *Re Missouri Steamship Co.* (1889), 42 Ch.D. 321; *Chatenay v. Brazilian Submarine Telegraph Co.* (1890), 60 L.J.Q.B. 295; *British South Africa Co. v. De Beers Consolidated Mines*, [1910] 2 Ch. 502; *Dynamit Act. v. Rio Tinto Co.*, [1918] A.C. 292; *Naylor, Benzon v. Krainische Industrie Gesellschaft* (1918), 87 L.J.K.B. 1066; *Matthey v. Curling*, [1922] All E.R.Rep. 1; *Benaïm v. Debono*, [1924] All E.R.Rep. 103; *Broken Hill Proprietary Co. v. Latham*, [1933] Ch. 373; *International Trustee*

for Protection of Bondholders *Aktiengesellschaft v. R.* (1935), 154 L.T. 56; *British and French Trust Corp. v. New Brunswick Rail. Co.*, [1937] 4 All E.R. 516; *Mount Albert Borough Council v. Australasian Temperance and General Mutual Life Assurance Society, Ltd.*, [1937] 4 All E.R. 206; *Joseph Constantine Steamship Line, Ltd. v. Imperial Smelting Corp., The Kingswood*, [1941] 2 All E.R. 165.

As to proper law of a contract, see 7 HALSBURY'S LAWS (3rd Edn.) 72-81; and for cases see 11 DIGEST (Repl.) 420 et seq.

Cases referred to :

- (1) *Robinson v. Bland* (1760), 1 Wm. Bl. 256; 2 Burr. 1077; 96 E.R. 141; 6 Digest (Repl.) 402, 2866.
- (2) *P. & O. Steam Navigation Co. v. Shand* (1865), 3 Moo.P.C.C.N.S. 272; 6 New Rep. 387; 12 L.T. 808; 11 Jur.N.S. 771; 13 W.R. 1049; 2 Mar.L.C. 244; 16 E.R. 103, P.C.; 11 Digest (Repl.) 431, 771.
- (3) *Lloyd v. Guibert* (1865), L.R. 1 Q.B. 115; 6 B. & S. 100; 35 L.J.Q.B. 74; 13 L.T. 602; 2 Mar.L.C. 283; 122 E.R. 1134, Ex. Ch.; 11 Digest (Repl.) 422, 722.
- (4) *Atkinson v. Ritchie* (1809), 10 East. 530; 103 E.R. 877; 41 Digest 464, 2955.
- (5) *Paradine v. Jane* (1647), Aleyn. 26; Sty. 47; 82 E.R. 897; 12 Digest (Repl.) 417, 3236.
- (6) *Spence v. Chodwick* (1847), 10 Q.B. 517; 16 L.J.Q.B. 313; 9 L.T.O.S. 101; 11 Jur. 872; 116 E.R. 197; 12 Digest (Repl.) 459, 3427.
- (7) *Barker v. Hodgson* (1814), 3 M. & S. 267; 105 E.R. 612; 12 Digest (Repl.) 333, 2579.
- (8) *Sjoerds v. Luscombe* (1812), 16 East, 201; 104 E.R. 1065; 12 Digest (Repl.) 439, 3346.

Also referred to in argument :

Scott v. Pilkington (1862), 2 B. & S. 11; 6 L.T. 21; 8 Jur.N.S. 557; 121 E.R. 978; sub nom. *Munroe v. Pilkington*, *Scott v. Pilkington*, 31 L.J.Q.B. 81; 11 Digest (Repl.) 426, 737.

Cohen v. South Eastern Rail. Co. (1877), 2 Ex.D. 253; 46 L.J.Q.B. 417; 36 L.T. 130; 41 J.P. 627; 25 W.R. 475, C.A.; 8 Digest (Repl.) 58, 381.

Greer v. Poole (1880), 5 Q.B.D. 272; 49 L.J.Q.B. 463; 42 L.T. 687; 28 W.R. 582; 4 Asp.M.L.C. 300, D.C.; 11 Digest (Repl.) 436, 793.

The Halley (1868), L.R. 2 P.C. 193; 5 Moo.P.C.C.N.S. 262; 37 L.J.Adm. 33; 18 L.T. 879; 16 W.R. 998; 3 Mar.L.C. 131; 16 E.R. 514, P.C.; 11 Digest (Repl.) 431, 773.

Appeal by the defendants from a decision of the Divisional Court (DENMAN and MANISTY, JJ.) in an action for damages for breach of a contract by which the defendants undertook to deliver to the plaintiffs a quantity of esparto to be shipped, as provided, from Algeria. The defendants admitted that they had not delivered more esparto than the quantity mentioned in the statement of claim, but they said that by the law which prevailed at the time of the making of the contract sued on, and which still prevailed in Algeria (being, the defendants contended, the country where the acts for the non-performance of which the action was brought were by the said contract contracted to be done), no damages were recoverable for the non-performance of the contract by reason of the matters hereinafter mentioned. Throughout Algeria the law of the French CIVIL CODE prevailed and was applicable to mercantile contracts such as those set forth in the statement of claim. By the CODE :

"1147. The obligor is condemned, if there is ground for it, to the payment of damages either for the non-performance of the obligation or for delay in its performance in all cases where he does not prove that such non-performance arises from an extraneous cause which cannot be imputed to him, provided that there is no bad faith on his part. 1148. There is no ground for any damages when, by means of a superior force (force majeure) or an accident, the obligor

A has been prevented from giving or doing that which he was bound to give or do, or has done that which he was not bound to do."

The defendants said that during the time when the contract sued on should have been performed there was an insurrection in Algeria, and military operations were going on, and commands were issued by persons in authority preventing the collection and transport of esparto. Some of the esparto intended for delivery to the plaintiffs was burnt, and the servants or agents employed in carrying on work towards fulfilling the contract sued on were in some cases killed, in other cases maltreated, driven away from their work, and prevented working. By the said matters so happening in Algeria, and by other matters arising out of the said insurrection, and all of which amounted to force majeure within the law of Algeria, the defendants were prevented from procuring for shipment to the plaintiffs, and from shipping to them, any more esparto than was in fact shipped to them, and the defendants were prevented from performing their contract with the plaintiffs any further than they did perform it. The plaintiffs demurred to these statements in the defence, on the ground that the contracts were governed by English law and not by the law of Algeria. The learned judges of the Queen's Bench Division, after hearing argument, gave judgment in favour of the plaintiffs, and the defendants appealed.

Sir Farrer Herschell, Q.C., and Channell for the defendants.

Sidney Woolf (with him Forbes, Q.C.) for the plaintiffs.

Cur. adv. vult.

Feb. 23, 1884. **BOWEN, L.J.**, read the following judgment of the court. The plaintiffs are esparto merchants carrying on business in the city of London, and the defendants are a banking firm also carrying on business in the city. By a contract made in London on Oct. 6, 1880, the defendants agreed to sell to the plaintiffs 20,000 tons of Algerian esparto, to be shipped from Algeria during the year, 1881, by monthly deliveries on board ships or steamers to be provided by the plaintiffs; payment to be made by cash on arrival of the ship or steamer at her port of destination. The defendants delivered a portion of the esparto under the contract, but failed to deliver the remainder, and this action was brought by the plaintiffs for its non-delivery.

The defendants in their statement of defence admitted the non-delivery complained of, but alleged that the insurrection in Algeria, and the military operations connected with it, had rendered the performance of the contract impossible, and that by the French CIVIL CODE, which prevails throughout Algeria, force majeure is an excuse for non-performance. The plaintiffs demurred to this defence, on the ground that the contracts were governed by English law and not by the law of Algeria, and further alleged that the defendants or their agents could have procured and shipped esparto from other parts of Algeria where force majeure did not exist. The defendants, to the latter allegation, rejoined that the insurrection and military operations rendered it impossible to transport such esparto as last mentioned to the place fixed in the contract for the approval by the plaintiffs of its quality before shipment, or to transport the same to the place fixed in the contract for shipment. To this rejoinder there was a further demurrer upon similar grounds. The Court of Queen's Bench having given judgment upon both demurrers for the plaintiffs, the case now comes before us upon appeal.

The question which we have in substance to consider is whether non-performance of this agreement by the defendants can be excused on the ground that military operations in Algeria and the Algerian insurrection had rendered its performance impossible, and that such an excuse would have been recognised by the French CIVIL CODE, which prevails in Algeria in conformity with the following section as translated from the French:

"There is no ground for any damages when by means of a superior force or an accident the obligor has been prevented from giving or doing that which he was bound to give or do, or has done that which he was not bound to do."

The first matter we have to determine is whether this contract is to be construed according to English law or according to French. To decide this point we must turn to the contract itself, for it is open in all cases for parties to make such agreement as they please as to incorporating the provisions of any foreign law with their contracts. What is to be the law by which a contract or any part of it is to be governed or applied must be always a matter of construction of the contract itself, as read by the light of the subject-matter and of the surrounding circumstances.

Certain presumptions or rules in this respect have been laid down by judicial writers of different countries and accepted by the courts, based upon common sense, upon business convenience, and upon the comity of nations, but these are only presumptions or prima facie rules that are capable of being displaced wherever the clear intention of the parties can be gathered from the document itself and from the nature of the transaction. The broad rule is that the law of a country where a contract is made presumably governs the nature, the obligation, and the interpretation of it, unless the contrary appears to be the express intention of the parties. LORD MANSFIELD, C.J., says (1 Wm. Bl. at p. 258):

"The general rule, established ex comitate et jure gentium, is, that the place where the contract is made, and not where the action is brought, is to be considered in expounding and enforcing the contract. But this rule admits of an exception where the parties, at the time of making the contract, had a view to a different kingdom."

Robinson v. Bland (1); see *P. & O. Steam Navigation Co. v. Shand* (2).

This principle was explained by the Exchequer Chamber, in *Lloyd v. Guibert* (3) as follows (L.R. 1 Q.B. at pp. 122, 123):

"It is generally agreed that the law of the place where the contract is made is prima facie that which the parties intended, or ought to be presumed to have adopted as the footing upon which they dealt, and that such law ought therefore to prevail in the absence of circumstances indicating a different intention, as for instance, that the contract is to be entirely performed elsewhere, or that the subject matter is immovable property situate in another country and so forth; which latter—though sometimes treated as distinct rules—appear more properly to be classed as exceptions to the more general one, by reason of the circumstances indicating an intention to be bound by a law different from that of the place where the contract is made, which intention is inferred from the subject-matter and from the surrounding circumstances, so far as they are relevant to construe and determine the character of the contract."

It is obvious, however, that the subject-matter of each contract must be looked at as well as the residence of the contracting parties, or the place where the contract is made. The place of performance is necessarily in many cases the place where the obligations of the contract will have to be enforced, and hence, as well as for other reasons, has been introduced another canon of construction to the effect that the law of the place of fulfilment of a contract determines its obligations. But this maxim as well as the former must give way to any inference that can legitimately be drawn from the character of the contract and the nature of the transaction. In most cases, no doubt, where a contract has to be wholly performed abroad, the reasonable presumption may be that it is intended to be a foreign contract determined by foreign law; but this prima facie view is in its turn capable of being rebutted by the expressed or implied intention of the parties as deduced from other circumstances. Again, it may be that the contract is partly to be performed in one place and partly in another. In such a case the only certain guide is to be found in applying sound ideas of business convenience and sense to the language of the contract itself, with a view to discovering from it the true intention of the parties. Even in respect of any performance that is to take place abroad, the parties may still have desired that their liabilities and obligations shall be governed by English law; or it may be that they have intended to incorporate the foreign law

A to regulate the method and manner of performance abroad, without altering any of the incidents which attach to the contract according to English law.

Stereotyped rules laid down by judicial writers cannot, therefore, be accepted as infallible canons of interpretation in these days, when commercial transactions have altered in character and increased in complexity; and there can be no hard and fast rule by which to construe the multiform commercial agreements with which in modern times we have to deal. In the present case, the contract was made in B London between merchants carrying on their business in the city of London, and payment was to be made in London. Presumably, therefore, we should infer that this was an English contract, and intended to be governed by English law, but it still remains to be considered whether anything in the contract itself, or in the nature of its stipulation, displaces this *prima facie* presumption either wholly or in C part.

It cannot be contended that the parties have in express terms provided that any portion of this contract is to be construed or applied otherwise than according to English law; but it was suggested by the defendants that such an intention ought to be inferred from certain provisions as to the collection of the *esparto* in Algeria, and as to the shipment thence. The *esparto* was to be shipped by the Compagnie

D Franco-Algerienne or their agent from Arzew, or any other port with safe anchorage, by sailing ships or steamers during the year 1881. The quality of the *esparto* was to be finally approved by the plaintiffs' representatives at the works of the Compagnie Franco-Algerienne at Ain-el-Hadjar in Algeria before being baled, and no claim respecting quality was to be allowed after the delivery of the bales at Arzew. The necessary ships or steamers were to be supplied by the plaintiffs.

E otherwise the *esparto* was to be warehoused by the Compagnie Franco-Algerienne at the plaintiffs' peril and risk. Insurance was to be effected by the defendants for the invoice amount at selling price, and 2 per cent. over in the United Kingdom on the usual conditions; payment to be made by cash on arrival of the ship or steamer at the port of destination. Finally, the contract contained an arbitration clause, with a provision that it should be made a rule of the High Court of Judicature on the application of either of the contracting parties. F

There is absolutely nothing in any part of this contract, as it appears to us, which can amount to an indication that it is in any way, or in any part of it, to be treated as anything except an English contract, unless it be the mere fact that the *esparto* is to be collected in Algeria, approved at the works of a French company in Algeria before shipment, and to be delivered on board ships of the plaintiffs at an G Algerian port, after which it is to be sent at the plaintiffs' risk. To hold that on this ground only the ordinary presumption is to be displaced, and that the parties must have meant some law other than the English law to govern the construction of any portion of the contract as regards the liabilities of the contracting parties, would be to introduce a serious element of uncertainty into mercantile contracts.

The mere fact that a contract of this description, made in England between English resident houses, under which payment is to be made in England upon delivery of goods from up country in an Algerian port, is partly to be performed in Algeria, does not put an end to the inference that the contract remains an English contract between English merchants, to be construed according to English law, and with all the incidents which English law attaches to the non-performance of such contracts. H

I One of the incidents which the English law attaches to a contract is that (except in certain excepted cases, as that of common carriers and bailees, of which this is not one), a person who expressly contracts absolutely to do a thing not naturally impossible is not excused for non-performance because of being prevented by *vis major*. LORD ELLENBOROUGH says in *Atkinson v. Ritchie* (4) (10 East, at p. 533):

"The rule laid down in the case of *Paradine v. Jane* (5) has often been recognised in courts of law as a sound one, i.e., that when the party by his own contract creates a duty or charge upon himself, he is bound to make it good,

if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract":

see also *Spence v. Chodwick* (6), *Lloyd v. Guibert* (3). If inevitable necessity occurring in this country would not excuse non-performance, why should non-performance be excused on account of inevitable necessity arising abroad? So to hold would be to alter the liability which English law attaches to contracts, and would, in the absence of an express or implied intention to that effect, be contrary to authority as well as principle: see *Barker v. Hodgson* (7); *Sjoerds v. Luscombe* (8). Counsel for the defendants, in his argument, admitted that he was driven to contend that the law of the place of fulfilment not merely governed the mode of performance of this particular contract, but governed also the obligations in respect of performance and the liabilities in respect of non-performance of it. It seems to us, however, that the true principles of construction to be applied do not admit of this interpretation of this contract.

To what extent foreign law is to be incorporated in any contract must be, as we have said, a question of construction of the contract itself read by the light of the surrounding circumstances. If a contract, made in England by English subjects or residents, and upon which payment is to be made in England, has to be performed in part abroad, it might not be unreasonable to assume that the mode in which any part of it has to be performed abroad was intended to be in accordance with the law of the foreign country, and to construe the contract as incorporating silently to that extent all provisions of a foreign law which would regulate the method of performance, and which were not inconsistent with the English contract. But it cannot be gathered from such a contract as the present that the parties desired to go further, and to discharge the defendants from performance wherever circumstances arose which would, according to foreign law, excuse them. The contract has absolutely provided that delivery of the esparto shall be duly made, not that the bargain as to such delivery need only be observed when the foreign law would insist upon such observance. The contract being an English contract, only such portions of the French CIVIL CODE can be applied to its provisions as to performance in Algeria as are not inconsistent with the express language of the contract as interpreted according to English law.

If the parties had wished to incorporate a provision of French law which, in the event of vis major, would operate to excuse the contracting parties for non-performance, and thus to vary the natural construction of the instrument according to English law, they should have done so in express terms. Read by English law the contract is not susceptible of such an interpretation, and there is nothing to show that in this respect the parties desired the contract to be governed by the French law. For these reasons we are of opinion that the judgment of the court below was right, and must be affirmed with costs.

Appeal dismissed.

Solicitors: *C. J. Davis; Nicol, Son & Jones.*

[Reported by A. A. HOPKINS, Esq., Barrister-at-Law.]

A

ATTORNEY-GENERAL v. SHREWSBURY (KINGSLAND) BRIDGE CO.

[CHANCERY DIVISION (Fry, J.), June 17, 1882]

B

[Reported 21 Ch.D. 752; 51 L.J.Ch. 746; 46 L.T. 687;
30 W.R. 916]

*Attorney-General—Institution of proceedings—Enforcement of public rights—
Illegal acts tending to the injury of the public—No evidence of actual injury.*

C

The Attorney-General may properly take proceedings on behalf of the public, when acts tending to the injury of the public are being done without lawful authority, even though no evidence be produced of actual injury having been inflicted.

D

The defendant company were incorporated by private Act to construct a road, bridge and works therein specified. The time laid down by the Act for the completion of the works expired, and the company continued the work. It was proved that the company so acted as to interfere with a public right of way and a towing path and also drove piles into the river Severn in such a way as to impede navigation, but there was no proof that any actual public injury had been sustained. The Attorney-General, at the relation of two shareholders of the defendant company, and the two shareholders, commenced proceedings against the company. The company obtained a new Act which revived and extended the powers given to them by the previous Act. The plaintiffs obtained leave to discontinue so much of their claim as related to matters other than a claim to restrain the defendant company from executing works off their own land, and the statement of claim was amended. On the question of costs, which depended on the sufficiency of the justification for the original institution of the action.

E

F

Held: the Attorney-General was justified in starting the action even though no actual public injury had occurred, and the company was liable to pay the costs of the action other than those relating to the part of it which had been discontinued.

G

Notes. Considered: *A.-G. v. London and North Western Rail. Co.*, [1900] 1 Q.B. 78; *A.-G. v. Sharp*, [1930] All E.R.Rep. 741; *A.-G. (on the relation of Manchester Corpn.) v. Harris*, [1959] 2 All E.R. 393. Referred to: *London Association of Shipowners and Brokers v. London and India Docks Joint Committee*, [1892] 3 Ch. 242; *A.-G. v. Birmingham, Tame and Rea District Drainage Board*, [1910] 1 Ch. 48; *A.-G. v. Denby*, [1925] Ch. 596; *A.-G. (on the relation of Manchester Corpn.) v. Harris*, [1960] 3 All E.R. 207.

H

As to proceedings by the Attorney-General for an injunction to protect public rights, see 21 HALSBURY'S LAWS (3rd Edn.) 403 et seq.; and for cases see 16 DIGEST (Repl.) 541 et seq.

Cases referred to:

I

- (1) *A.-G. v. Oxford, Worcester and Wolverhampton Rail. Co.* (1854), 2 W.R. 330; 38 Digest (Repl.) 283, 7.
- (2) *A.-G. v. Cockermouth Local Board* (1874), L.R. 18 Eq. 172; 44 L.J.Ch. 118; 30 L.T. 590; 38 J.P. 660; 22 W.R. 619; 16 Digest (Repl.) 542, 3827.
- (3) *A.-G. v. Great Eastern Rail. Co.* (1879), 11 Ch.D. 449; 48 L.J.Ch. 428; 40 L.T. 265; 27 W.R. 759, C.A.; affirmed (1880), 5 App. Cas. 473; 49 L.J.Ch. 545; 42 L.T. 810; 44 J.P. 648; 28 W.R. 769, H.L.; 16 Digest (Repl.) 541, 3824.
- (4) *A.-G. v. Ely, Haddenham and Sutton Rail. Co.* (1869), 4 Ch. App. 194; 38 L.J.Ch. 258; 20 L.T. 1; 17 W.R. 356, L.C.; 38 Digest (Repl.) 318, 177.

Also referred to in argument :

A.-G. v. Great Northern Rail. Co. (1860), 1 Drew. & Sm. 154; 29 L.J.Ch. 794; 2 L.T. 653; 6 Jur.N.S. 1006; 8 W.R. 556; 62 E.R. 337; 16 Digest (Repl.) 541, 3825.

Action by the Attorney-General, at the relation of two shareholders in the defendant company, and by the two shareholders for an injunction to restrain the defendant company from proceeding with works after the time allowed for their completion by Act of Parliament had expired, and claiming costs.

By the Shrewsbury (Kingsland) Bridge Act, 1873, which became law on May 15, 1873, the defendant company was incorporated, and was authorised to construct a certain road, bridge, and works therein specified, with power for those purposes to purchase, take, hold, and dispose of certain lands and hereditaments. Certain powers of raising moneys were contained in the Act, and by s. 14 it was provided that all moneys raised under the Acts should be applied for the purposes of the Act only. By s. 20 it was provided that the powers of the company for the compulsory purchase of lands for the purposes of the Act should not be exercised after the expiration of three years from the passing of the Act; and by s. 21 it was provided that if the undertaking was not completed within five years from the passing of the Act, then, on the expiration of that period, the powers granted by the Act to the company for making and completing the same, or otherwise in relation thereto, should cease to be exercised, except as to so much thereof as was then completed. On May 15, 1878, the five years allowed for completion by the Act of Parliament had expired, but the road and bridge were not completed.

On Dec. 31, 1879, the present action was commenced by the Attorney-General (on the relation of Benjamin Brown and Charles John Harris), and the said B. Brown and C. J. Harris, against the company, Brown and Harris being shareholders in the company. By their statement of claim the plaintiffs alleged that, notwithstanding the expiration of the five years, the defendants were proceeding with their road, bridge, and works, and were interfering with roads and lanes for that purpose, and were expending the capital of the company in such construction, and had lately entered into contracts for the purpose of further proceeding with the undertaking, which would involve a large expenditure of capital, and were threatening and intending to interfere with public roads and ways, lands and hereditaments, in alleged pursuance of the Act, in the same manner as if they had Parliamentary powers, notwithstanding the cessation of those powers, and that they intended to expend money raised or to be raised under the Act for the purposes aforesaid, and other purposes not authorised by Parliament. The statement of claim also alleged that the defendants were spending and intending to spend moneys raised under the Act in applying for a new Act to revive their lapsed powers and grant new ones; that the defendants were largely in debt; and that, unless the defendants were restrained from proceeding with the acts aforesaid, the shareholders' moneys would be used by the defendants for illegal purposes, to the injury of the public and the personal injury of the plaintiffs. The plaintiffs claimed an injunction to restrain the defendants from proceeding with the works originally authorised by the Act of 1873, and from interfering with any roads, lands, or hereditaments for the purpose, or alleged purpose, of the said works, or other purposes not authorised by Parliament, and from applying any of the moneys so raised or to be raised under the said Act for the purposes aforesaid, or for the preparation for, or otherwise in or about, such contemplated application to Parliament as aforesaid, or for any other purpose not authorised by Parliament; with further relief.

By their statement of defence the defendants denied that they had done unauthorised acts since May 15, 1878, and alleged that work done since that date with the sanction of the company had been done on land belonging to the company, and that work done since that date on land not belonging to the company had been done by the contractors without the authority of the company, and at their own risk. The defendants also denied the other statements contained in the

A statement of claim, and alleged that the plaintiffs Brown and Harris were interested in a rival scheme for a bridge over the Severn. They alleged that they had not, since the expiration of their powers, done any act which was ultra vires, and they had not done or threatened to do anything which had caused, or tended to cause, any mischief or injury to the public, or any damage peculiar to Brown and Harris, and they submitted and insisted that nothing had been done, or threatened to be done, by them which entitled Brown and Harris to any personal remedy in the action, or which entitled the Attorney-General to sue in the action for the purpose of protecting the interests of the public. On Jan. 30, 1880, the plaintiffs moved to restrain the acts complained of, and the defendants gave an undertaking not to do anything off their own land, and not to expend moneys of the company.

On July 9, 1880, the defendant company obtained the new Act, by which the powers of their former Act of 1873 were revived and extended, and on Mar. 17, 1881, the plaintiffs applied for and obtained leave to discontinue so much of their claim in the action as related to matters other than the claim to have the defendants restrained before the passing of the Act of 1880 from executing works off their own lands according to the terms of the defendants' undertaking, given on Jan. 30, 1880. The plaintiffs were ordered to pay the defendants' costs of the discontinued part of the action, and leave was given to amend the statement of claim. The statement of claim was accordingly amended so as to claim only an injunction in the terms of the undertaking so far as related to the execution of work off the defendants' own land before the Act of 1880, and the costs of the action other than those ordered to be paid by the plaintiffs by the order of Mar. 17, 1881. The action now came on for hearing, and the only real question at issue was as to the costs of the action, which depended on the sufficiency of the justification for its original institution.

Beale for the plaintiffs.

Langworthy for the defendants.

FRY, J.—The facts of the case which I have now to decide are shortly these. The defendant company, after the expiration of the five years for which the powers given by their Act of Parliament were made to last, acted in such a way as to interfere with a public right of way and with a towing path, and also drove piles into the bed of the river Severn in such a manner as to be calculated to impede the navigation. The Attorney-General thereupon filed an information against the company at the relation of the co-plaintiffs, two of the shareholders in the company. It does not appear that there has been any interference with any private right, and the question, therefore, is whether the Attorney-General has or has not a right to interfere in such a case without showing some substantial injury to the public.

From the cases which have been cited it appears that there is some conflict of authority on the point, or, at least, a want of uniformity among the various opinions which have been expressed. But, before considering them, I will make this observation, that this is clearly a case in which I have to deal with a public body which thinks fit, without any power (for its powers had come to an end), to do acts which undoubtedly tend in their nature to interfere with the rights of the public, and so to injure the public. The question is whether the Attorney-General is justified in interfering, though there is no evidence of public injury, and in my judgment he is entitled and bound so to interfere, and the court is bound to attend to his interference.

One of the earliest cases on the subject which came before the courts was *A.-G. v. Oxford, Worcester and Wolverhampton Rail. Co.* (1), in which the court, at the instance of the Attorney-General, restrained the opening of a railway not authorised by the Board of Trade. There **LORD ROMILLY, M.R.**, stated the view he took of the case in these words (2 W.R. at p. 331), that

"undoubtedly the Attorney-General might apply to the court in cases of nuisances. It was properly said on the other side that, in all such cases, the

court required that the nuisance should be proved. But he was also of opinion that the Attorney-General, as *parens patriæ*, might apply to the court to restrain the execution of an illegal act of a public nature, provided it was established that the act was an illegal act, and it affected the public generally."

Again, in *A.-G. v. Cockermouth Local Board* (2), SIR GEORGE JESSEL, M.R., refused to grant an injunction upon the bill, because he came to the conclusion that there was no evidence of nuisance caused by the defendants' acts, but he nevertheless granted an injunction to restrain the board from polluting the water of the river Derwent, because that was prohibited by the Act of Parliament. There, as in the present case, there was no evidence of actual injury, but there was evidence that the board was doing illegal acts tending in their nature to the injury of the public, and the injunction was granted on the information, with costs.

In the more recent case of *A.-G. v. Great Eastern Rail. Co.* (3), however, the learned lords justices appear to have differed somewhat in their opinions. If they had expressed any decided view affecting this case, I need not say I should have followed it; but, having regard to the difference of opinion in that case, it seems to me that the case furnishes no very distinct guide. But when I examine the judgment of JAMES, L.J., whose opinion was most adverse to the rights of the Attorney-General, I think that, according to his view, the action in the present case can be maintained; for, referring to *A.-G. v. Cockermouth Local Board* (2) he says in explanation of it that the board was doing work which would, or might probably, poison a running stream, in direct violation of the law which prohibited the commission of a nuisance, and that that seemed to him to be a good illustration of the cases in which it was essential for the protection of the public and of individuals that the Attorney-General should interfere. But just as those acts, which were there restrained without proof of injury, were acts which tended to the injury of the public, so are the acts which in the present case the Attorney-General seeks to have restrained such as in their nature tend to the injury of the public. Therefore, in coming to the conclusion that the action can be maintained without evidence of actual injury to the public, I consider that I am acting in accordance with the views of the lords justices.

There is the further authority of LORD HATHERLEY, in *A.-G. v. Ely, Haddenham and Sutton Rail. Co.* (4) in which he said (4 Ch. App. at p. 199):

"The question is whether what has been done has been done in accordance with the observance of the law. If not, the Attorney-General strictly represents the whole of the public, in saying that the law shall be observed."

Here the law has been broken in a manner tending to the injury of the public, and in my judgment the relators are entitled to costs. The costs have not been increased by adding the relators as plaintiffs, and I shall allow the whole of the costs which are now in dispute.

Order accordingly.

Solicitors: *Clarke, Woodcock & Ryland*, for *Clarke & Sons*, Shrewsbury; *Paterson, Snow & Bloxam*, for *Salt & Sons*, Shrewsbury.

[Reported by L. B. SEBASTIAN, Esq., Barrister-at-Law.]

A

NICOLL v. FENNING AND ANOTHER

[CHANCERY DIVISION (Bacon, V.-C.), November 15, 16, 17, 1881]

[Reported 19 Ch.D. 258; 51 L.J.Ch. 166; 45 L.T. 738; 30 W.R. 95]

B *Sale of Land—Building scheme—Restrictive covenant—Covenant against use of premises as beershop.*

Under an order of the court building land was sold by trustees in lots. One lot was sold for the purpose of erecting a public-house, and the trustees covenanted with the purchaser that they would take covenants from all the purchasers of other lots against the use of the buildings to be erected on their lots "as a public-house, tavern, or beershop." One of the other lots was subsequently sold to a gas company, who sold to the defendant A who let the house erected on his lot to his co-defendant B on a tenancy from year to year. B obtained a licence for the sale of beer to be consumed off the premises, and carried on trade under his licence. Restrictive covenants had been inserted in the conveyances to the gas company and to A. The plaintiff acquired the freehold in the public-house lot from the original purchaser.

D

Held: the plaintiff was entitled to the benefit of the covenants contained in the conveyance to the gas company and to A, and injunctions lay against both defendants restraining them from using the premises as a beershop, with an inquiry as to damages.

E **Notes.** Referred to: *Formby v. Barker*, [1900-3] All E.R.Rep. 445; *Newton Abbot Co-operative Society, Ltd. v. Williamson and Treadgold, Ltd.*, [1952] 1 All E.R. 279.

As to covenants against the use of premises as "public-house, tavern, or beershop," see 23 HALSBURY'S LAWS (3rd Edn.) 624; and for cases see 31 DIGEST (Repl.) 164 et seq.

F Cases referred to:

- (1) *Mann v. Stephens* (1846), 15 Sim. 377; 60 E.R. 665, L.C.; 28 Digest (Repl.) 890, 1195.
- (2) *Renals v. Cowlishaw* (1878), 9 Ch.D. 125; 48 L.J.Ch. 33; 38 L.T. 503; 26 W.R. 754; affirmed (1879), 11 Ch.D. 866; 48 L.J.Ch. 830; 41 L.T. 116; 28 W.R. 9, C.A.; 40 Digest (Repl.) 346, 2796.
- (3) *Kemp v. Bird* (1877), 5 Ch.D. 974; 46 L.J.Ch. 828; 37 L.T. 53; 42 J.P. 36; 25 W.R. 838, C.A.; 31 Digest (Repl.) 180, 3128.

G

Also referred to in argument:

- Bishop of St. Alban's v. Battersby* (1878), 3 Q.B.D. 359; 47 L.J.Q.B. 571; 38 L.T. 685; 42 J.P. 581; 26 W.R. 679; 31 Digest (Repl.) 173, 3070.
- London and Suburban Land and Building Co. v. Field* (1881), 16 Ch.D. 645; 50 L.J.Ch. 549; 44 L.T. 444, C.A.; 31 Digest (Repl.) 173, 3074.
- Holt & Co. v. Collyer* (1881), 16 Ch.D. 718; 50 L.J.Ch. 311; 44 L.T. 214; 45 J.P. 456; 29 W.R. 502; 31 Digest (Repl.) 173, 3072.
- Western v. MacDermott* (1866), L.R. 1 Eq. 499; 35 L.J.Ch. 190; affirmed, 2 Ch. App. 72; 36 L.J.Ch. 76; 15 L.T. 641; 31 J.P. 73; 15 W.R. 265, L.C.; 31 Digest (Repl.) 188, 3200.

H

I

- Harrison v. Good* (1871), L.R. 11 Eq. 338; 40 L.J.Ch. 294; 24 L.T. 263; 35 J.P. 612; 19 W.R. 346; 40 Digest (Repl.) 358, 2869.
- Manners v. Johnson* (1875), 1 Ch.D. 673; 45 L.J.Ch. 404; 40 J.P. 345; 24 W.R. 481; 40 Digest (Repl.) 351, 2829.
- Eastwood v. Lever* (1863), 4 De G.J. & Sm. 114; 3 New Rep. 232; 33 L.J.Ch. 355; 9 L.T. 615; 28 J.P. 212; 12 W.R. 195; 46 E.R. 859, L.J.J.; 40 Digest (Repl.) 343, 2779.
- Wilson v. Hart* (1866), 1 Ch. App. 463; 35 L.J.Ch. 569; 14 L.T. 499; 30 J.P. 582; 12 Jur.N.S. 460; 14 W.R. 748, L.J.J.; 31 Digest (Repl.) 164, 3003.

- Feilden v. Slater* (1869), L.R. 7 Eq. 523; 17 W.R. 485; sub nom. *Fielden v. Slater*, 38 L.J.Ch. 379; 20 L.T. 112; 31 Digest (Repl.) 165, 3004.
- Patman v. Harland* (1881), post; 17 Ch.D. 353; 50 L.J.Ch. 642; 44 L.T. 728; 29 W.R. 707; 40 Digest (Repl.) 350, 2823.
- Clements v. Welles* (1865), L.R. 1 Eq. 200; 35 Beav. 513; 53 L.J.Ch. 265; 13 L.T. 548; 30 J.P. 100; 11 Jur.N.S. 991; 14 W.R. 187; 55 E.R. 995; 30 Digest (Repl.) 516, 1564.
- Keates v. Lyon* (1869), 4 Ch. App. 218; 38 L.J.Ch. 357; 20 L.T. 255; 33 J.P. 340; 17 W.R. 338, L.JJ.; 40 Digest (Repl.) 343, 2780.
- Child v. Douglas* (1854), Kay, 560; 23 L.T.O.S. 140; 2 W.R. 461; 69 E.R. 237; on appeal, 5 De G.M. & G. 739; 23 L.T.O.S. 283; 2 W.R. 701, L.JJ.; 40 Digest (Repl.) 340, 2766.
- Jones v. Bone* (1870), L.R. 9 Eq. 674; 39 L.J.Ch. 405; 23 L.T. 304; 34 J.P. 468; 18 W.R. 489; 40 Digest (Repl.) 357, 2862.
- Pease v. Coats* (1866), L.R. 2 Eq. 688; 36 L.J.Ch. 57; 14 L.T. 886; 30 J.P. 819; 12 Jur.N.S. 684; 14 W.R. 1021; 40 Digest (Repl.) 356, 2859.
- Duke of Bedford v. British Museum Trustees* (1822), 2 My. & K. 552; 1 Coop. temp. Cott. 90, n.; 2 L.J.Ch. 129; 39 E.R. 1055, L.C.; 40 Digest (Repl.) 360, 2887.
- Master v. Hansard* (1876), 4 Ch.D. 718; 46 L.J.Ch. 505; 36 L.T. 535; 41 J.P. 373; 25 W.R. 570, C.A.; 31 Digest (Repl.) 189, 3207.
- Fairclough v. Marshall* (1878), 4 Ex.D. 87; 48 L.J.Q.B. 146; 39 L.T. 389; 27 W.R. 145, C.A.; 40 Digest (Repl.) 355, 2848.

Action for injunctions.

In 1863 property at West Ham was laid out as a building estate, under the direction of the Court of Chancery, by the trustees under the will of one Richard Hudson, in whom the property was then vested. By a deed of conveyance dated July 1, 1863, the trustees conveyed to Abel Collins one plot which had been reserved for a public-house, and (for the purpose of binding their assigns at all times, but each of them, so as to be personally binding only on himself, his heirs, executors, and administrators) covenanted with Collins, his heirs and assigns, that they would not thereafter sell or convey any portion of the property without requiring the purchaser to enter into a covenant with them not to erect thereon, or use or permit to be used, any building to be erected thereon as a tavern, public-house, or beershop. It was proved that Collins had stipulated for the insertion of this covenant, and that it formed part of the consideration for his purchasing the property. Collins built on the plot a public-house called the Princess Alexandra Tavern. In 1866 by indenture he demised the public-house to the plaintiff Nicoll, his son-in-law, for the term of 99 years, and the plaintiff subsequently acquired the reversion in fee. In 1869, by order of the court, other portions of the property at West Ham were put up for sale by auction in building lots; among the conditions of sale was one requiring the purchasers to covenant against the use of their respective lots for the purposes of a tavern, public-house, or beershop. The Gas Light and Coke Co. purchased certain lots, in the conveyance of which, on Dec. 31, 1870, the company entered into a covenant for themselves, their successors and assigns, that they would not at any time thereafter use or permit to be used any building erected on the piece of land and premises as a tavern, public-house, or beershop. The company erected a messuage on part of the land, and sold it to the defendant Prosser, who by the conveyance to him, entered into a covenant in terms similar to those contained in the conveyance to the company. In December, 1879, the defendant Prosser agreed to let the messuage in question to his co-defendant Fenning for one year certain, Fenning by the agreement covenanting not to carry on upon the premises without Prosser's licence any trade, business, or manufacture whatsoever, except the trade or business of a retailer of beer, not to be drunk on the premises, and of wines and spirits under the licence commonly known as a grocer's licence. Fenning obtained the necessary licence in January, 1880, and at once commenced to sell beer to be drunk off the premises. In April, 1881, the plaintiff brought an action to restrain the defendants, their servants and agents from using or permitting

A the message to be used as a public-house, tavern or beershop and for damages. By leave of the court the present trustees of Richard Hudson's will were added as co-plaintiffs. Evidence was adduced to prove that there had been a falling off in the plaintiff's takings since the opening of the defendant's house, in consequence of the trade carried on there.

Higgins, Q.C., and Whitehorne, Q.C., for the plaintiffs.

B *Hemming, Q.C., and Stirling for the first defendant; Marten, Q.C., and Stirling for the second defendant.*

C **BACON, V.-C.**—The time of the court has been spent in discussing a great number of cases which have the most remote bearing on the question at issue in the case before me. It is a plain principle of equity that covenants of this kind must be construed according to the intentions of the parties by and with whom they were entered into. In the present case there was a building estate divided into lots, and it was arranged that one of the lots should be set apart for a public-house, and that the purchasers of the other lots should enter into covenants against the use of their lots for public-houses. It was for the mutual benefit of all parties that all should be protected against the building of many public-houses on the estate, and all the parties have a right to enforce what was meant for the benefit of all.

D If I attended at all to the argument that has been addressed to me as to the want of mutuality in such a covenant as this, that would be a sufficient answer to it, that the covenant was equally for the benefit of the purchasers as of the vendors. Every person to whom the original purchasers afterwards sold was entitled to the benefit of that covenant; each one was to benefit by the covenant that only one public-house should be built upon the property. From the date of the contract entered into with the purchasers the vendors held the remainder of the property subject to that covenant, imposed by them, but for the benefit of all parties. From that time they could not rightly assign any portion of the land without inserting in the conveyance such a restrictive covenant. That being so, the gas company purchase a portion of the land subject to the covenant and enter into the covenant. F The defendant Prosser, in his turn, buys the land subject to the same covenant.

G In the old days, before the Common Law Procedure Acts, this case might have been argued ad infinitum at common law whether the covenant ran with the land, but in equity it could never have been doubted. The cases that have been cited before me are all entirely different from that with which I have to deal, except *Mann v. Stephens* (1), which is entirely in point. In *Renals v. Cowlshaw* (2) I find in the judgment the principle laid down that the intention of the parties is to be followed, and that is the principle which I apply in deciding this case. In *Kemp v. Bird* (3) the decision was different, but the very same principle is laid down in that case also. I think there has been sufficient evidence of damage to induce me to grant an inquiry as to the amount of that damage.

H *Injunctions against both defendants and inquiry as to damages.*

Solicitors: Nash & Field; Bedford & Monier-Williams.

[Reported by J. G. ALEXANDER, Esq., Barrister-at-Law.]

ALLOWAY v. STEERE

[QUEEN'S BENCH DIVISION (Denman and Manisty, JJ.), November 11, 1882]

[Reported 10 Q.B.D. 22; 52 L.J.Q.B. 38; 47 L.T. 333; 47 J.P. 55;
31 W.R. 290]

Bankruptcy—Set-off—Landlord and tenant—Farm—Bankruptcy of farmer—Trustee continuing tenancy—Customary claim for tillages by trustee at expiration of lease—Landlord's right to set off rent due from bankrupt at time of bankruptcy.

The trustee of a bankrupt lessee of a farm did not disclaim the lease, but carried on the farm for a year, when the lease terminated by due notice from the trustee to the landlord. The custom of the country required the landlord, at the expiration of the lease, to pay the tenant a valuation for tillages, sowing, and cultivation. In an action by the trustee for the recovery of this sum from the landlord,

Held: the landlord was not entitled to set off against the trustee's claim rent due from the bankrupt lessee at the time of his bankruptcy.

Notes. Section 39 of the Bankruptcy Act, 1869, dealt with mutual credit and set-off. This section has been repealed and replaced by s. 31 of the Bankruptcy Act, 1914 (2 HALSBURY'S STATUTES (2nd Edn.) 365).

Considered: *Re Wilson, Ex parte Hastings* (1893), 10 Morr. 219; *Kitchen's Trustee v. Madders*, [1949] 2 All E.R. 1079; *Hole v. Cuzen*, [1953] 1 All E.R. 87. Referred to: *Re A Debtor* (No. 66 of 1955), *Ex parte The Debtor v. The Trustee of the Property of Waite*, [1956] 2 All E.R. 94.

As to set-off in bankruptcy, see 2 HALSBURY'S LAWS (3rd Edn.) 480 et seq.; and for cases see 4 DIGEST (Repl.) 423 et seq.

Cases referred to:

- (1) *Re Sneezum, Ex parte Davis* (1876), 3 Ch.D. 463; 45 L.J.Bcy. 137; 35 L.T. 389; 25 W.R. 49, C.A.; 5 Digest (Repl.) 1005, 8102.
- (2) *Titterton v. Cooper* (1882), post p. 757, 9 Q.B.D. 473; 51 L.J.Q.B. 472; 46 L.T. 870; 30 W.R. 866, C.A.; 5 Digest (Repl.) 1005, 8098.

Also referred to in argument:

Agra and Masterman's Bank v. Leighton (1866), L.R. 2 Exch. 56; 4 H. & C. 656; 36 L.J.Ex. 33; 6 Digest (Repl.) 154, 1107.

Cochrane v. Green (1860), 9 C.B.N.S. 448; 30 L.J.C.P. 97; 3 L.T. 475; 7 Jur.N.S. 548; 9 W.R. 124; 142 E.R. 176; 40 Digest (Repl.) 407, 19.

Bailey v. Johnson (1871), L.R. 6 Exch. 279; 40 L.J.Ex. 189; 24 L.T. 711; 19 W.R. 1069; affirmed (1872), L.R. 7 Exch. 263; 41 L.J.Ex. 211; 27 L.T. 714; 20 W.R. 1013, Ex. Ch.; 4 Digest (Repl.) 431, 3825.

Sankey Brook Coal Co. v. Marsh (1871), L.R. 6 Exch. 185; 40 L.J.Ex. 125; 24 L.T. 479; 19 W.R. 1012; 10 Digest (Repl.) 1123, 7321.

Re Willis, Percival & Co., Ex parte Morier Lee (1879), 12 Ch.D. 491; 49 L.J.Bcy. 9; 40 L.T. 792; 28 W.R. 235, C.A.; 4 Digest (Repl.) 431, 3821.

Special Case stated for the opinion of the Queen's Bench Division by consent of the parties to determine whether the defendant was entitled to set off against the plaintiff's claim for tillages rent due to him from a bankrupt lessee of whom the plaintiff was trustee.

Vaughan Williams for the defendant.

Grantham, Q.C. (Muir with him), for the plaintiff.

Cur. adv. vult.

Nov. 11, 1882. **DENMAN, J.**—In this case we took time to consider our judgment until this morning, and for myself I will at once candidly admit that, though after the argument yesterday I thought counsel for the defendant had made out no case, still I was under the apprehension that it might be owing to my not under-

A standing the argument addressed to us. Counsel for the defendant made a most ingenious argument, but upon the best judgment I can form, his contention was entirely unsupported by any authority.

B The Special Case states that in 1879 one Webb was tenant from year to year to the defendant of a farm. The terms of the tenancy were not expressly agreed upon, but the custom of the country required that Webb should till and cultivate the farm in a husbandlike manner, and that the landlord for the time being should, at the expiration of the tenancy, pay Webb, or the person who should at the expiration of the tenancy be tenant of the farm, all such reasonable allowances as the tenant should, according to the custom of the country, be entitled to receive from the landlord for any tillages, sowing, or cultivation of the tenant. Then it states that on Sept. 29, 1879, Webb instituted proceedings in bankruptcy for the liquidation of his affairs by arrangement, and the plaintiff was appointed trustee, and, therefore, the tenancy of Webb became vested in the plaintiff, subject to the right of the plaintiff to disclaim the same, pursuant to the provisions of the Bankruptcy Act, 1869, s. 23 [see now the Bankruptcy Act, 1914, s. 54 (2 HALSBURY'S STATUTES (2nd Edn.) 389)]. The plaintiff elected not to disclaim but to carry on the business of the debtor, and to remain tenant to the defendant, and the tenancy expired on Sept. 29, 1880, by the plaintiff having duly given notice to the defendant of his intention to deliver up possession of the farm upon that day. It then states that the plaintiff, according to the custom, was entitled to receive from the defendant reasonable allowances for tillages, sowing, and cultivation; that a valuer was appointed, and the amount fixed. There is another minor sum about which there is no dispute, and then it was stated that

E "the defendant admits [this] debt and admits that the valuation was properly made and is binding on him, but seeks to reduce his liability to the plaintiff in respect of the said matters by the set-off or counterclaim hereinafter appearing."

F We need not go into the details of that. It amounts to a statement that at the time of the liquidation there was due from Webb to the defendant £300 for two years' arrears of rent.

As to £150, being a year's rent due, the plaintiff says he always was willing and has frequently offered to set off such sum against his claim. At the end of the Case the question for our opinion is,

G "whether the defendant is, under the circumstances hereinbefore appearing, entitled to set off against the claim of the plaintiff the said rent, amounting to £450, or any part thereof."

H But it is agreed between the parties that the only question is as to £150 for a year's rent due before the bankruptcy; that is, whether it can be set off against the plaintiff's claim by reason of any statute or any equitable principle. I can find nothing in the statute relating to such a case, and counsel for the defendant has been driven to contend that, by an analogy to another case he has cited, *Re Sneezum, Ex parte Davis* (1), and according to the principles of that case, the defendant should be allowed to set off the rent due before the bankruptcy, and on the ground that the trustee was getting the benefit of the nonpayment of the rent by Webb, and that was a consideration for what he was to receive for tillage. I see nothing in *Re Sneezum* (1) which decides anything of the kind. I see no analogy between that case and this. That was not as to a right to set-off, but as to a right to prove against the bankrupt's estate. There may be here a right to prove, but I cannot see that that renders it analogous to *Re Sneezum* (1).

I But counsel for the defendant has not cited any case where the trustee carries on a farm, and, by reason of the custom of the country or otherwise, he is entitled to receive compensation for tillage, that in such a case the landlord has not only a right of proof, but a right to set off as against money actually expended by the trustee a sum for rent which was due at the time the trustee's interest first accrued. Then he says that the rent ought to have been paid, and but for that the trustee

could not have earned what he now sues for; but there is no privity, no mutuality between the two things. The trustee for the benefit of the estate enters and carries on the farm, lays out money, and at the end of the term he is entitled to be reimbursed the sum he has laid out. I cannot see any such one contract, any such mutual dealings, to make one have any connection with the other. The case for the defendant is put upon two grounds, the first of which is based upon the statute. but I see no argument whatever on that ground. The second ground is, that the defendant is entitled to set it off on an equitable principle; but I think counsel for the defendant has failed to make out any right on the part of the defendant to set off the £150 for a year's rent due before the bankruptcy against the sum due to the trustee for tillage.

MANISTY, J.—I have arrived at the same conclusion. The facts are so short that I may be excused for repeating them. Webb was tenant from year to year; he became bankrupt on Sept. 29, 1879, and the plaintiff, Alloway, was appointed trustee.

The first question to be considered is: What was the position, rights, and liabilities of Alloway when he was appointed trustee? There were two courses open to him. He might have disclaimed, but omitting to do that the term became vested in him. At that time there was a breach of the agreement or of the conditions on which the farm was held by the tenant; and the landlord for that breach could no longer sue the tenant because of the bankruptcy. He could prove against the estate and distrain. There were two years' rent due, and he did distrain, and it is assumed between the parties that he must be taken to have distrained for one year's rent. But what was the relative position of the trustee in bankruptcy and the landlord? Counsel for the defendant candidly admitted that he felt the plaintiff was personally liable for the performance of the covenants, and he spoke as if it was a formidable difficulty in his way, and I think it was. In *Titterton v. Cooper* (2) the whole matter was gone into, and the conclusion arrived at by the Court of Appeal was, that the trustee not disclaiming is in the position of an ordinary assignee. I cannot do better than read a few lines in the judgment of COTTON, L.J.:

"He is liable not by reason of any express provision in the Bankruptcy Act, 1869, but because the statute makes him an assignee, and the same liability attaches to him as to an ordinary assignee. In my opinion he cannot be liable for any claim for which an ordinary assignee would not be liable."

I suppose no one would suggest that an ordinary assignee could be liable for a breach before he became assignee.

Then the lord justice goes on to say:

"It is true that the property of the debtor has vested in him, but his liability arises from the statutory transfer, and in my opinion it ought not to be extended so as to make it relate back to a period previous to that at which the debtor's estate vested in him."

Suppose instead of bankruptcy there had been an assignment, the assignees could never have been liable. If it had been the case of an ordinary assignment, on what principle could it have been contended that the landlord could have had a right to recover rent due before? This is just the same as if the plaintiff had been an ordinary assignee. I quite agree that *Re Sneezum* (1) has no bearing whatever upon this case. It seems to me that the answer to the question,

"whether the defendant is under the circumstances entitled to set off against the claim of the plaintiff the rent amounting to £450 or any part thereof."

that being reduced to £150, one year's rent which had accrued due before the bankruptcy, is that he has no right of set-off.

Solicitors: *Morrison*s, for G. C. *Morrison*, Reigate; *Duncan*, *Warren & Gardner*, for *Hart, Hart & Marten*, Dorking.

[Reported by H. D. BONSEY, Esq., Barrister-at-Law.]

A

SKINNER v. CITY OF LONDON MARINE INSURANCE CORPORATION

[COURT OF APPEAL (Sir Baliol Brett, M.R., Baggallay and Bowen, L.JJ.), April 22, 23, 1885]

B

[Reported 14 Q.B.D. 882; 54 L.J.Q.B. 437; 53 L.T. 191; 33 W.R. 628; 1 T.L.R. 426]

Company—Shares—Transfer—Registration—Wrongful refusal to register—Damages.

C

The plaintiff transferred shares in the defendant company to a creditor on the terms that the shares were to be accepted by the creditor in reduction of the plaintiff's debt at their market price at the date of the registration of the transfer. These terms were not known to the company, and the transfer was expressed to be made in consideration of five shillings. The company, who by their articles of association were entitled to refuse to register a transfer by a person who owed them money, refused to register the transfer, on the ground that the plaintiff was indebted to them. Afterwards it was shown that he was not indebted, and the company registered the transfer, but the shares had then fallen in value, and the plaintiff sued to recover damages for the wrongful refusal to register.

D

Held: as the terms on which the plaintiff parted with the shares had not been brought to the knowledge of the company, they were not liable for the loss occasioned by the fall in value of the shares, and the plaintiff was only entitled to nominal damages.

E

Notes. Section 26 of the Companies Act, 1867, has been replaced by s. 77 of the Companies Act, 1948 (3 HALSBURY'S STATUTES (2nd Edn.) 523).

Considered: *Hichens, Harrison, Woolston & Co. v. Jackson & Sons*, [1941] 2 All E.R. 704. Referred to: *Hichens, Harrison, Woolston & Co. v. Jackson & Sons*, [1942] 1 All E.R. 128.

F

As to transfer of shares, see 6 HALSBURY'S LAWS (3rd Edn.) 248 et seq.; and for cases see 9 DIGEST (Repl.) 358 et seq.

Cases referred to:

G

- (1) *Hadley v. Baxendale* (1854), 9 Exch. 341; 23 L.J.Ex. 179; 23 L.T.O.S. 69; 18 Jur. 358; 2 W.R. 302; 2 C.L.R. 517; 156 E.R. 145; 17 Digest 91, 99.
- (2) *Wilkinson v. Lloyd* (1845), 7 Q.B. 27; 115 E.R. 398; sub nom. *Leeman v. Lloyd, Wilkinson v. Lloyd*, 14 L.J.Q.B. 165; 9 Jur. 328; sub nom. *Wilkinson v. Lloyd, Leman v. Lloyd*, 4 L.T.O.S. 432; 9 Digest (Repl.) 365, 2334.
- (3) *Re London, Hamburg and Continental Exchange Bank, Ward and Henry's Case* (1866), L.R. 2 Eq. 226; 14 L.T. 457; reversed (1867), 2 Ch. App. 481; 36 L.J.Ch. 462; 16 L.T. 254; 15 W.R. 569, L.JJ.; 9 Digest (Repl.) 217, 1377.

H

Appeal from a decision of the Divisional Court (LORD COLERIDGE, C.J., and A. L. SMITH, J.), in an action brought by the plaintiff against the defendant company to recover damages for the refusal of the company to enter in the register of members of the company the name of a person to whom the plaintiff had transferred certain shares.

I

At the trial, which took place in the Mayor's Court before the recorder of London and a jury, it appeared that the plaintiff had been the holder of 1,300 shares in the defendant company, and on Nov. 1, 1882, he executed a transfer of these shares to a Mr. Levy. The transfer was expressed to be made in consideration of 5s., but evidence was given to show that the plaintiff was indebted to Mr. Levy, who had agreed to accept the shares in reduction of the debt at their market value at the date of the registration of the transfer. There was no evidence that the existence of this agreement had been brought to the knowledge of the company. Shortly after execution the transfer was sent to the office of the company to be registered; but

the company, who by their articles of association were entitled to refuse to register a transfer executed by a transferor who was indebted to them, refused to enter the name of the transferee, Mr. Levy, in the register of their members, alleging that the transferor, the present plaintiff, was indebted to the company, and also that he was a partner in a firm which was indebted to them. The company brought an action against the present plaintiff to recover the money alleged to be due to them, and it was decided that he was not liable. Afterwards, in April, 1884, the company entered the name of Mr. Levy in their register of members as transferee of the shares. In November, 1882, when the company refused to register the transfer, the quoted price of the shares in the market was 26s. or 27s. each, and in April, 1884, when they did register, the value of the shares had fallen to 10s. each. The plaintiff claimed to recover, as damages for the wrongful refusal to register, the difference between the value of the shares at the date of such refusal and the value to which they had fallen at the date of the registration of the transfer. The jury, under the direction of the Recorder, found a verdict for the plaintiff for £1,248. The Divisional Court (LORD COLERIDGE, C.J., and A. L. SMITH, J.) directed a new trial on the ground that the damages were excessive, but gave the plaintiff leave to appeal. The plaintiff appealed from this decision.

By the Companies Act, 1867, s. 26 :

"A company shall, on the application of the transferor of any share or interest in the company, enter in its register of members the name of the transferee of such share or interest, in the same manner and subject to the same conditions as if the application for such entry were made by the transferee."

Cohen, Q.C. (Masterman with him), for the plaintiff.

Lockwood, Q.C., and *Fletcher Moulton* for the defendants.

SIR BALIOL BRETT, M.R.—This is an action brought to recover damages from the defendant company for their wrongful refusal to enter in their register of members the name of a person to whom the plaintiff had transferred certain shares. The plaintiff had applied to the company, under s. 26 of the Companies Act, 1867, to enter in their register the name of a Mr. Levy, to whom he had transferred the shares in question. His case was that he had made a valid transfer of the shares, and the company, by s. 26 of the statute, were bound to enter the name of the transferee in their register of members, and they had refused to do so. It has been proved that they wrongfully refused to enter the name of the transferee. They would have had a right to refuse if a debt had been due to them from the plaintiff, but they took the risk whether the allegation that a debt was due was true or not, and as it was shown that such an allegation was not, in fact, true, it follows that the company were in the wrong, and have committed a breach of their statutory duty. Whether they have committed a breach of contract or not is immaterial. The plaintiff, therefore, is clearly entitled to recover nominal damages, at least; but it is alleged that in this case he is entitled to substantial damages.

No doubt, under certain circumstances, substantial damages may be recovered for a breach of duty such as that which is complained of in the present case. If the name of the transferor is left on the register after he has applied to have it removed, he may be a loser, as, for instance, he may have to pay calls on the shares, if calls are made after the refusal to put the name of the transferee on the register, which involves keeping his own name on. Here, however, there was no evidence of any such damage. The plaintiff says that he has suffered loss by the falling of the shares in the market between the time when the company ought to have and the time when they did put the name of Mr. Levy, to whom the plaintiff had transferred his shares, on the register. The question is whether, assuming the alleged contract between the plaintiff and Mr. Levy to be proved, the company can be made liable for the loss which the plaintiff has sustained by reason of the shares having fallen in value before Mr. Levy's name was placed on the register. If the contract were a special, and not an ordinary contract, the case would come within the rule laid down in *Hadley v. Baxendale* (1), and the company would not be

A liable unless the terms of the contract were brought to their notice. If the terms were not brought to their notice the company was not bound to assume that the contract was other than the ordinary contract for the sale and purchase of shares. It becomes necessary, therefore, to consider whether this was the ordinary contract, and that raises the question what the ordinary contract is.

B The usual contract before the Companies Act, 1867, as stated in *Wilkinson v. Lloyd* (2), was that the seller should execute a valid transfer, and hand over the certificate to the transferee, and do all in his power to enable the transferee to insist on his right to have the transfer registered. This agrees with what was laid down by LORD CAIRNS in *Ward and Henry's Case* (3). The seller had to execute a valid transfer, and the transferee had to get himself registered as holder of the shares, and clear the transferor from all liability which might arise from his name being on the register.

C Then comes the question whether any change is made by s. 26 of the Companies Act, 1867. That is a point which required some consideration, but I have come to the conclusion that the section does not alter the contract, and it is still the duty of the transferee to get himself registered as holder of the shares. The section is for the protection of the transferor, and if the transferee does not perform his part of the contract it gives power to the transferor, for his own protection, to get the name of the transferee registered, but it has no effect on the contract. I am, therefore, of opinion that the company is only liable for such damages as would have arisen if the contract had been an ordinary contract. If it were the ordinary contract, the plaintiff would still have the right to the price of the shares as against the transferee, and, therefore, he cannot recover against the company the difference caused by the peculiar nature of the contract unless the nature of the contract was called to the attention of the company when they committed the breach of duty. It follows that in this case only nominal damages are recoverable, and that it was the duty of the court so to direct the jury. Counsel for the plaintiff is willing to accept judgment for nominal damages if we think no more is recoverable, and therefore there will be no new trial, but the verdict will be entered for nominal damages, and this appeal will be dismissed.

F **BAGGALLAY, L.J.**—I am of the same opinion. When the transfer was left at the office of the company they were not bound to know more than appeared from the terms of the document, according to which the consideration was 5s. They were, however, bound to register the transfer. By their articles of association the company were entitled to refuse to register the transfer while a debt remained due to them from the transferor. But it turned out that the claim made by the company against the plaintiff had no foundation, and the transfer was registered in April, 1884, nearly eighteen months after its execution. The company were clearly wrong in refusing to register the transfer, and are liable in damages; but the question is, What is the measure of damages? The plaintiff might have had calls to pay on the shares, or the company might have been wound-up, and he might have been made liable as a contributory; but there is no evidence of any such damage here. It was contended that, although on the face of the transfer the agreement was to dispose of the shares for 5s., we should read, instead of the consideration so expressed, the market value of the shares when registered. It may be that this was the consideration as between the plaintiff and Levy; but there are no circumstances to show that the company were affected with notice of this. Transfers for a nominal consideration are frequently made, as, for instance, in the case of trustees. I think the company had a right to consider the transfer as made for a nominal consideration, and are liable for nominal damages only.

I **BOWEN, L.J.**, concurred.

Appeal dismissed.

Solicitors: *Blewitt & Tyler; Walter Webb & Co.*

[*Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.*]

Re JONES AND ANOTHER. Ex Parte NICHOLS

[COURT OF APPEAL (Sir George Jessel, M.R., Lindley and Bowen, L.JJ.), February 1, 1883]

[Reported 22 Ch.D. 782; 52 L.J.Ch. 635; 48 L.T. 492;
31 W.R. 661]

Bankruptcy—Property available for distribution—After-acquired property—Future profits—Assignment by debtor—Right of trustee in bankruptcy.

A bankrupt cannot, by any assignment or charge, give a good title as against his trustee to profits of his business which will arise after the commencement of his bankruptcy.

The debtors, who were lessees of a place of public amusement adjoining a railway station, agreed with the railway company that the latter should collect, not only the railway fares, but also the admission fees of persons frequenting the place of amusement, and should pay a proportion of the moneys received to the debtors. The debtors afterwards assigned the moneys due under the agreement with the company to brewers to secure the price of goods supplied on credit. The debtors having filed a petition for liquidation,

Held: as the profits payable in futuro were not property of the debtors which they could assign, the trustee in bankruptcy was entitled to the receipts from the business accruing after the act of bankruptcy.

Brice v. Bannister (1) (1878), 3 Q.B.D. 569, distinguished.

Notes. Section 11 of the Bankruptcy Act, 1869, has been repealed. See now s. 37 of the Bankruptcy Act, 1914.

Distinguished: *Re Toward, Ex parte Moss* (1884), 14 Q.B.D. 310; *Re Davis, Ex parte Rawlings* (1888), 22 Q.B.D. 193. Applied: *Wilmot v. Alton*, [1895-9] All E.R.Rep. 188; *Re Collins, Ex parte Solomon*, [1925] All E.R.Rep. 215. Distinguished: *G. and T. Earle, Ltd. v. Hemsworth R.D.C.*, [1928] All E.R.Rep. 602. Considered: *Re Trytel, Ex parte Trustee of the Property of the Bankrupt v. Performing Right Society, Ltd. and Soundbox Film Co.*, [1952] 2 T.L.R. 32. Referred to: *Mercer v. Vans Colina* (1897), 67 L.J.Q.B. 424; *King v. Michael Faraday & Partners, Ltd.*, [1939] 2 All E.R. 478; *Re Tout and Finch, Ltd.*, [1954] 1 All E.R. 127.

As to assignment of after-acquired property, see 2 HALSBURY'S LAWS (3rd Edn.) 324; and for cases see 5 DIGEST (Repl.) 749 et seq. For the Bankruptcy Act, 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 321 et seq.

Cases referred to:

- (1) *Brice v. Bannister* (1878), 3 Q.B.D. 569; 47 L.J.Q.B. 722; 38 L.T. 739; 26 W.R. 670, C.A.; 8 Digest (Repl.) 553, 78.
- (2) *Holroyd v. Marshall* (1862), 10 H.L.Cas. 191; 33 L.J.Ch. 193; 7 L.T. 172; 9 Jur.N.S. 213; 11 W.R. 171; 11 E.R. 999, H.L.; 20 Digest (Repl.) 270, 164.

Also referred to in argument:

Collyer v. Isaacs (1881), post; 19 Ch.D. 342; 51 L.J.Ch. 14; 45 L.T. 567; 30 W.R. 70, C.A.; 5 Digest (Repl.) 750, 6456.

Appeal from a decision of Mr. Registrar BROUGHAM sitting as Chief Judge in bankruptcy.

The debtors, Jones and Barber, were the lessees of and carried on business at Alexandra Palace, and by a verbal contract between them and the Great Northern Rail. Co., which had a station adjoining the grounds of the palace, it was agreed that the railway company should take, in addition to the railway fares of passengers over their lines to the palace, the admission fees of such passengers to the palace, and should pay the debtors a proportion of the sums so received for railway fares and admission fees, viz., 11d. for every first-class passenger, 9d. for every second-class passenger, and 7d. for every third-class passenger: and in case of excursions

A (which only applied to third-class passengers) it was agreed that the proportion payable to the debtors should vary according to the number of passengers to the palace, the minimum proportion to be 5d. for adults and 2½d. for school children, and the maximum the full ordinary proportion. The railway company were to render a monthly account. By an indenture dated Feb. 25, 1882, and made between the debtors, of the one part, and Henry Johnston Younger, Alexander B Smith, and Alexander Low Bruce (trading as William Younger & Co.), of the other part, in consideration of a past debt and future advances and an agreement by William Younger & Co. to supply the debtors with ale and stout, the debtors jointly and severally covenanted for repayment, and appointed Younger, Smith, and Bruce their attorneys to

C "ask, demand, sue for, recover, and receive from the Great Northern Rail. Co. all sums of money now due and owing, and hereafter to become due and owing from the said company"

to the debtors, and to give receipts for the same. And it was declared that the moneys so received should be applied as far as the same would extend in payment of the money due to Younger & Co. Many further advances were made by Younger & Co. to the debtors.

D By an indenture dated Mar. 21, 1882, and made between the same parties, reciting the above indenture, and that £1,800 and an arrear of interest were due to Younger & Co., and that the debtors had requested a further advance, and that Younger & Co. had agreed to make further advances on the repayment of the £1,800 and interest, the further advances, and the amounts to become due for goods sold, secured in manner thereafter appearing. It was witnessed that, for the considerations aforesaid and in consideration of the premises, the debtors did thereby

E "assign unto the said William Younger & Co., their executors, administrators, and assigns, all and every the sums and sum of money now due and owing, and hereafter to become due and owing from the Great Northern Rail. Co. to the said Jones and Barber, or either of them. To hold the same sums and sum of money unto the said William Younger & Co., their executors, administrators, and assigns, upon trust to pay the expenses incurred in recovering and receiving the same, or otherwise in relation to the premises, and in the next place to apply such moneys in or towards payment or satisfaction of the moneys for the time being owing from the debtors, and to pay the surplus, if any, to the debtors."

G And the debtors thereby confirmed the power of attorney above mentioned. On April 3, 1882, notice in writing of the power of attorney and assignment was given to the railway company by Younger & Co.. On Aug. 10, 1882, Jones and Barber filed a petition for the liquidation of their affairs by arrangement. At that date the sum of £5,286 6s. 1d. was due by the debtors to Younger & Co. Alexandra Palace was kept open by the receiver, and afterwards by the same person when appointed trustee in the liquidation. A sum of £587 3s. 8d. due from the railway company under the verbal contract in respect of railway fares and admission fees subsequently to the filing of the liquidation petition was claimed by Younger & Co. and by the trustee, and was accordingly paid into a bank to await the decision of the court as to the person entitled to it. MR. REGISTRAR BROUGHAM decided that Younger & Co. were entitled to the sum in the bank. The trustee appealed.

I *E. C. Willis, Q.C.*, and *J. C. Earle* for the trustee.
Winslow, Q.C., and *B. Houghton* for the mortgagees.

SIR GEORGE JESSEL, M.R.—This is a total misapprehension of the nature of the bankruptcy law. Let us consider what the contract was. Jones and Barber carried on the Alexandra Palace, and they arranged with the Great Northern Rail. Co. that the moneys paid by the public for conveyance to the palace, and admission into it, should be received by the railway company in one gross sum, and afterwards divided between them and the debtors in certain specified proportions. The company were to carry the public, and Jones and Barber were to admit them. What

is the meaning of the contract? It makes the railway company the agents of Jones and Barber to receive their share of the gross charges. Under ordinary circumstances there would have been two charges, one for conveyance and the other for admission. This arrangement was made for the convenience of the public, and probably also of the debtors. No doubt the railway company became debtors to Jones and Barber for their share of the gross sums received under the arrangement, but the arrangement was nothing more than an agreement for the gross sum paid by the public for conveyance and admission. The so-called debt was simply in respect of the receipt by the railway company from the public of the charges paid by the public for admission to the palace, and it makes no difference that they received it, not under an implied but under an express contract. It only became a debt due to Jones and Barber after the railway company had received it. It is just the same thing as if the company had been agents paid to receive the money at the doors of the palace. It is just the same case as receiving money at the doors of a theatre. It represents the gross earnings of the persons who are carrying on the trade.

That being so, and the debtors having become bankrupt, the bankruptcy relates back to the act of bankruptcy on which it is founded, and the receipts from the business after the act of bankruptcy, which are in the hands of an agent, go to the trustee in the bankruptcy. The income derived from the business after the act of bankruptcy passes to the trustee. These sums are simply payments made by customers, for admission to the palace, to the person who was carrying on the business. There is no difference in principle as regards payments of this kind between the Alexandra Palace and a theatre or a cheesemonger's shop. The sums of money received for admission are equivalent to sums paid over the counter for the purchase of cheese. The title of the trustee relates back to the act of bankruptcy; that is, to the filing of the petition for liquidation.

It is said that the payments were received by the railway company under a contract which the trustee affirmed. But the trustee would have had a right to the debtor's share of the gross sums received by the company even if he had annulled the contract. The only difference made by adopting the contract was, that he assented to the division of the gross sum in the proportions laid down by the company; he did not adopt the contract in any other sense. That being so, his title is quite unaffected by any assent to the contract. It is said that the respondents are claiming under a mortgage or assignment made by the debtors before bankruptcy. The answer is that by no assignment or charge can a bankrupt give a good title, as against his trustee, to the profits of his business which will arise after the commencement of his bankruptcy. The future profits are not his property within the meaning of the Bankruptcy Act. It was a mere accident that the business in this case went on after the proceedings had commenced; but, being so carried on, it was carried on *ex relatione* by the trustee for the benefit of the debtor's estate. The case bears no analogy to cases in which the property of the bankrupt has been validly charged by him before his bankruptcy. This sum of money was not the property of the debtors, and they could not validly assign it as against the trustee.

LINDLEY, L.J.—I am of the same opinion. The argument arises from some little confusion of thought, and it seeks to apply the principles of *Holroyd v. Marshall* (2), where there was an equitable assignment of after-acquired chattels, to an assignment like the one in the present case. Nothing appears to turn on the exact language of the assignment. It is in terms an assignment of moneys due and to become due from the railway company. I think it would in substance be the same thing if it were an assignment of moneys due and to become due from the railway company under the prior arrangement. It is an agreement to assign to Younger & Co., not the property of Jones and Barber, but money which would become due to them under the arrangement with the railway company. There was no specific property assigned, and the principles of *Holroyd v. Marshall* (2) do not apply. It was a mere agreement,

A for the breach of which an action would lie, and the title of the so-called assignees cannot prevail when asserted as to money paid after the title of the trustee accrued, that is the filing of the liquidation petition. The decision in *Brice v. Bannister* (1) turned on the principle that the right of an equitable assignee of a debt cannot be defeated by a voluntary payment in advance by the debtor to the assignor.

B **BOWEN, L.J.**—I am of the same opinion. These profits payable in futuro were not property of the debtors which they could assign so as to defeat the title of the trustee in their liquidation.

Appeal allowed.

Solicitors: *W. Sturt; C. Sawbridge.*

C [Reported by FRANK EVANS, ESQ., Barrister-at-Law.]

D

Re SINCLAIR. Ex Parte PAYNE

[QUEEN'S BENCH DIVISION (Cave, J.), August 4, 10, 1885]

[Reported 15 Q.B.D. 616; 53 L.T. 767; 2 Morr. 255]

E Bankruptcy—Property available for distribution—Payment to solicitor to oppose petition—Recovery by trustee from solicitor.

Where money has been paid by a debtor to his solicitor to oppose a bankruptcy petition and the opposition is unsuccessful the trustee in bankruptcy cannot recover the money from the solicitor, even though the solicitor had knowledge of an act of bankruptcy committed by the debtor.

F **Notes.** Distinguished: *Re Spackman, Ex parte Foley* (No. 2), [1886-90] All E.R.Rep. 1131. Considered: *Re Pollitt, Ex parte Minor* (1892), 67 L.T. 715. Explained: *Re Whitlock and Jackson, Ex parte Official Receiver* (1893), 63 L.J.Q.B. 245. Distinguished: *Re Charwood, Ex parte Trustee* (1894), 63 L.J.Q.B. 344; *Re Simonson, Ex parte Ball*, [1894] 1 Q.B. 433. Followed: *Re Johnson, Ex parte Ellis* (1914), 111 L.T. 165. Distinguished: *Re British Folding Bed Co., Ex parte Trustee v. Woodiwiss & Co.*, [1948] 2 All E.R. 216 Referred to: *Re Beyts and Craig, Ex parte Cooper and Irvine* (1894), 1 Mans. 56.

G As to relation back of title of trustee, see 2 HALSBURY'S LAWS (3rd Edn.) 447 et seq.; and for cases see 5 DIGEST (Repl.) 688 et seq.

Case referred to:

H (1) *Re Chapman, Ex parte Edwards* (1884), 13 Q.B.D. 747; 51 L.T. 881; 33 W.R. 268; 1 Morr. 238, C.A.; 5 Digest (Repl.) 690, 6061.

Also referred to in argument:

Coles v. Wright (1811), 4 Taunt. 198; 128 E.R. 305; 5 Digest (Repl.) 688, 6038.

Re Vanlohe, Ex parte Dewhurst (1871), 7 Ch. App. 185; 41 L.J.Bey. 18; 25 L.T. 731; 20 W.R. 172, L.JJ.; 5 Digest (Repl.) 789, 6697.

I **Application** by the trustee of a bankrupt for an order directing the bankrupt's solicitor to refund sums paid to him by the debtor for the purpose of opposing a bankruptcy petition.

On Mar. 9 a bankruptcy petition was presented against the debtor Sinclair, on the ground that he had departed from his dwelling-house with the intention of defeating and delaying his creditors. On Mar. 10 an interim receiver was appointed in accordance with an application under s. 10 (1) of the Bankruptcy Act, 1883 [see now the Bankruptcy Act, 1914, s. 8 (2 HALSBURY'S STATUTES (2nd Edn.) 336)].

The debtor instructed Mr. Norman, a solicitor, to oppose the petition, and to move to rescind the order appointing the official receiver interim receiver, and at the request of the solicitor paid to him the sum of £25 for that purpose. The opposition having been unsuccessful and the debtor having been adjudicated bankrupt, the trustee applied for an order directing the solicitor to refund the money. A

F. C. Willis for the trustee.

Herbert Reed for the solicitor. B

CAYE, J.—This is an apparently unprecedented application and must be dismissed; if it were granted the necessary consequence would be that the presentation of a bankruptcy petition would place a debtor in a most unfortunate position. At the very time when he stood in paramount need of legal assistance he would be practically debarred from it, if money paid to a solicitor for services rendered could be subsequently recovered by the trustee in bankruptcy. Nobody could be expected to undertake his case under such circumstances. In *Re Chapman* (1), which has been quoted, the circumstances were altogether different. The money was paid on account of the petitioning creditor's debt; here it is paid in order to cover counsel's fees for opposing the proceedings. I cannot hold that, where a solicitor receives his instructions to oppose a petition, and does his work honestly, and is paid for it, the trustee is entitled to recover the money from the solicitor merely because the opposition has not succeeded. It would not be more unreasonable to hold that a baker who sells a man a loaf for ready money, knowing the man to have committed an act of bankruptcy, could be called upon to refund the money to the trustee in bankruptcy. C

Application dismissed with costs. D

Solicitors: *F. W. Henry*; *G. B. Norman*. E

[Reported by J. E. VINCENT, Esq., Barrister-at-Law.]

R. v. NASH. Re CAREY F

[COURT OF APPEAL (Sir George Jessel, M.R., Lindley and Bowen, L.J.J.), February 14, 1883] G

[Reported 10 Q.B.D. 454; 52 L.J.Q.B. 442; 48 L.T. 447;
81 W.R. 420]

Infant—Custody—Welfare of infant paramount consideration—Illegitimate child—Claims by mother and strangers—Right of mother to preference. H

The mother of an illegitimate child left the child in the care of friends and for a while provided some maintenance for it. Seven years later she applied for the custody of the child to be given to her sister and brother-in-law who were respectable persons in a position superior to that of the friends in whose care the child was, but the friends refused to hand the child over to them and sought the custody of the child themselves. At the time of the application the mother was living with a man to whom she was not married. I

Held: the benefit of the child was to be regarded, and where there were conflicting claims to the custody of an illegitimate child the blood relationship between the child and its mother gave a preference to the mother as against a stranger, and therefore, the mother's application should be granted.

Notes. Applied: *Re Ullee* (1885), 53 L.T. 711. Approved: *Barnardo v. McHugh*, [1891-4] All E.R.Rep. 825. Followed: *R. v. Barnardo, Jones' Case*, [1891] 1 Q.B.

- A 194. Referred to: *R. v. Walker* (1912), 28 T.L.R. 342; *Re Carroll* (No. 2), [1930] All E.R.Rep. 192; *Re A. (an infant)*, [1955] 2 All E.R. 202; *Re C. T. (an infant)*, *Re J. T. (an infant)*, [1956] 2 All E.R. 500.

As to the rights and liabilities of the mother of a bastard child, see 3 HALSBURY'S LAWS (3rd Edn.) 106 et seq.; and for cases see 3 DIGEST (Repl.) 432 et seq.

B Cases referred to:

- (1) *Re Lloyd* (1841), 3 Man. & G. 547; 4 Scott, N.R. 200; 133 E.R. 1259; sub nom. *Re A.B.*, 11 L.J.C.P. 43; sub nom. *Anon.*, 5 Jur. 1198; 3 Digest (Repl.) 434, 282.
- (2) *Ex parte Knee* (1804), 1 Bos. & P.N.R. 148; 127 E.R. 416; 3 Digest (Repl.) 432, 270.

C Also referred to in argument:

- Re White, Ex parte White* (1848), 10 L.T.O.S. 331, 349; 12 J.P.Jo. 87; 3 Digest (Repl.) 434, 283.

Appeal from an order of the Divisional Court (POLLOCK, B., and MANISTY, J.), directing a writ of habeas corpus to issue for the delivery up of an illegitimate female child, aged seven years, to a Mr. and Mrs. Wright.

- D The mother of the child, Rose Carey, originally applied to NORTH, J., for a writ of habeas corpus for delivery up of her child to her by Mr. and Mrs. Nash in whose care the child was. It appeared from the mother's evidence, in support of her application, that the child was born in May, 1876; that the putative father denied that she was his child; that shortly after the birth of the child she was put out to nurse with Mr. and Mrs. Nash, with whom, except for one short interval, she had since remained; and that Mr. and Mrs. Nash were poor people, subsisting partly on charity, and partly on what Mr. Nash got from odd jobs as a day labourer. In affidavits filed on behalf of Mr. and Mrs. Nash it was alleged that Rose Carey gained her living by prostitution; that Mr. and Mrs. Nash were not living upon charity; that the child was being well brought up; and that Mr. and Mrs. Nash's reasons for keeping her were their affection for her, and their wish to preserve her from an immoral life. NORTH, J., refused to order the writ to be issued on the ground that Rose Carey was not a proper person to have the custody of the child.

- E Rose Carey then applied to a Divisional Court of the Queen's Bench Division for a writ of habeas corpus requiring the child to be brought up and delivered over to the custody of Mr. and Mrs. Wright, a brother-in-law and sister of the applicant.
- G In a further affidavit, filed by Rose Carey, in support of this application, she stated that she was seduced, when living with her parents and under the age of fifteen years, by an officer in the army; that her father, who was a gardener, insisted on her taking proceedings against the father of the child, and on her refusing to do so turned her out of doors; that her mother died two months before the applicant's confinement; that, her sister being out at service, Mr. and Mrs. Nash, whom she had known since she was six years old, and who lived near her father's house, were the only persons she could think of or turn to to mind the child; that she afterwards got a situation as waitress, which she retained until it was proved the work was too much for her, and she was laid up for three months in an infirmary; that when she came out she was offered the protection of a gentleman, and under such protection had "since lived in a respectable way." Mr. Wright also made an affidavit stating that for the past eleven years he had been a clerk in the employ of the Press Association; that he was married to the applicant's sister, and had one child, who was then living; that he was acquainted with the manner of living of Rose Carey, and that she was not a prostitute; and that he was quite willing to take the guardianship of the child and bring her up with his own child. On this evidence the Divisional Court directed the writ of habeas corpus to issue for delivery of the child to Mr. and Mrs. Wright, and Mr. and Mrs. Nash appealed.

H. Lacy Fraser for Mr. and Mrs. Nash.

Herbert Reed for the mother.

SIR GEORGE JESSEL, M.R.—If ever a judgment was right, it is the one now appealed from. This unfortunate young woman was seduced when she was fourteen years old, and the consequence was that she had a child. Her father having turned her out of his house, she found herself compelled to put her child out to nurse with poor people in the neighbourhood whom she intended to pay for their trouble, and it appears that she did give them some money which she obtained from her seducer. Then she came up to London and got a situation as a waitress. After a time her strength failed her, she was obliged to throw up her situation, and was unable to pay for the maintenance of the child. In the meantime the child was maintained by the poor people in whose custody she remained, and who were assisted by the contributions of charitable persons in the neighbourhood. The mother had to go into a public infirmary, and when she came out she went into the keeping of a gentleman, with whom she is still living—in that sense she is living an immoral life. She now wants to get her child back, and these poor people want to keep it from her—but they have no claim whatever to the child. They are mere strangers, and have not a particle of right to its custody, yet they contend by their counsel in this court that a natural mother is no relation to her child, and has no more right to its custody than a mere stranger. A

The absurdity of their claim cannot be exaggerated. It is true that MAULE, J., in *Re Lloyd* (1), is reported to have asked: "How does the mother of an illegitimate child differ from a stranger?" I should have thought the answer was: "Because she is its mother." The question was asked during the argument, and not when the learned judge was delivering his judgment in the case, and, knowing something of him, I think he must have intended the question as a joke. At any rate, if he did not mean to make a joke, he could only have been speaking of the strict legal right to the guardianship of an illegitimate child. But even at common law there were many cases in which the right of the mother to the custody of her illegitimate child was recognised, and LORD MANSFIELD, in *Ex parte Knee* (2), held that she was so entitled unless good cause was shown to the contrary. Her rights are also recognised by the poor law, which imposes on her the liability to maintain her illegitimate child. But now the courts are courts of equity, as well as of law, and the question is not to be decided with reference only to the legal rights which were formerly considered in granting writs of habeas corpus, for equity does consider the natural relationship, not only of the mother of an illegitimate child, but of the putative father and the relations on the mother's side. B

What is to be regarded is the benefit of the child, and that kind of blood relationship, though it was not always recognised at law, gives a preference when there are conflicting claims to the custody of an illegitimate child. In this case the mother says: "I do not want you to give the child to me, but to give her to my sister, who is a respectable married woman, the wife of a respectable man." The sister's husband is a clerk, and in a position far superior to that of Mr. and Mrs. Nash, and he is willing to take charge of the child. I cannot understand why this contest has been raised. To me this appears to be the plainest possible case for ordering the child to be delivered to blood relations, who will give it every possible care and a better education than that which the appellants could give it. In my opinion, no order was ever more rightly made, and this appeal ought to be dismissed. C

LINDLEY, L.J.—I am of the same opinion. In some respects this is a very painful case. There is no apparent reason for depriving Nash and his wife of the custody of the child, except the superior right of her mother. There is no suggestion that they have been unkind to or neglectful of it. But they have no more right to the custody of the child than any other stranger has, and the affection even of a natural mother gives a better right than the regard of a mere stranger. The child is now at school, and no doubt the fact of her having been taken up by some district visitor is at the bottom of the whole affair. D

BOWEN, L.J.—I am of the same opinion. I have no doubt that this appeal has been brought with the best of motives in the supposed interest of the child; E

A but philanthropy sometimes makes mistakes, and this is one of them. It is said that the mother is not entitled to the legal guardianship of the child. But that is not the question. The question is whether, as between the mother and a stranger, the court, in deciding who is to have the custody of an illegitimate child, ought not to give preference to the mother. It is said that the mother is not respectable, but she asks that her sister may have the custody of the child, and it seems to me

B the scale is turned in favour of her demand, when it appears that the child is to be given into the care of respectable people. I have no hesitation in saying that the decision of the court below is right in principle and upon the merits. I am satisfied that it is the best for the child itself, and that it ought to be affirmed.

Appeal dismissed.

C Solicitors: *A. R. O. Strutfield; Wilkinson & Howlett.*

[*Reported by FRANK EVANS, Esq., Barrister-at-Law.*]

D

HAIGH AND OTHERS v. ROYAL MAIL STEAM PACKET CO., LTD.

E

[COURT OF APPEAL (Sir Baliol Brett, M.R., and Fry, L.J.), July 4, 30, 1883]

[*Reported* 52 L.J.Q.B. 641; 49 L.T. 802; 48 J.P. 230;
5 Asp.M.L.C. 189]

F *Fatal Accident—Negligence—Exemption from liability—Condition in ticket for sea voyage—Deceased deprived of right to sue if he had not been killed—Fatal Accidents Act, 1846 (9 & 10 Vict., c. 93), s. 1.*

The ticket of a passenger on the defendants' ship contained a notice that the defendants would not be responsible "for the maintenance of passengers or . . . for any loss or damage arising from perils of the sea, or from machinery, boilers, or steam, or from any act, neglect, or default whatsoever of the pilot, master, or mariners." Through the alleged negligence of the defendants' servants the defendants' ship was sunk after a collision with another vessel at sea and the passenger lost his life. In an action brought by the passenger's executors under the Fatal Accidents Act, 1846,

G

Held: personal injury to a passenger was covered by the condition in the ticket, and so, if the passenger had not died, he would not have been entitled to maintain an action and recover damages in respect thereof within s. 1 of the Fatal Accidents Act, 1846; accordingly, the action failed.

H

Notes. Considered: *Travers v. Cooper*, [1915] 1 K.B. 73. Applied: *Fagan v. Green and Edwards, Ltd.*, [1925] All E.R.Rep. 266. Considered: *Grein v. Imperial Airways, Ltd.*, [1936] 2 All E.R. 1258. Referred to: *Woodgate v. Great Western Rail. Co.* (1884), 51 L.T. 826; *McCartan v. North Eastern Rail. Co.* (1885), 54 L.J.Q.B. 441; *Nunan v. Southern Rail. Co.*, [1923] All E.R.Rep. 21; *Beaumont-Thomas v. Blue Line, Ltd.*, [1939] 1 All E.R. 174.

I

As to negligence causing death in general, see 28 HALSBURY'S LAWS (3rd Edn.) 34 et seq.; and for cases see 36 DIGEST (Repl.) 206 et seq. For the Fatal Accidents Act, 1846, see 17 HALSBURY'S STATUTES (2nd Edn.) 4. As to exclusion of liability by carriers for injury to passengers, see 4 HALSBURY'S LAWS (3rd Edn.) 186-187; and for cases see 8 DIGEST (Repl.) 111 et seq.

Cases referred to:

- (1) *Thompson v. Royal Mail Steam Packet Co.* (1875), 5 Asp.M.L.C. 190, n.; 8 Digest (Repl.) 138, 892.
- (2) *Martin v. Great Indian Peninsular Rail. Co.* (1867), L.R. 3 Exch. 9; 37 L.J.Ex. 27; 17 L.T. 349; 8 Digest (Repl.) 67, 449.

Also referred to in argument:

- Smith v. Brown* (1871), L.R. 6 Q.B. 729; 40 L.J.Q.B. 214; 24 L.T. 808; 36 J.P. 264; 19 W.R. 1165; 1 Asp.M.L.C. 56; 1 Digest (Repl.) 169, 555.
- The Franconia* (1877), 2 P.D. 163; 46 L.J.P. 33; 36 L.T. 640; 3 Asp.M.L.C. 435; 25 W.R. 796, C.A.; 1 Digest (Repl.) 169, 556.
- Griffiths v. Earl of Dudley* (1882), post p. 450; 9 Q.B.D. 357; 51 L.J.Q.B. 543; 47 L.T. 10; 46 J.P. 711; 30 W.R. 797, D.C.; 36 Digest (Repl.) 217, 1143.
- Read v. Great Eastern Rail. Co.* (1868), L.R. 3 Q.B. 555; 9 B. & S. 714; 37 L.J.Q.B. 278; 18 L.T. 822; 33 J.P. 199; 16 W.R. 1040; 36 Digest (Repl.) 216, 1142.

Appeal by the plaintiffs from a decision of the Divisional Court (CAVE and DAY, JJ.), reported 48 L.T. 267, in an action brought by the plaintiffs, executors of the will of Charles Schwind, deceased, for the benefit of and on behalf of his wife and children, for damages caused by the alleged negligence of the defendants' servants on board the defendants' steamship *Douro*, which had resulted in the deceased losing his life when the ship sank after a collision at sea.

The defendants, among other defences, alleged that the contract of carriage between themselves and the said Charles Schwind exempted them from liability for the alleged negligence, and relied on the following clause which was contained in the ticket given by them to Charles Schwind when he paid his passage money:

"The company will not be responsible for the maintenance of passengers, or for their loss of time, or any consequence resulting therefrom, during any detention consequent upon the occurrence of any cause to prevent the vessels from meeting at the appointed places, nor for any delay arising out of accidents, nor for any loss or damage arising from perils of the sea, or from machinery, boilers, or steam, or from any act, neglect, or default whatsoever of the pilot, master, or mariners, etc."

By the Fatal Accidents Act, 1846, s. 1:

"Whosoever the death of a person shall be caused by the wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured."

A. T. Lawrence (Cohen, Q.C., with him) for the plaintiffs.
Charles Russell, Q.C., and *Phillimore* for the defendants.

Cur. adv. vult.

July 30, 1883. **SIR BALIOL BRETT, M.R.**, read the following judgment of the court.—The question to be determined in this case is whether the executors of Schwind can maintain an action against the defendants under Lord Campbell's Act (the Fatal Accidents Act, 1846) on behalf of the widow and children of the deceased; and they certainly can, unless they are prevented by something beyond the mere law of negligence.

The defendants rely upon a contract entered into between themselves and the deceased, by virtue of which, if the accident had happened without causing his death, he would not have been entitled to recover against them. For the plaintiffs it was argued that the representatives of the deceased could recover on behalf of the widow and children, although if he had survived he might not have been entitled

A to recover. I am of opinion that this contention is inconsistent with the obvious interpretation of Lord Campbell's Act, and that it is clear, under the statute, that the executors can recover only where the deceased himself could have recovered if he had not been killed.

The question, therefore, is whether the contract between the defendants and the deceased would have prevented him from maintaining an action against them for
B personal injury caused to him by the negligence of their servants. That question depends upon the construction of the passenger's ticket, which formed the contract relied upon by the defendants. The ticket was given to the defendant as a receipt for the passage money paid by him for the carriage of himself and his luggage, and applied both to the person and the luggage of the passenger. With regard to the luggage, this stipulation contained in the ticket, was that the defendants would
C not be responsible "for any loss, damage, or detention of luggage under any circumstances." In *Thompson v. Royal Mail Packet Co.* (1) the Court of Exchequer (KELLY, C.B., BRAMWELL and CLEASBY, BB.) construed a stipulation which was in very similar terms to that contained in the ticket in the present case. The words there were,

D "the company will not be responsible for any loss or damage to luggage in any circumstances,"

and the court held that the words "in any circumstances" applied to loss or damage to luggage occasioned by negligence. It had been previously decided (see *Martin v. Great Indian Peninsular Rail. Co.* (2)) that a stipulation that the company would not be responsible for any loss or detention of goods did not include loss occasioned
E by negligence. After that decision, the words "under any circumstances" were inserted in the contract, in addition to the words which had been held insufficient to cover a loss occasioned by negligence. I agree with the decision of the Court of Exchequer in *Thompson v. Royal Mail Steam Packet Co.* (1), and I think these words must have been intended to carry the case further, and that they would be sufficient to include loss or damage to luggage occasioned by negligence.

F If that is so, the ticket in the present case would cover the case of loss or damage to luggage. The ticket, however, is also a passenger ticket, and contains the stipulation against responsibility with regard to passengers on which the defendants rely. I confess this seems to me to be a somewhat odd stipulation for I cannot understand how there can be any loss or damage to a passenger, as such, exclusive
G of loss or damage to his property, for which the shipowner could be liable if it were caused by perils of the sea. Again, by reason of the words "from machinery, boilers, or steam," if damage were caused by the accidental explosion of a boiler, or from some accident not occasioned by negligence, the shipowners would not be liable. Therefore, if we exclude the words which are inapplicable to the present case, the stipulation as to passengers will read as follows: "The company will
H not be responsible for any loss or damage arising from any act, neglect, or default whatsoever of the pilot, master, or mariners." It has been suggested on the part of the plaintiffs that the word "damage" cannot be correctly applied to personal injury, and certainly it is not a very usual expression to say that a man is damaged; it seems more natural to say that he is hurt. Personal injury cannot be included under the word "loss"; but, although "injury" would have been a more apt word,
I I think there can be no doubt that "damage" may include personal injury. Here the sentence in which the word occurs appears to be solely applicable to passengers personally, and we are unable to come to the conclusion that personal injury is not covered by the words of the stipulation; and we think that personal injury to a passenger, caused by the negligence of the pilot, master, or mariners, is an injury from which the defendants have relieved themselves by the contract contained in the ticket.

After careful consideration of the case, and after considerable hesitation, we have come to the conclusion that we cannot differ from the decision of the Divisional

Court, and we think that if the passenger had not been killed, but only injured, he could not have recovered for the injury. If this is so, it follows that his executors cannot recover under Lord Campbell's Act. We are, therefore, of opinion that this appeal ought to be dismissed.

Appeal dismissed.

Solicitors: *C. W. Dommett* for Slater & Turnbull, Manchester; *Wilson, Bristows & Carpmæl.*

[Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.]

SHUBROOK AND ANOTHER v. TUFNELL

[QUEEN'S BENCH DIVISION (Manisty and Watkin Williams, JJ.), May 23, 1882]

[Reported 46 L.T. 886; 46 J.P. 694]

Easement—Implied grant—Easement of necessity—Reservation implied from nature of transaction.

Where an easement is an easement of necessity, there is no need of an express reservation of such easement in a conveyance of the property to be affected by the easement. Reservation is a matter of legal presumption, to be implied from the nature of the transaction between the grantor and grantee.

Notes. As to the creation of easements by implication of law, see 12 HALSBURY'S LAWS (3rd Edn.) 538-9; and for cases see 19 DIGEST (Repl.) 40 et seq.

Case referred to:

- (1) *Wheeldon v. Burrows* (1879), 12 Ch.D. 31; 48 L.J.Ch. 853; 41 L.T. 327; 28 W.R. 196, C.A.; 19 Digest (Repl.) 48, 269.

Also referred to in argument:

Palmer v. Fletcher (1663), 1 Lev. 122; 1 Keb. 553, 625; 1 Sid. 167; 83 E.R. 329; 19 Digest (Repl.) 54, 293.

Compton v. Richards (1814), 1 Price, 27; 145 E.R. 1320; 19 Digest (Repl.) 54, 294.

Swansborough v. Coventry (1832), 9 Bing. 305; 2 Moo. & S. 302; 2 L.J.C.P. 11; 131 E.R. 629; 19 Digest (Repl.) 54, 295.

North-Eastern Rail. Co. v. Elliot (1860), 1 John. & H. 145; 29 L.J.Ch. 808; 6 Jur.N.S. 817; 8 W.R. 603; affirmed sub nom. *North-Eastern Rail. Co. v. Elliott*, 2 De G.F. & J. 423; 30 L.J.Ch. 160; 7 Jur.N.S. 6; 9 W.R. 173, L.C.; on appeal sub nom. *Elliot v. North-Eastern Rail. Co.* (1863), 10 H.L.Cas. 333; 2 New Rep. 87; 32 L.J.Ch. 402; 8 L.T. 337; 27 J.P. 564; 9 Jur.N.S. 555; 11 W.R. 604; 11 E.R. 1055, H.L.; 19 Digest (Repl.) 179, 1202.

Allen v. Taylor (1880), 16 Ch.D. 355; 50 L.J.Ch. 178; 19 Digest (Repl.) 55, 297.

Caledonian Rail. Co. v. Sprot (1856), 27 L.T.O.S. 264; 2 Jur.N.S. 623; 4 W.R. 659; 2 Macq. 449, H.L.; 19 Digest (Repl.) 49, 272.

Booth v. Alcock (1873), 8 Ch. App. 663; 42 L.J.Ch. 557; 29 L.T. 231; 37 J.P. 709; 21 W.R. 743, L.J.J.; 19 Digest (Repl.) 23, 95.

Pyer v. Carter (1857), 1 H. & N. 916; 26 L.J.Ex. 258; 28 L.T.O.S. 371; 21 J.P. 247; 5 W.R. 371; 156 E.R. 1472; 19 Digest (Repl.) 43, 228.

Watts v. Kelson (1871), 6 Ch. App. 166; 40 L.J.Ch. 126; 24 L.T. 209; 35 J.P. 422; 19 W.R. 338, L.J.J.; 19 Digest (Repl.) 48, 265.

- A** *Dodd v. Burchell* (1862), 1 H. & C. 113; L.J.Ex. 364; 8 Jur.N.S. 1180; 158 E.R. 822; 19 Digest (Repl.) 100, 595.
- Suffield v. Brown* (1864), 4 De G.J. & Sm. 185; 3 New Rep. 340; 33 L.J.Ch. 249; 9 L.T. 627; 10 Jur.N.S. 111; 12 W.R. 356; 46 E.R. 888, L.C.; 19 Digest (Repl.) 45, 238.
- Dalton v. Angus* (1881), ante p. 1; 6 App. Cas. 740; 46 J.P. 132; 30 W.R. 191; sub nom. *Public Works Comrs. v. Angus & Co.*, *Dalton v. Angus & Co.*, 50 L.J.Q.B. 689; 44 L.T. 844, H.L.; 19 Digest (Repl.) 6, 4.
- Brett v. Clowser* (1880), 5 C.P.D. 376; 19 Digest (Repl.) 32, 159.

C **Case Stated** by the arbitrator with the consent of both parties and in pursuance of an order made at the hearing of the action in which the plaintiffs sought to recover damages for injuries to two houses which they owned and alleged to have been damaged by the defendant's making a drain through land of his adjoining the plaintiffs' two houses.

D The defendant was the owner in fee of certain land called "Tufnell Park Estate," which he divided into plots for building purposes. On Mar. 22, 1878, the defendant demised to one Clarkson, for a term of ninety-nine years, two plots of the said land with the dwelling-houses thereon erected. The said plots were numbered and known as 164 and 166, Tufnell Park Road. A third plot included in the said lease was afterwards converted into a private road, and adjoined the said two plots of land. The said road was a portion of the Tufnell Park Estate. On May 31, 1878, Clarkson demised to L. G. Shubbrook (whose executors the plaintiffs were), for a term of ninety-nine years, the two plots of land, No. 164 and No. 166, with the dwelling-houses thereon erected. The private road was not included in the last-mentioned demise, but on May 12, 1879, it was leased by Clarkson to one South, for a term of ninety-nine years. This private road ran alongside of and actually adjoined the side wall of the house No. 164. In October, 1878, the defendant, at the alleged request of the lessee of the private road, made a drain through it to the main sewer in the Tufnell Park Road. The two houses, Nos. 164 and 166, sustained considerable structural damage, and the plaintiffs attributed it to the drain, and to subsidence (caused by the construction thereof) of the adjoining ground upon which the two houses were built, and they complained that the drain deprived the houses of their support from the road to which they contended they were entitled. It was contended on the part of the defendant that the plaintiff had no cause of action, as he had not shown any right of support.

G The question for the opinion of the court was whether, upon the facts stated (and on the assumption that the damage was in fact attributable to the drain works), there was any cause of action by reason of an infringement of a legal right of support in the plaintiffs.

J. C. Lawrence, Q.C. (Sills with him), for the plaintiffs.

H *H. Matthews, Q.C. (Fellowes and R. A. McCall with him)*, for the defendant.

I **MANISTY, J.**—Though this Case is so stated that we have had a good deal of difficulty in getting at the facts, yet as they appear to stand they are within a small compass. There are but very few material dates. In February, 1878, Clarkson, being the equitable owner of all this property, viz., the plots marked in the Case 164 and 166, and that called "The Road," being in fact the owner of the entirety, entered into the contract with Morgan to let the plot called "The Road" for a term of ninety years, commencing from Lady Day, 1877. There must have been some such binding arrangement as this, which it is unnecessary to state, because that which was done later on in October, 1878, was said to be done "at the request of the lessee of the private road." That is, Clarkson had made a demise of the premises which could have been specifically enforced. Thus, in February, 1878, this property was partly in possession of Clarkson, and partly in that of Morgan and of those claiming under him. At this time there was no

lease of the houses 164 and 166; then came a demise of these houses from Clarkson A
to the plaintiffs' predecessor in title on May 31, 1878.

In October, 1878, the drain was constructed which has caused the alleged damage. The contention on the part of the plaintiffs is that, Clarkson, having severed the entirety through his contract with Morgan, neither Morgan nor those claiming under him had any right so to use this particular road as structurally to injure the houses 164 and 166. The defendant, on the contrary, says that, immediately after B
the making of the contract of February, 1878, Morgan or those claiming under him could, as against Clarkson, have so used this road, on the principle that a grantor cannot derogate from his own grant. These two houses did suffer structural damage. Had then Morgan and those claiming under him, even if lessees, the right so to use their property as to do structural injury to houses belonging to Clarkson which he has since parted with to the plaintiffs? C

I agree with most of the principles advanced by the defendant, and hold it to be now settled that there is no implied reservation of easements, when the owner of an entirety parts with a portion of his property, except such as are known as quasi easements or ways of necessity for the benefit of that part not granted: *Wheeldon v. Burrows* (1). So, on the other hand, as regards grants, what are the mutual rights of grantor and grantee? What are the rights of the grantee under D
this particular contract? Was he entitled to do what he liked with his property, even to the extent of letting down the structures belonging to his grantor? I think the expression "easement of necessity" quite right and apt, and that the plaintiffs here had an "easement of necessity," for these houses were bound to be injured and let down by the action of the defendant. For such there was no need of an express reservation of such a right. There are no doubt instances in which such E
express reservation is necessary, as where an owner of land conveys the minerals under the surface, retaining in himself the ownership of the surface. Unless the owner of the surface has by the instrument contracted himself out of his right, by allowing the owner of the minerals to win and take them in every possible way, even to the letting down of the surface, he has the right of subjacent support. The reservation of such rights as easements of necessity is a matter of legal pre- F
sumption, and is implied from the nature of the transaction between the parties. This disposes of the case, and judgment must be for the plaintiffs.

WATKIN WILLIAMS, J.—I am of the same opinion, and think the plaintiffs are entitled to judgment. The facts are very short and simple. In February, 1878, this land was divided into three plots, viz., 164, 166, and 164A, otherwise known as G
the road plot. On May 31, 1878, Clarkson conveyed the plot 164, with the house on it, nearly finished, to the plaintiffs' predecessor in title. In October, 1878, the defendant, acting on the request of one South, who claimed through Clarkson, so excavated a drain through the road plot, which had been made a private road, to a cricket field, as to cause a crack in and do serious structural damage to house H
No. 164. The plaintiffs claimed damages for such injury, and based their claim on the conveyance of May 31, 1878, for by it they alleged that they had acquired a right by implication to the support of the house on plot 164 from the adjoining plot 164A. To that the defendant replied in the negative, on the ground that before I
the conveyance of May 31, 1878, viz., in February, 1878, Clarkson had already parted, not with the legal, but equitable estate in plot 164A by an arrangement with one Morgan, which was subsequently completed by a conveyance to one South in May, 1879. The defendant alleged that the rights of the parties in October, 1878, were governed as though the then existing agreement had been the actual conveyance between them, and that there had not been in such conveyance a sufficient reservation by Clarkson of the right of support for the house already erected on plot 164. Supposing there had been a valid conveyance of the two plots, would Clarkson have reserved by implication the right of support for the house which in May, 1878, was conveyed by him? It is clear that such a right was reserved by implication of law by the transaction in February, 1878, which

A amounted to an equitable lease of the private road to Morgan. This case comes within the exceptions stated by THESIGER, L.J., in *Wheeldon v. Burrows* (1), as being of the nature of a quasi easement, or easement of necessity. Counsel would be driven by his contention to say, that if the owner of a house let it out in stories to different occupants, the occupants of the lower stories would not be bound to keep their floors in order, so as to afford proper support to those above them. Here

B the right of support was a necessary incident to the enjoyment of the property, and the reservation of it was implied in the act of severance. On these grounds I found my judgment in favour of the plaintiffs, and think they have a good cause of action.

Case remitted.

C Solicitors: *Fred. Taylor; Torr, Janeways, Gribble & Oddie.*

[*Reported by W. P. EVERSLEY, Esq., Barrister-at-Law.*]

D

HYMAN v. NYE

[QUEEN'S BENCH DIVISION (Lindley and Mathew, JJ.), March 31, April 4, 1881]

E [Reported 6 Q.B.D. 685; 44 L.T. 919; 45 J.P. 554]

Carriage of Passengers—Safety of passengers—Hire of carriage—Duty of care—
"To supply carriage as fit for purpose for which it is hired as care and skill can render it."

F The plaintiff hired from the defendant, a jobmaster, a carriage, horses, and a driver for a journey. While on the journey a bolt in the under part of the carriage broke causing the horses to become frightened and to overturn the carriage, whereby the plaintiff was injured. It was proved that neither the driver nor the horses had been at fault. The carriage had been properly built by a reputable firm and had been repaired some fifteen months before by a competent repairer. The defendant had no reason to suspect that the bolt was defective, and the defect could not have been discovered by ordinary inspection.

G The defendant did not produce the bolt and prove the exact nature of the defect. In an action by the plaintiff for negligence the judge directed the jury that the onus was on the plaintiff to prove negligence, and that if, in their opinion, the defendant did not know of the defective bolt and had taken all reasonable care to provide a fit and proper carriage, they should find for him.

H The jury brought in a verdict for the defendant. On appeal,

I **Held:** although a person who hired out carriages was not an insurer against all defects he was an insurer against all defects which care and skill could guard against; his duty was to supply a carriage as fit for the purpose for which it was hired as care and skill could render it, and if, while the carriage was being properly used for such purpose, it broke down, it became incumbent on him to show that the breakdown was not preventible by any care and skill; and, therefore, the judge's direction was wrong and a new trial would be ordered.

Per MATHEW, J.: The question which the jury ought to have been asked was whether the carriage was in fact reasonably safe when it was hired by the plaintiff.

Notes. Distinguished: *Robertson v. Amazon Tug and Lighterage Co.* (1881), 7 Q.B.D. 598. Followed: *Vogan v. Oulton* (1898), 79 L.T. 384. Considered: *Maclean v. Segar*, [1917] 2 K.B. 325; *Yeoman Credit, Ltd. v. Apps*, [1961] 2 All E.R. 281. Referred to: *Wing v. London General Omnibus Co.*, [1908-10] All

E.R.Rep. 496; *Lilly v. Tilling and L.C.C.* (1912), 57 Sol. Jo. 59; *Newberry v. A Bristol Tramways and Carriage Co.*, [1911-13] All E.R.Rep. 747; *Geddling v. Marsh*, [1920] All E.R.Rep. 631; *Aslan v. Imperial Airways, Ltd.*, [1933] All E.R.Rep. 567; *Reed v. Dean*, [1949] 1 K.B. 188; *White v. John Warrick & Co.*, [1953] 2 All E.R. 1021.

As to the degree of care owed by carriers in general, see 4 HALSBURY'S LAWS (3rd Edn.) 174 et seq. and for cases see 8 DIGEST (Repl.) 75 et seq.

Cases referred to:

- (1) *Christie v. Griggs* (1809), 2 Camp. 79, N.P.; 8 Digest (Repl.) 79, 531.
- (2) *Bremner v. Williams* (1824), 1 C. & P. 414, N.P.; 8 Digest (Repl.) 80, 534.
- (3) *Sharp v. Grey* (1833), 9 Bing. 457; 2 Moo. & S. 620; 2 L.J.C.P. 45; 131 E.R. 684; 8 Digest (Repl.) 80, 535.
- (4) *Readhead v. Midland Rail. Co.* (1867), L.R. 2 Q.B. 412; 8 B. & S. 371; 36 L.J.Q.B. 181; 15 W.R. 831; 16 L.T. 485; affirmed (1869), L.R. 4 Q.B. 379; 38 L.J.Q.B. 169; 17 W.R. 737; sub nom. *Redhead v. Midland Rail. Co.*, 9 B. & S. 519; 20 L.T. 628, Ex. Ch.; 8 Digest (Repl.) 75, 496.
- (5) *Francis v. Cockrell* (1870), L.R. 5 Q.B. 184; 39 L.J.Q.B. 113; 22 L.T. 203; affirmed, L.R. 5 Q.B. 501; 10 B. & S. 950; 39 L.J.Q.B. 291; 23 L.T. 466; 18 W.R. 1205, Ex. Ch.; 34 Digest (Repl.) 208, 1460.
- (6) *Fowler v. Lock* (1872), L.R. 7 C.P. 272; 41 L.J.C.P. 99; 26 L.T. 476; 20 W.R. 672; on appeal (1874), L.R. 9 C.P. 751 n., Ex. Ch.; 3 Digest (Repl.) 95, 237.
- (7) *Searle v. Laverick* (1874), L.R. 9 Q.B. 122; 43 L.J.Q.B. 43; 30 L.T. 89; 38 J.P. 278; 22 W.R. 367; 3 Digest (Repl.) 77, 152.
- (8) *Kopitoff v. Wilson* (1876), 1 Q.B.D. 377; 45 L.J.Q.B. 436; 34 L.T. 677; 24 W.R. 706; 3 Asp.M.L.C. 163; 41 Digest 473, 3045.
- (9) *Randall v. Newson* (1877), 2 Q.B.D. 102; 46 L.J.Q.B. 259; 36 L.T. 164; 25 W.R. 313, C.A.; 39 Digest 440, 694.
- (10) *Brown v. Boorman* (1844), 11 Cl. & Fin. 1; 8 E.R. 1003, H.L.; 36 Digest (Repl.) 20, 80.
- (11) *Steel v. State Line Steamship Co.* (1877), 3 App. Cas. 72; 37 L.T. 333; 3 Asp.M.L.C. 516, H.L.; 41 Digest 428, 2693.

Appeal from a decision of HAWKINS, J., and a jury in an action brought by the plaintiff and his wife to recover damages for personal injuries caused by the negligence of the defendant in which a verdict had been entered for the defendant. A rule nisi for a new trial was obtained on the grounds that the verdict was against the weight of the evidence and that the learned judge misdirected the jury.

Petheram, Q.C. (Sir John Holker, Q.C., with him), for the defendant.

Houghton (Sir H. Giffard, Q.C., and Willis, Q.C., with him) for the plaintiff.

Cur. adv. vult.

April 4, 1881. The following judgments were read.

LINDLEY, J.—The defendant in this case was a jobmaster at Brighton, letting out carriages and horses for hire. The plaintiff hired from him a landau and a pair of horses, and a driver, for a drive from Brighton to Shoreham and back. After having driven some way, and while the carriage was going down hill and slowly over a newly-mended part of the road, a bolt in the under part of the carriage broke. The splinter-bar became displaced, the horses started off, the carriage was upset, the plaintiff was thrown out and injured, and he brought this action for compensation. It was proved at the trial that no fault could be imputed to the horses nor to the driver, and although the plaintiff was charged with having caused the accident by pulling the reins, the jury found in the plaintiff's favour on this point, and nothing now turns upon it. It further appeared that the carriage had been built by a good builder some eight or nine years before the accident, had been repaired by a competent person about fifteen months before it; that the defendant had no reason to suppose that there was any defect in the

A carriage or any of its bolts; and that the defect, if any, in the bolt which broke could not have been discovered by any ordinary inspection. The bolt itself was not produced at the trial, and the nature of the defect, if any, in it when the carriage started was not proved. The learned judge at the trial told the jury in substance that the plaintiff was bound to prove that the injury which he had sustained was caused by the negligence of the defendant; and if in their opinion the defendant took all reasonable care to provide a fit and proper carriage, their verdict ought to be for him. Being thus directed, the jury found a verdict for the defendant, and in particular they found that the carriage was reasonably fit for the purpose for which it was hired, and that the defect in the bolt could not have been discovered by the defendant by ordinary care and attention.

The plaintiff complains of this direction and of the verdict founded upon it, and we have to consider whether the direction was correct. The substance of the complaint against the direction to the jury is that it was too favourable to the defendant, inasmuch as the judge did not sufficiently explain the degree of care which the defendant was bound to take, and the jury were led to believe that the defendant was not liable for defects of which he knew nothing, and which were not discoverable by him by ordinary care and attention. The plaintiff also contends that the breaking of the bolt under no unusual strain rendered it incumbent on the defendant to show that the carriage when sent out was fit for its journey, and that the verdict on this point was against the weight of evidence, especially as the broken bolt was not produced.

The questions thus raised are of considerable difficulty and importance, and have rendered it necessary to examine a great number of authorities. The most important are the following: *Christie v. Griggs* (1); *Bremner v. Williams* (2); *Sharp v. Grey* (3); *Readhead v. Midland Rail. Co.* (4); *Francis v. Cockrell* (5); *Fowler v. Lock* (6); *Searle v. Laverick* (7); *Kopitoff v. Wilson* (8); *Randall v. Newson* (9); STORY ON BAILMENTS (ss. 498, 592). A careful study of these authorities leads me to the conclusion that the learned judge at the trial put the duty of the defendant too low. A person who lets out carriages is not, in my opinion, responsible for all defects, discoverable or not; he is not an insurer against all defects, nor is he bound to take more care than coach proprietors or railway companies who provide carriages for the public to travel in; but, in my opinion, he is bound to take as much care as they, and although not an insurer against all defects, he is an insurer against all defects which care and skill can guard against. His duty appears to me to be to supply a carriage as fit for the purpose for which it is hired as care and skill can render it; and if while the carriage is being properly used for such purpose it breaks down, it becomes incumbent on the person who has let it out to show that the breakdown was in the proper sense of the word an accident not preventible by any care or skill. If he can prove this, as the defendant did in *Christie v. Griggs* (1), and as the railway company did in *Readhead v. Midland Rail. Co.* (4), he will not be liable, but no proof short of this will exonerate him. Nor does it appear to me to be at all unreasonable to exact such vigilance from a person who makes it his business to let out carriages for hire. As between him and the hirer the risk of defects in the carriage, so far as care and skill can avoid them, ought to be thrown on the owner of the carriage. The hirer trusts him to supply a fit and proper carriage; the lender has it in his power not only to see that it is in a proper state, and to keep it so, and thus protect himself from risk, but also to charge his customers enough to cover his expenses.

Such being, in my opinion, the law applicable to the case, it follows that the direction given to the jury did not go far enough, and that it was not sufficient in order to exonerate the defendant from liability for him to prove that he did not know of any defect in the bolt; had no reason to suppose it was weak, and could not see that it was by an ordinary inspection of the carriage. It further follows, in my opinion, the evidence was not such as to warrant the finding that the carriage was in a fit and proper state when it left the defendant's yard. In many of the cases bearing on this subject the expression "reasonably fit and proper" is used.

This is a little ambiguous and requires explanation. In a case like the present, a carriage to be reasonably fit and proper must be as fit and proper as care and skill can make it for use in a reasonable and proper manner, i.e., as fit and proper as care and skill can make it to carry a reasonable number of people, conducting themselves in a reasonable manner, and going at a reasonable pace on the journey for which the carriage was hired; or (if no journey was specified) along roads, or over ground reasonably fit for carriages. A carriage not fit and proper in this sense would not be reasonably fit and proper, and vice versa. The expression "reasonably fit" denotes something short of absolutely fit; but in a case of this description the difference between the two expressions is not great.

It was objected on the part of the defendant that the plaintiff had in his statement of claim based his case on negligence on the part of the defendant, and not on any breach of warranty, express or implied, and consequently that the plaintiff could not recover in this action, at least, without amending. But the absence of such care as a person is by law bound to take is negligence; and whether the plaintiff sues the defendant in tort for negligence in not having supplied such a fit and proper carriage as he ought to have supplied, or whether the plaintiff sues him in contract for the breach of an implied warranty that the carriage was as fit and proper as it ought to have been, appears to me wholly immaterial. Upon this point I adopt the opinion of MARTIN, B., in *Francis v. Cockrell* (5), which is based upon and warranted by *Brown v. Boorman* (10). The plaintiff's pleadings would have been free from all objection if he had stated in his statement of claim that he hired the carriage of the defendant, and not merely that the plaintiff was lawfully in the carriage. But the defendant knew under what circumstances the plaintiff was lawfully in it, and there was no surprise or miscarriage of justice occasioned by the omission of the statement of the fact of hiring. It appears to me, therefore, that the plaintiff ought not to be precluded from recovering in this action as the pleadings stand, if the facts come out in his favour. For the above reasons I am of opinion that there should be a new trial, and that the costs of the first trial and of this rule should abide the event.

MATHEW, J.—The learned judge appears to have considered that the plaintiff by his pleadings had undertaken to prove negligence, and to have told the jury that if they thought reasonable care and precaution had been taken by the defendant to ascertain that the carriage was safe, they might find that it was safe. In other words, the question whether the carriage was safe was treated as if it were the same with the question whether the defendant might have reasonably believed it to be safe. It appears to me that the question which the jury ought to have been asked was whether the carriage was in fact reasonably safe when it was hired by the plaintiff.

The cases referred to by my brother LINDLEY seem to show that there is no distinction in this respect between contracts for sale and for the hire of an article for a specific purpose, where trust is reposed in the person who, in the ordinary course of business, sells or lets to hire. The purpose and use, the time for which the article is intended to be used, seems to me the essential part of the contract. The warranty of seaworthiness in the case of a ship has been traced in many recent cases to its source in the ordinary contract for hiring an article for a specific purpose, and the obligation to provide a roadworthy carriage is not as onerous as the obligation to provide a seaworthy ship, which, in the absence of express terms, is implied in any contract of affreightment: *Steel v. State Line Steamship Co.* (11). Here the defendant let the carriage for the purpose of carrying the plaintiff safely. The plaintiff trusted him to select the carriage, horses, and driver, and there seems to me nothing unreasonable in charging the defendant with a duty which it was certainly in his power to fulfil, and which from his business he would be presumed to have bound himself to take the proper steps to perform strictly.

Reference has been made to the form of the pleadings, and it has been argued that the question of negligence was the only question raised by the statement of

A claim, and that his present contention is not open to the plaintiff. I conceive it to be the duty of a judge in cases of this description to permit such amendments as will permit the real questions in dispute between the litigants to be determined. It is only a question of terms. Here neither party insisted upon a strict construction of the pleadings. The learned judge would probably not have refused an adjournment if the defendant had made out that he was not in a position to meet the case made by the plaintiff at the trial. The defendant could hardly have made any such assertion with reason. The defendant knew that the plaintiff did not know how the accident had been brought about. It was from the defendant's witness, who was called to show that there was no defect in the construction of the carriage, that important evidence was obtained as to the broken bolt. The defendant could not reasonably complain that this evidence was any surprise to him. I only add that I do not think the defect in question could be regarded as a latent defect, if the obligation of the hirer be restricted to defects which are not latent—a point which it is unnecessary at present to discuss.

Rule absolute.

Solicitors: A. G. Ditton; Warry, Robins & Burges.

[Reported by W. P. EVERSLEY, Esq., Barrister-at-Law.]

HICKS v. FAULKNER

[QUEEN'S BENCH DIVISION (Huddleston, B., and Hawkins, J.), November 7, December 9, 1881]

[COURT OF APPEAL (Lord Coleridge, C.J., Brett and Holker, L.J.J.), March 8, 1882]

[Reported 8 Q.B.D. 167; 51 L.J.Q.B. 268; 46 L.T. 127;
46 J.P. 420; 30 W.R. 545]

G *Malicious Prosecution—Defence—Honest belief that offence had been committed.*

In an action for malicious prosecution, in the course of his summing-up to the jury, the trial judge directed them that if they thought that the defendant, acting upon an honest impression, the upshot of a fallacious memory, honestly believed that the plaintiff had committed perjury, then no jury would be justified in saying that the defendant had maliciously and without reasonable or probable cause prosecuted the plaintiff, as the best probable and reasonable cause would be that he honestly believed in the plaintiff's guilt.

Held: if the defendant honestly believed that the plaintiff had committed perjury this would negative any malice on his part, and, therefore, the direction was correct.

I **Notes.** Considered: *Herniman v. Smith*, [1938] 1 All E.R. 1; *Tempest v. Snowden*, [1952] 1 All E.R. 1. Referred to: *Quartz Hill Consolidated Gold Mining Co. v. Eyre* (1883), 11 Q.B.D. 674; *Tims v. John Lewis & Co.*, [1951] 2 K.B. 459; *Leibo v. D. Buckman, Ltd.*, [1952] 2 All E.R. 1057; *Abbott v. Refuge Assurance Co., Ltd.*, [1961] 3 All E.R. 1074; *Glinski v. McIver*, [1962] 1 All E.R. 696.

As to what amounts to reasonable and probable cause in malicious prosecution, see 25 HALSBURY'S LAWS (3rd Edn.) 357-8 and 364; and for cases see 33 DIGEST (Repl.) 418 et seq.

Cases referred to :

- (1) *Mitchell v. Jenkins* (1833), 5 B. & Ad. 588; 2 Nev. & M.K.B. 301; 3 L.J.K.B. 35; 110 E.R. 908; 33 Digest (Repl.) 407, 238.
- (2) *Lister v. Perryman* (1870), L.R. 4 H.L. 521; 39 L.J.Ex. 177; 23 L.T. 269; 35 J.P. 4; 19 W.R. 9, H.L.; 33 Digest (Repl.) 428, 456.
- (3) *Turner v. Ambler* (1847), 10 Q.B. 252; 16 L.J.Q.B. 158; 9 L.T.O.S. 36; 11 J.P. 631; 11 Jur. 346; 116 E.R. 98; 33 Digest (Repl.) 427, 451.
- (4) *Bromage v. Prosser* (1825), 4 B. & C. 247; 1 C. & P. 673; 6 Dow. & Ry.K.B. 296; 3 L.J.O.S.K.B. 203; 107 E.R. 1051; 33 Digest (Repl.) 407, 235.

Appeal from an order of the Divisional Court (HUDDLESTON, B., and HAWKINS, J.), discharging a rule nisi for a new trial in an action brought by the plaintiff against the defendant for malicious prosecution. The action was tried by HUDDLESTON, B., with a jury and on the verdict of the jury judgment was entered for the defendant. The plaintiff appealed on the grounds that the trial judge had misdirected the jury, and also that the verdict was against the weight of the evidence.

The defendant was the landlord of a house in Belgrave Road, St. John's Wood. The plaintiff's father was the tenant of these premises. In February, 1879, the defendant brought a county court action against the plaintiff's father to recover alleged arrears of rent due after December, 1877. The defence to this action was that there had been a surrender of the tenancy on Dec. 17, 1877, before any of the rent became due. The surrender had been effected by giving up possession of the premises and by delivering the key of the house to the defendant who had accepted it. The plaintiff was called as a witness for his father and gave evidence that on Dec. 17, 1877, he had at the defendant's request given the key to him. Subsequently after the county court action the defendant indicted the plaintiff for perjury at the Central Criminal Court where at that trial the plaintiff was acquitted. The plaintiff then commenced proceedings against the defendant for malicious prosecution.

At the trial during his summing-up of the case to the jury the learned judge said that if the plaintiff had satisfied them he was telling the truth that he really did give up the key, and the defendant knowing he had done so, indicted him for perjury, the plaintiff would be entitled to their verdict. If on the other hand they disbelieved the plaintiff and came to the conclusion that what he said on oath was untrue and that he knew this to be so, the defendant was justified in the course he had taken. The learned judge further directed the jury that, if in substance they believed the plaintiff's version, their verdict ought to be for him, but that, if they thought the defendant was speaking the truth he was entitled to their verdict. If they thought the matter was left in such doubt that they could not arrive at a conclusion as to which of the parties was speaking correctly, then the plaintiff had not made out his case to their satisfaction and the defendant would be entitled to their verdict. The learned judge then proceeded to present another alternative view to the jury which the plaintiff contended was a misdirection. The learned judge told the jury that it might be they would come to the conclusion that the plaintiff did in fact deliver up the key as he swore, and that the defendant had a very treacherous memory and had forgotten all about it, and went on with the prosecution under the impression that he never had the key. Nevertheless, if that was an honest impression, the upshot of a fallacious memory, and acting upon it, he honestly believed the plaintiff had sworn falsely and corruptly, no jury would be justified in saying that the defendant maliciously and without reasonable or probable cause prosecuted the plaintiff because the best probable and reasonable cause would be that he honestly believed it. The jury returned a general verdict for the defendant.

Willis, Q.C., and McLeod for the defendant.

Grantham, Q.C., and Agabeg for the plaintiff.

A

Cur. adv. vult.

B

Dec. 9, 1881. **HAWKINS, J.**, read the following judgment of the court. This is an action for a malicious prosecution. It was tried before my brother HUDDLESTON at Westminster on June 20 last. The verdict was for the defendant. Subsequently the plaintiff obtained a rule nisi for a new trial on the following grounds —(i) that the learned baron misdirected the jury; and (ii) that the verdict was against the weight of evidence. This rule was argued before my brother HUDDLESTON and myself on Nov. 7, and I have now to deliver my judgment upon it.

C

The defendant was the landlord of a house in the Belgrave Road, St. John's Wood. The father of the plaintiff was tenant of that house. In February, 1879, an action which the defendant had brought in the county court against the plaintiff's father to recover rent alleged to be in arrear and to have accrued due after the month of December, 1877, came on to be tried before the county court judge. The defence set up, was, that before any of the rent became due, namely, on Dec. 17, 1877, there was a surrender of the tenancy, and that on that day, in completion of the surrender, and by way of giving up possession of the premises, the key of the house was delivered to and accepted by the defendant. To support this defence, the plaintiff was called as a witness for his father, and swore that he, on the last-mentioned day, at the request of the defendant, gave him up the key. Of the materiality of this statement there could be no doubt. After the determination of the county court action, the defendant indicted the plaintiff for perjury at the Central Criminal Court. On the trial of that indictment the plaintiff was acquitted. He then commenced this action for a malicious prosecution. On the trial before HUDDLESTON, B., the plaintiff repeated the evidence he had given at the county court. On the other hand, the defendant on his oath expressly denied the truth of the plaintiff's statement, and, in confirmation of his own testimony, referred to his diary and other corroborating circumstances, to which it is not necessary to allude more particularly than the result I have already stated.

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I proceed now to deal with the motion for a new trial, and first with the alleged misdirection. In summing-up the case, the learned baron told the jury that if the plaintiff had satisfied them he was telling the truth that he really did give up the key, and the defendant, knowing he had done so, indicted him for perjury, the plaintiff would be entitled to their verdict. On the other hand, he told them that if they believed the statement on oath of the plaintiff was untrue, and that he made it knowing it to be so, the defendant was justified in the course he took. To neither of these propositions could any objection be made. The learned baron also told the jury that, if in substance they believed the plaintiff's version, their verdict ought to be for him, but that, if they thought the defendant was speaking the truth, he was entitled to their verdict. To this, too, most properly no objection was taken, for, although no doubt as an abstract proposition the plaintiff might have spoken the truth, still the defendant for reasonable cause might have believed him to be guilty. So on the other hand the defendant might have spoken the truth as to the key, and yet have had no reason to suppose the plaintiff's oath to the contrary was other than the result of innocent forgetfulness.

The learned baron's direction, however, must be construed, as the summing-up of a judge always ought to be, in connection with the particular circumstances of the case then before him. In the present case those circumstances were such that it was difficult to suppose either of the parties, in giving his evidence, could be labouring under any mistake. The learned baron, however, thought it right to provide for an alternative view of the case, viz., the event of an inability on the part of the jury to agree upon either of the questions so submitted to them. He accordingly told them that if they thought the matter was left in such doubt that they could not arrive at a conclusion as to which of the parties was speaking correctly, then they were left in this position—that the plaintiff had not made out his case to their satisfaction, and the defendant would be entitled to their verdict.

The learned baron then proceeded to present another alternative view to the jury, and told them that it might be they would come to the conclusion that the plaintiff did in fact deliver up the key as he swore, and that the defendant had a very treacherous memory and had forgotten all about it, and went on with the prosecution under the impression that he never had the key. Nevertheless, if that was an honest impression, the upshot of a fallacious memory, and acting upon it, he honestly believed the plaintiff had sworn falsely and corruptly, no jury would be justified in saying that the defendant maliciously and without reasonable or probable cause prosecuted the plaintiff, because the best probable and reasonable cause would be that he honestly believed it. With this direction the case was left to the jury, who returned a general verdict for the defendant.

Upon the points of misdirection, counsel for the plaintiff, confining his objections to the two latter alternatives, argued that as the verdict was a general one, and it was uncertain whether it was based upon the belief of the jury in the defendant's version or upon one of these alternatives, there ought, if either of his objections was sustained, to be a new trial. In this I think he was right; it becomes, therefore, necessary to consider these objections separately. The first was as to the learned baron telling the jury that if they were left in doubt, their verdict should be for the defendant. I think this direction is not open to exception. To succeed in an action for malicious prosecution the plaintiff must allege and establish two things—absence of reasonable and probable cause and malice. The affirmative of these allegations is upon him, failing to establish both of them he fails altogether. It is an essential element in his case that the jury should, under the judge's directions as to what facts will suffice for that purpose, find affirmatively the non-existence of probable cause, and they have no right to assume it without proof. If on the trial of such an action the plaintiff were to offer no other evidence than that the defendant caused him to be indicted even from the most vindictive motives the defendant would be entitled to a verdict: *Mitchell v. Jenkins* (1), 5 B. & Ad. at p. 594, per PARKE, J. In this respect the action for malicious prosecution does not differ from any other action in which the plaintiff is called upon to prove his case. If further authority upon this point were necessary it is to be found in the dictum of LORD COLONSAY in *Lister v. Perryman* (2) (L.R. 4 H.L. at p. 542). With regard to that dictum, however, I must observe that in uttering it the learned Lord must have been under the impression that the action under consideration was for a malicious prosecution, whereas it was for false imprisonment, there being this recognised distinction between the two actions, that in false imprisonment the onus lies upon the defendant to plead and prove affirmatively the existence of reasonable cause as his justification; whereas in an action for malicious prosecution the plaintiff must allege and prove affirmatively its non-existence.

With regard to the last alternative presented to the jury, counsel for the plaintiff contended as a general proposition that where a defendant relies upon his own memory for the facts which go to make up probable cause, he must prove to the satisfaction of the jury that his memory of the facts is accurate, and if he fails to do so he must be taken in law to have acted without that reasonable and probable cause which the facts, if true, would have established. In other words, he contended that giving a defendant full credit for honesty, if he relies upon his own memory for his justification, he must stand or fall by its accuracy. Applying this general proposition to the present case, he urged that the learned baron ought to have told the jury that if they believed the plaintiff did in fact deliver the key to the defendant, and the defendant unfortunately acted upon a fallacious memory, and in forgetfulness of the circumstance which once was clearly within his knowledge, and which forgotten circumstance would, if recollected, have established a clear want of reasonable and probable cause, his belief in the accuracy of his memory, and in the guilt of the plaintiff, however conscientious, would not afford him justification or excuse. In support of his argument he cited *Turner v. Ambler* (3), and, moreover, he informed us that DENMAN, J., and POLLOCK, B., had virtually

A so ruled. I do not assent to this proposition. I do not find in the case cited anything which favours it, and I have the best reason for saying that my brothers DENMAN and POLLOCK have been altogether misunderstood.

This brings me to the consideration of what is reasonable and probable cause. I should define reasonable and probable cause to be an honest belief in the guilt of the accused, based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed. There must be first, an honest belief of the accuser in the guilt of the accused; secondly, such belief must be based on an honest conviction of the existence of the circumstances which led the accuser to that conclusion; thirdly, such secondly mentioned belief must be based upon reasonable grounds—by this I mean such grounds as would lead any fairly cautious man in the defendant's situation so to believe; fourthly, the circumstances so believed and relied on by the accuser must be such as amount to reasonable ground for belief in the guilt of the accused.

The belief of the accuser in the guilt of the accused, his belief in the existence of the facts on which he acted, and the reasonableness of such last-mentioned belief, are questions of fact for the jury, whose findings upon them become so many facts from which the judge is to draw the inference and determine whether they do or do not amount to reasonable and probable cause. This, also, is an inference of fact, not of law, as is sometimes erroneously supposed, and the judge is to draw it from all the circumstances of the case: see *Lister v. Perryman* (2), L.R. 4 H.L. at pp. 535, 538, per LORD CHELMSFORD and LORD WESTBURY. This inference is certainly not to be interfered with upon lighter grounds than if it had been entrusted by law to the jury. In practice everybody knows the judge may and often does anticipate the findings of the jury alternatively in his summing-up, as the learned baron did in this case. If in this case now under discussion the jury found their verdict for the defendant upon the last alternative presented to them by the learned baron, I think the undisputed circumstances were such that they must be taken to have found that in fact the plaintiff was not guilty, but that an honest and reasonable belief was entertained by the defendant to the contrary, and in the existence of facts which, if true, justified that conclusion. True it is that, according to the hypothesis involved in the last alternative, the defendant's belief in the one great fact mainly relied on by him, namely, that the key was not delivered to him by the plaintiff, must have been found by the jury to be erroneous, and the supposed fact to have had no real existence. It does not, however, follow that because the supposed fact had no real existence the belief was unreasonable. Yet this is what counsel for the plaintiff in substance contended.

Let us consider this for a minute or two. If a man has never seen reason to doubt, but on the contrary, has ever had reason to trust, the general accuracy of his memory, and that memory presents to him a vivid apparent recollection that a particular occurrence took place in his presence within a recent period of time, is it not reasonable to believe in the existence of it? The more especially if, as in the present case, his diary and other surrounding circumstances appear to confirm his memory. What more reasonable ground can be suggested for a belief that any particular act was done than the conviction of the person believing that he remembers it as having been done in his presence before his own eyes? Would it not, under such circumstances, be most unreasonable, if not impossible, to disbelieve? Counsel for the plaintiff admitted indeed it was impossible to dispute, for a long list of authorities, notably among them *Lister v. Perryman* (2), might be cited to establish the proposition that a person may reasonably institute a prosecution solely upon information given to him by another, and which he honestly believes to be true. What does this admission, coupled with his argument, amount to? That a prosecutor may trust, provided he knows no ground for distrust, the memory of

another, but may not give credit to his own. I cannot recognise such a distinction, either in law or common sense, and no authority, as far as I know, can be found to warrant it. A

The question of reasonable and probable cause depends in all cases not upon the actual existence, but upon the reasonable bona fide belief in the existence of such a state of things as would amount to a justification of the course pursued in making the accusation complained of. No matter whether the belief arises out of the recollection and memory of the accuser, or out of information furnished to him by another. It is not essential in any case that facts should be established proper and fit and admissible as evidence to be submitted to the jury upon an issue as to the actual guilt of the accused. The distinction between facts necessary to establish actual guilt and those required to establish a reasonable bona fide belief in guilt should never be lost sight of in considering such cases as I am now discussing. Many facts admissible to prove the latter would be wholly inadmissible to prove the former. B C

It cannot of course be laid down as an abstract proposition that an accuser is justified in acting either upon the credited statement of an informant, or upon his own memory. The question must always arise according to circumstances whether it was reasonable to trust either the one or the other. A person who acts upon the information of another trusts the veracity, the memory and the accuracy of that other, in each of which he may be completely deceived; his informant's veracity may be questionable; his memory fallacious, and his accuracy unreliable. Yet it does not follow that it was unreasonable to believe in his information if he never had cause to doubt him. In like manner a man may be deceived by his own memory, yet it does not follow that it was unreasonable to trust it if he never before knew it to be defective. Why, I ask, if he may rely on the memory of another, may he not rely upon his own? The reasonableness or otherwise of this reliance, I have already said, it is for the jury to determine. If the informant were known by the accuser to be a person in whose veracity, memory, power of observation, and accuracy no confidence could be placed, no jury, I should think, would hesitate to find that a belief based solely upon information from such an informant was unreasonable; the same observation would apply if an accuser acted wholly upon the information of his own memory, knowing that it was untrustworthy. In short, it would be unreasonable to rely either on an informant known to be untrustworthy or a memory known to be unreliable without substantial confirmation especially when the liberty of another is concerned. I am of opinion then that there was no misdirection, and, this being so, the jury, under the learned baron's direction, must be taken to have found that absence of reasonable cause was not established, and the verdict was rightly entered for the defendant. D E F G

Under these circumstances it becomes unnecessary to consider the question of malice: *Mitchell v. Jenkins* (1), 5 B. & Ad. at p. 594, per PARKE, J. I cannot, however, refrain from referring to an argument of counsel for the plaintiff that, if the learned baron ought to have told the jury there was want of reasonable cause, that of itself was evidence of malice. I do not agree in this. It is true as a general proposition that want of probable cause is evidence of malice, but this general proposition is apt to be misunderstood. In an action of this description the question of malice is an independent one of fact purely and altogether for the consideration of the jury and not at all for the judge. The malice necessary to be established is not mere malice in law such as may be assumed from the intentional doing of a wrongful act: see *Bromage v. Prosser* (4), 4 B. & C. at p. 255, per BAYLEY, J.; but malice in fact, *malus animus*, indicating that the party was actuated either by spite or ill-will towards an individual or by indirect or improper motives, though these may be wholly unconnected with any uncharitable feeling towards anybody. In order to arrive at a conclusion upon this question, the jury are to take into consideration all the circumstances of the case, and to form their own opinion upon them, uninfluenced by any opinion of the judge, unless that opinion accords with their own view. If among these circumstances it appears to the jury that there was H I

- A no reasonable ground for the prosecution, they may, though by no means bound to do so, well think that it must have been dictated by some sinister motive on the part of the person who instituted it. Absence of reasonable cause to be evidence of malice must be absence of such cause in the opinion of the jury themselves, and I do not think they could be properly told to consider the opinion of the judge upon that point, if it differed from their own as it possibly might, and in some cases
- B probably would, as evidence for their consideration in determining whether there was malice or not. In no case, however, will their finding relieve the judge of the duty of determining for himself the question of reasonable cause. As an essential element of the case, want of reasonable cause is for the judge alone to determine upon the facts found for the jury. As evidence of malice, it is a question wholly for the jury, who, even if they should think there was want of probable cause,
- C might nevertheless think that the defendant acted honestly and without ill-will, or any other motive or desire than to do what he bona fide believed to be right, and purely in the interest of justice, in which case they ought not, in my opinion, to find the existence of malice: see *Mitchell v. Jenkins* (1); *Turner v. Ambler* (3), 10 Q.B. at p. 254; *Lister v. Perryman* (2), L.R. 4 H.L. at p. 538, per LORD WESTBURY.
- D It is an anomalous state of things that there may be two different and opposite findings in the same cause upon the question of probable cause, one by the jury, and another by the judge, but such at present is the law. With regard to that part of the rule which complains that the verdict was against the weight of evidence, my brother HUDDLESTON thinks the verdict was right. Having carefully considered the whole case, I am of the same opinion. This rule, therefore, fails
- E upon every point, and must be discharged.

The plaintiff appealed.

- Grantham, Q.C.* (with him *Agabeg*) for the plaintiff.—Believing a thing erroneously, honestly forgetting it, trusting to a treacherous memory, is not reasonable and probable cause. [LORD COLERIDGE, C.J.—It is necessary for the plaintiff to show not only that there was no reasonable and probable cause for the prosecution,
- F but also that there was malice.]

McLeod for the defendant, was not called on to argue.

- LORD COLERIDGE, C.J.—It appears to me that there was no evidence in this case to justify a finding of malice on the part of the defendant; and if the jury were told, as they were told, that if they thought that the defendant, acting upon
- G an honest impression, the upshot of a fallacious memory, honestly believed that the plaintiff had sworn falsely, they ought not to say that the defendant maliciously and without reasonable and probable cause prosecuted the plaintiff, it appears to me that the direction of the learned baron was perfectly correct.

- BRETT, L.J.—The only question here is: Was there a misdirection? The judge told the jury that if they thought that the plaintiff did in fact deliver up the key as he swore, but that the defendant had a very treacherous memory and had forgotten all about it, and went on with the prosecution under the honest impression that he never had the key, they ought to find for the defendant. The whole question really was, whether there was malice or not; and the jury could not find that there was malice in fact, if the defendant really believed his version of the story to be the true one. I therefore think that there was no misdirection.
- I

HOLKER, L.J.—I am of the same opinion.

Appeal dismissed.

Solicitors: *W. J. Child; Geo. T. Robinson.*

[Reported by A. H. BITTLESTON, Esq., and DUNLOP HILL, Esq.,
Barristers-at-Law.]

ROSE v. ROSE

[COURT OF APPEAL (Sir George Jessel, M.R., Baggallay and Lindley, L.JJ.),
March 12, 1883]

[Reported 8 P.D. 98; 52 L.J.P. 25; 48 L.T. 378; 31 W.R. 573]

Divorce—Condonation—Covenant in separation agreement not to rely on matrimonial offences committed before date of deed.

Under the terms of a deed of separation a wife was granted custody of the child of the marriage and was to retain all the household furniture. The husband undertook to pay certain sums of money to trustees on the wife's behalf, the covenants by him being expressed to be in consideration of the wife observing the covenants set out in the deed. The last covenant in the deed provided that any cause of complaint "which now exists or has arisen" between the parties should be forgiven and deemed to have been condoned, that neither party should subsequently commence proceedings in respect of the same, and that, if proceedings were subsequently initiated, evidence as to these causes of complaint was not to be admissible. Subsequently, the wife brought a suit for the dissolution of the marriage on the grounds of her husband's cruelty committed before the execution of the deed and his adultery since the execution of the deed.

Held: the wife could not revive the cruelty committed before the execution of the deed since she had made a final and binding bargain, which was contained in a deed under which she took certain benefits, not to take any proceedings against her husband in respect of any of his past misconduct.

Per SIR GEORGE JESSEL, M.R.: There is nothing in public policy . . . opposed to final condonation, and there is no statute or common law against it.

Notes. Section 3 of the Matrimonial Causes Act, 1963, now provides that adultery which has been condoned shall not be capable of being revived.

Distinguished: *Gooch v. Gooch*, [1893] P. 99; *Dowling v. Dowling*, [1898] P. 228; *Norman v. Norman*, [1908] P. 6. Considered: *Thompson v. Thompson*, [1916] P. 165. Followed: *L. v. L.*, [1931] P. 63. Considered: *Countess Russell v. Earl Russell*, [1934] All E.R.Rep. 569; *H. — v. H. —*, [1938] 3 All E.R. 415; *Fearn v. Fearn*, [1948] 1 All E.R. 459. Applied: *N. v. N. and L.*, [1957] 1 All E.R. 914. Referred to: *Wood v. Wood* (1887), 36 W.R. 33; *Bernstein v. Bernstein*, [1891-4] All E.R.Rep. 706; *Balcombe v. Balcombe*, [1908] P. 176; *Bourne v. Bourne*, [1913] P. 164; *Cramp v. Cramp and Freeman*, [1920] All E.R.Rep. 164; *Hyman v. Hyman*, *Hughes v. Hughes* (1928), 139 L.T. 416; *James v. James*, [1948] 1 All E.R. 214; *Morley v. Morley*, [1961] 1 All E.R. 428.

As to condonation in general, see 12 HALSBURY'S LAWS (3rd Edn.) 302 et seq.; and for cases see 27 DIGEST (Repl.) 395 et seq.

Cases referred to:

- (1) *Besant v. Wood* (1879), 12 Ch.D. 605; 40 L.T. 445; 23 Sol. Jo. 443; 27 Digest (Repl.) 236, 1894.
- (2) *Rowley v. Rowley* (1866), L.R. 1 Sc. & Div. 63; 35 L.J.P. & M. 110, H.L.; 27 Digest (Repl.) 376, 3103.
- (3) *Gandy v. Gandy* (1882), post p. 376; 7 P.D. 168; 51 L.J.P. 41; 46 L.T. 607; 30 W.R. 673, C.A.; 27 Digest (Repl.) 235, 1887.

Appeal from an order of SIR JAMES HANNEN, P., reported 7 P.D. 225, granting a decree of judicial separation on a petition by a wife, Agnes Rose, for the dissolution of her marriage on the grounds of her husband's, Henry Rose's, cruelty and adultery.

The parties were married on July 2, 1860, and there was one child of the marriage who was born on Oct. 18, 1869. On April 6, 1877, the parties executed a separation deed, under which the wife retained as her separate property all the furniture, etc.

A in the house in which she then resided, and all future acquired property. The deed provided that the husband, in consideration of his wife

B "faithfully keeping, performing, and observing the covenants and stipulations herein contained to be kept and performed and observed by her, shall and will pay unto [a trustee] at or before the execution hereof, the sum of £25 . . . and shall and will on Oct. 7, 1877, pay unto the [trustee] a further sum of £95 . . . such moneys to be held by her in trust for and on behalf of the said Agnes Rose, and to be used and applied by her for and towards the support and maintenance of the said Agnes Rose, and to assist her in gaining a livelihood as a lodging-house keeper, and in full discharge of all claims by the said Agnes Rose against the said Henry Rose for maintenance and support."

C The wife was to have the custody of the child; and was out of the provision made for her by the deed "or otherwise" to maintain herself and the child. The last clause of the deed was in the following terms:

D "No proceedings shall be commenced or prosecuted by or on behalf of either party against the other in respect of any cause of complaint which now exists, or has arisen before the date of these presents, and every offence (if any) which has been committed or permitted by either party against the other shall be considered, as the same is, hereby forgiven and condoned; and, in case hereafter either shall commence or prosecute any proceedings against the other in respect of any cause of complaint which may hereafter arise, no offence or misconduct, which has been committed or permitted before the execution of these presents, and no act, deed, neglect, or default of either party in relation to any such offence or misconduct shall be pleaded or alleged by either party E or be admissible in evidence."

F The learned judge found that cruelty prior to the execution of the deed and adultery subsequent to the deed had both been proved, but that there had been no cruelty since the date of the deed. In these circumstances HIS LORDSHIP, following *Gandy v. Gandy* (3) held that the adultery did not revive the acts of cruelty committed before the separation deed and therefore only granted the wife a decree of judicial separation with costs.

Dr. Tristram and W. T. Barnard, jun., for the wife.

C. A. Middleton for the husband.

G **SIR GEORGE JESSEL, M.R.**—As I have already pointed out in *Besant v. Wood* (1), unless married women were allowed to contract themselves out of their strict rights every suit in the Divorce Court would have to be fought out to the end. It is impossible to suppose that if the legislature has given a married woman the right to sue, she has not also the right to contract not to sue. The House of Lords in *Rowley v. Rowley* (2) enforced an undertaking not to institute proceedings, holding that proceedings were not to be instituted for anything up to the time of the undertaking. That is logical enough. That being so, there is in this case a contract for value not to sue in respect of the previous misconduct. That contract H appears to me to be perfectly valid, not only as not being in any way inconsistent with public policy, but as being one of the incidents of the right of suit. It is not inconsistent with the Act of Parliament that the woman shall have the right of finally condoning matrimonial offences. I am afraid that a good deal of the monkish I doctrine of the ecclesiastical courts has been transferred to the new court constituted by the Matrimonial Causes Act, 1857 [repealed]. One of those doctrines was that condonation of matrimonial misconduct never was final, but that the condoned offence was always liable to be revived by subsequent misconduct. There is nothing in public policy, so far as I understand it, opposed to final condonation; and there is no statute or common law against it. It is just as desirable in domestic, as in other transactions that by-gones should be treated as by-gones.

In the present case the wife made a final and binding bargain, which was contained in a deed under which she took certain benefits, not to take any proceedings

against her husband in respect of any of his past misconduct. Now she says: "I will take those benefits under the deed and repudiate that part of the agreement which I am to perform." I am of opinion that she cannot be allowed to do that. She cannot revive the charges of cruelty committed before the separation deed, so as, by combining these charges with the husband's subsequent adultery, to obtain a dissolution of marriage. The learned President of the Divorce Division was, in my opinion, quite right in refusing to make a decree for dissolution of marriage. It has been contended that if the previous misconduct had been adultery, instead of cruelty, the case could not have been decided in this way, and that adultery, as distinguished from cruelty, could never have been finally condoned. That is not, in my opinion, the true meaning of the Act of Parliament, and if the question ever arises the Court of Appeal may have an opportunity of deciding the point.

BAGGALLAY, L.J.—The husband in this case committed adultery since the execution of a separation deed executed by his wife and himself. In respect of that adultery the wife was entitled to a decree for judicial separation, and such a decree has been made by the President of the Divorce Division. The object of this appeal, which is brought by the wife, is to obtain a decree for dissolution of marriage. There has been no cruelty on the part of the husband since the separation deed, but there was before. As to previous misconduct, however, the deed provides that no proceedings are to be commenced by either party, but that every such previous offence is to be considered as condoned. Unless, therefore, we are prepared to hold that the whole deed, or the whole of the clause which I have referred to, is absolutely void, that clause is a bar to the right which she would otherwise have of relying on the previous cruelty. If the deed had been obtained in an improper manner, then, no doubt, the clause would not be allowed to stand in the wife's way to obtaining a dissolution of marriage, but such a case is not set up in the pleadings, and no circumstances to impeach it have been shown. It is suggested, however, that the very terms of the deed show that it is contrary to public policy. I do not agree with that suggestion. Deeds couched in quite as strong language have been upheld in the highest courts, and in my opinion there is nothing in this deed which is invalid. I am of opinion, therefore, that the appeal ought to be dismissed.

LINDLEY, L.J.—I, also, am of opinion that the appeal ought to be dismissed. The question appears to me to be, Is the deed good for anything or not? It is too late now to say that such a clause as the one which has been referred to so many times is contrary to public policy. The authorities were carefully examined in *Besant v. Wood* (1) and the result was that SIR GEORGE JESSEL, M.R., came to the conclusion that the wife had a right to compromise suits, not only after the commencement of litigation, but after the quarrel, and before proceedings had actually commenced—in other words, that after much controversy a separation deed must be considered just as binding on the wife as on the husband. Then followed *Gandy v. Gandy* (3), in which the same principle was adopted by the Court of Appeal. The present case indeed appears to be on all fours with *Gandy v. Gandy* (3). Counsel for the wife has argued that the clause is against public policy. In my opinion, a clause in a separation deed releasing a person from liability as to past misconduct is not against public policy. I think the deed was not condonation at all, but a contract between the parties.

Appeal dismissed without costs.

Solicitors: *Hicklin & Washington; W. H. Lane.*

[Reported by FRANK EVANS, Esq., Barrister-at-Law.]

SANDERS AND ANOTHER v. SANDERS

[COURT OF APPEAL (Sir George Jessel, M.R., Baggallay and Lush, L.JJ.),
November 29, 1881]

[Reported 19 Ch.D. 373; 51 L.J.Ch. 276; 45 L.T. 637;
30 W.R. 280]

Limitation of Action—Recovery of land—Tenancy in common—Rents received by one tenant for more than twenty years—Payments of moiety made after 21 years—Presumption that payments made previously.

In 1833 A and B became tenants in common of certain property in fee simple. A took possession and he and his successors at all times received the whole of the rent. From November, 1864, to November, 1877, one half of the rent was paid to solicitors acting for B and a mortgagee of his share. The payments then ceased. After B's death, his successor and the mortgagee brought an action against A's successor for sale or partition. The statement of claim originally did not allege any payment by A before 1864, and the defence was that A had acquired a title by limitation, having received the whole of the rent for upwards of 20 years without accounting for B's share. The statement of claim was amended to allege payments by A on account of B's share throughout the period before 1864. The amended defence did not admit those payments. The parties made admissions which, however, were silent as to any payments before 1864 and neither side called any evidence on the point.

Held: if A had in fact not accounted for B's share of the rent between 1833 and 1864, B's title would have been extinguished and would not have been revived by the subsequent payments, but the admission as to these payments raised a presumption that payments had also been made before 1864, and, there being nothing to negative that, the defence was not established.

Court of Appeal—Evidence—Fresh evidence—Admission—"Special grounds"—R.S.C., Ord. 58, r. 5.

The defendant applied for leave to call further evidence under R.S.C., Ord. 58, r. 5, on the ground that he had taken the admission to raise the contrary presumption.

Held: the wrong construction of the admissions was not a special ground for the exercise of the court's discretion under the rule.

Notes. The Limitation Act, 1939, s. 25, replaced Real Property Limitation Act, 1874, s. 7 (repealed by s. 34 (4) and Sched. to Act of 1939) which replaced Real Property Limitation Act, 1833, s. 28. Section 34 of the Act of 1833 was replaced by s. 16 of the Act of 1939 and repealed by s. 34 (4) and Sched. to Act of 1939. By R.S.C., Ord. 58, r. 9 (2), the Court of Appeal has full discretionary power to receive further evidence on questions of fact.

Referred to: *Re Hobbs, Hobbs v. Wade* (1887), 36 Ch.D. 553; *Lyell v. Kennedy* (1887), 18 Q.B.D. 796; *E. H. Lewis & Son, Ltd. v. Morelli*, [1948] 2 All E.R. 1021; *Leeder v. Ellis*, [1952] 2 All E.R. 814; *Corbett v. Corbett*, [1953] 2 All E.R. 69; *Wright v. Pepin*, [1954] 2 All E.R. 52.

As to payment of rent, see 24 HALSBURY'S LAWS (3rd Edn.) 246; as to effect of statutory trust for sale, see *ibid.* 256; as to acknowledgment after time has run, see *ibid.* 298; as to production of further evidence, see 30 HALSBURY'S LAWS (3rd Edn.) 468. For cases see 32 DIGEST 458, DIGEST (Practice) 776. For the Limitation Act, 1939, ss. 16, 25, see 13 HALSBURY'S STATUTES (2nd Edn.) 1175, 1186–1187.

Cases referred to:

(1) *Stansfield v. Hobson* (1853), 3 De G.M. & G. 620; 22 L.J.Ch. 657; 20 L.T.O.S. 301; 1 W.R. 216; 43 E.R. 244, L.J.J.; 32 Digest (Repl.) 480, 1430.

(2) *Re Alison, Johnson v. Mounsey* (1879), 11 Ch.D. 284; 40 L.T. 234; 27 W.R. 537, C.A.; 32 Digest (Repl.) 479, 1416.

Also referred to in argument :

Locking v. Parker (1872), 8 Ch. App. 80; 42 L.J.Ch. 257; 27 L.T. 635; 21 W.R. 113, L.J.J.; 32 Digest (Repl.) 479, 1415.

Appeal from a decision of MALINS, V.-C.

By his will dated Oct. 27, 1813, Thomas Sanders devised certain hereditaments to his wife, Anne Sanders, for her life, with remainder to his sons, Thomas Sanders and John Sanders, in equal shares as tenants in common. The testator died shortly afterwards and his widow died in 1833. Thomas Sanders, the son, died on July 29, 1877, leaving his son, the defendant, his heir-at-law. John Sanders, who mortgaged his share in 1864 to the plaintiff, Elizabeth Weatherill, died in April, 1878, having devised his share to his son, the plaintiff Sanders.

The following facts were stated in admissions: On the death of Anne Sanders, Thomas Sanders the son, through whom the defendant claimed title, entered into receipt of the whole of the rents and profits of the entirety of the hereditaments and premises and from and after the decease of Anne Sanders and down to his death continued in such receipt. As from November, 1864, Thomas Sanders the son paid to the plaintiffs' solicitors for their use a moiety of the rents of the hereditaments and premises, due in that month, and he continued to pay to the solicitors for the use of the plaintiffs a moiety of the rents until the time of his death.

Thomas Sanders the son died on July 29, 1877. The defendant was his eldest son and heir-at-law, and the defendant, upon his said father's death, entered into the receipt of the rents and profits of the entirety of the hereditaments and premises. After the death of Thomas Sanders, the son, the defendant paid the plaintiffs' solicitors extra rent received by Thomas Sanders, the son, up to May, 1877, from the tenant of part of the property and not accounted for by him. He also paid the plaintiffs' solicitors an occupation rent in respect of a moiety of another part of the property occupied by himself up to November, 1877, and a moiety of a year's rent received by him from one Starling, a tenant of part of the property, to November, 1877, and a moiety of a half year's rent due from one Agar, another tenant, to May, 1877. In 1865 Thomas Sanders the son wrote a letter to John Sanders and his mortgagee acknowledging their title to a moiety. After November, 1878, the defendant Sanders received the whole of the rents and profits of the said hereditaments without accounting to the plaintiffs.

The plaintiffs brought an action for sale or partition. The defendant having raised the defence of the Real Property Limitation Act, 1833, the statement of claim was amended by adding a prayer for a declaration that the plaintiffs were entitled as tenants in common with the defendant to one undivided moiety of the hereditaments devised by the will of the testator. MALINS, V.-C., decided that although there had then been twenty years' possession, the acknowledgment of 1865 was sufficient to take the case out of the statute. The defendant appealed.

Higgins, Q.C., and *Herbert Smith* for the defendant.

Glasse, Q.C., and *G. Williamson* for the plaintiffs.

SIR GEORGE JESSEL, M.R.—The decision of MALINS, V.-C., seems to have some authority in support of it, though there is also authority against it. I must express my dissent from so much of that authority as affirms the proposition of law contained in the judgment of the court below. This holding does not affect the question as to the acknowledgment being evidence of a payment having been made before the end of the twenty years. I am convinced, however, that such acknowledgment will not re-vest a title fully established in another person.

In *Stansfeld v. Hobson* (1) the point was not noticed in the judgment of either of the lords justices who decided that case, although it was mentioned in the argument which took place before them. They were judges who would not evade such a question, and the only conclusion to which I can come is that the point was overlooked. That being so, I cannot treat that case as an authority that an

- A acknowledgment after the title has once gone can re-vest that title in the former owner. In *Re Alison* (2) the Court of Appeal arrived at an opposite decision, but in justice to the Vice-Chancellor I ought to say that that case was not cited before him. This appeal is brought for that reason, and if there was nothing else the defendant would be entitled to succeed on the present appeal; but the appeal is not against the reasons of the decision, but against the decision itself.
- B The judgment of the Vice-Chancellor can be supported on other grounds. The case came on to be heard on admissions, and the defendant's counsel thought that he should succeed in the absence of any evidence of an actual payment within the twenty years during which his client's predecessors in title had been in possession of the entirety of the property after the widow's death. It appears that, after holding possession of the entirety of the property for more than twenty years, the defendant and his predecessors in title for more than thirteen years continued the payment of the rents and profits to the owners of the other moiety. The plaintiff thought that, even if no payment was made in the twenty years, he would be entitled to succeed by reason of the acknowledgment given after that period had expired. He was about to adduce evidence of payment before 1864. The Vice-Chancellor, however, decided the case in his favour on the point of law, and the defendant did not tender any evidence to show that there was no payment before 1864. He relied on the judgment given on the question of law by the Vice-Chancellor being erroneous, and concluded that the effect of the admissions was sufficient evidence of no payment before the completion of his title. He cannot be said to have been in any way surprised. He chose to conduct his own case without putting in any evidence.
- E The evidence afforded by the admissions is very plain as to payment, and, therefore, there is nothing from which the court could infer that the defendant's predecessor had acquired an indefeasible title by undisturbed possession for the statutory period. The Real Property Limitation Act, 1833, is thus out of the case altogether. There is nothing whatever to show the extinguishment of the title to the other moiety. The defendant's counsel, probably when they saw how the appeal would be decided, asked leave to bring fresh evidence. I think that application must be refused. In the first place it is an application for indulgence. The defendant did not conduct his case as he might have done, and probably would have done if he could have foreseen what would happen. But that is no ground for the application. It is extremely dangerous, after trial, to allow fresh evidence to be brought. Nothing seems to be more likely to lead to perjury than allowing such fresh evidence. The exact point on which the court requires to be satisfied is known, and, if evidence is allowed to be given on the point, there is a great temptation to invent the facts required. Nothing, in my opinion, is more likely to prejudice the interests of truth and justice. Sometimes we consider what I may call moral merits.
- G It appears that this defendant's father entered into possession, and that from November, 1864, to July, 1877, a period of nearly thirteen years, he accounted for the rents of one moiety to the person with whom he held in common. The defendant asks now to be allowed to bring evidence that no rent was paid during the previous twenty years. I should think it would be almost impossible by any evidence to convince a jury that during the twenty years no rent had been paid. Assuming that one brother had possession of the whole for twenty years, is that a case for allowing the indulgence now asked? If we have any discretion in a case like this we ought, in my opinion, to exercise it against the person making such an application.
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BAGGALLAY, L.J.—This action is brought by one of two tenants in common against the other for sale or partition of the property held in common. The defence set up is, that the right of the plaintiff's predecessor in title first accrued on the death of the testator's widow in 1833, and that the defendant's predecessor held the whole for twenty years without accounting for any part of the rents and profits

The plaintiff sets up in answer to that a claim by reason of the acknowledgment of his predecessor's title after the expiration of the twenty years. The Vice-Chancellor decided in favour of the plaintiff. I agree with his decision, but I cannot agree with the grounds on which he based it. The Vice-Chancellor has held that where there has been possession without accounting for twenty years a subsequent acknowledgment in writing is sufficient to exclude the Real Property Limitation Act, 1833, and, as an authority for this proposition, he relies on *Stansfield v. Hobson* (1). According to the marginal notes of the reports of that case, it is an authority for the Vice-Chancellor's decision. But, when we look at the judgments of the two lords justices, it is clear that the only point actually decided by them was whether the document in that case was itself a sufficient acknowledgment, independently of the time of its being given, of the title of the mortgagor or of his right to redeem, to satisfy s. 28 of the Real Property Limitation Act, 1833. However, the Vice-Chancellor thought that the case was in point and binding upon him; and he followed what he thought was the decision of the lords justices. I am unable to adopt the view that the case is in point.

It was not established in *Stansfield v. Hobson* (1) that an acknowledgment from a mortgagee after he had been twenty years in possession was sufficient to take the case out of the statute. The point was, however, argued in *Re Alison* (2), and in that case it was held that the right of the mortgagee was fully established by the twenty years' possession, notwithstanding an acknowledgment given after that time had elapsed. I am unable to agree with the grounds of the Vice-Chancellor's judgment. The grounds on which the case must be decided are that the facts are on the written admissions, and that there is nothing on the face of the admissions to show that, during the possession of the defendant's predecessor in title, there had been no accounting to the owner of the other half share for the rents and profits of that share.

Applying the rule as to presumption of payments to the facts stated in the admissions, I should think that there had been accounting for rents and profits during that period. Counsel for the defendant asks to be allowed to bring additional evidence to show that the admissions are not correct, and he relies upon R.S.C., 1875, Ord. 58, r. 5 [now R.S.C., Ord. 58, r. 9 (2)]. No doubt the court has full discretionary power to order such evidence to be admitted if it thinks that special grounds for allowing such fresh evidence have been shown. What special grounds are there for acceding to the application? That those who advised the plaintiff put a special construction on those admissions which is not a right construction to put upon them. That is no sufficient ground, and I think that the application should be refused, and that the judgment must be affirmed.

LUSH, L.J.—If it is proved that for more than twenty years before accounting no payment was made at all, any payment made after the expiration of that would not have given a title. If there has been possession for twenty years without paying or accounting for the rents and profits, a new title in the claimant is created by the statute. No evidence has been given that the rents and profits were not accounted for from 1833 to 1864. It is said that we may infer from the admissions that there was no accounting for the rents and profits of a moiety. I cannot agree to that. The admissions state that upon the death of the widow Thomas Sanders the son entered into receipt of the rents and profits and continued in such receipt down to the time of his death. What does that say more than that one tenant got into possession of the entire estate? It does not say that possession was not given and kept on the footing of the person taking possession accounting. [His LORDSHIP read the rest of the admissions, and continued:] To my mind it is not only consistent with the admitted facts that payment of half of the rents and profits may have been continued, but, as an inference of fact, it is not at all likely that a man who had got an estate himself by an adverse title would continue payment of rents to the brother whom he had excluded by such adverse possession. It is not likely

A that a man would willingly create a title against himself. The reasonable inference of fact to be drawn is, that payments of rent were made continuously during and after the time when title by adverse possession is said to have been gained, and that such payments only changed hands in 1864.

Appeal dismissed.

B Solicitors: *Gold & Son*, for *R. & R. P. Dale*, York; *Williamson, Hill & Co.*, for *J. C. & T. Sowerby*, Stokesley.

[Reported by FRANK EVANS, ESQ., Barrister-at-Law.]

C

HOWE AND ANOTHER v. SMITH

D

[COURT OF APPEAL (Cotton, Bowen and Fry, L.JJ.), March 31, April 1, May 29, 1884]

[Reported 27 Ch.D. 89; 53 L.J.Ch. 1055; 50 L.T. 573; 48 J.P. 773; 32 W.R. 802]

E

Sale of Land—Contract—Breach—Deposit—Recovery—Repudiation of contract by purchaser—Deposit paid “as a deposit and in part payment of the purchase money.”

A deposit, paid by the purchaser to the vendor in accordance with the terms of a contract for the sale of land, is, in the absence of some contrary provision in the contract, according to the ordinary interpretation by business men, a security for the completion of the contract, and where the conduct of the purchaser is such as to amount to repudiation of the contract and he has lost all right to specific performance of the contract in equity and to damages for its non-performance in law, he is not entitled to recover the deposit from the vendor. This is so where the deposit is “paid as a deposit and in part payment of the purchase money.”

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A. contracted to sell real estate to B. for £12,500, “£500, part thereof, having been paid, on the signing of this agreement, as a deposit and in part payment of the purchase money.” The balance of the purchase money was to be paid on April 24, and the contract provided that if the purchaser “shall fail to comply with this agreement the vendor shall be at liberty to re-sell the premises in any manner, and the deficiency on such second sale thereof, with all expenses attending the same, shall be made good by the defaulter at this present sale, and be recoverable as liquidated damages.” There was no provision as to what was to be done with the deposit in case of a re-sale. The purchaser was guilty of such delay in completion as in the opinion of the court amounted to a repudiation of the contract, and the vendor re-sold for an amount equal to the original price.

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Held: the purchaser was not entitled to recover the deposit.

PER FRY, L.J.: Where the vendor has a power to re-sell in case of default and the purchaser is to pay the deficiency, and the purchaser has been guilty of such default as justifies the vendor in treating the contract as rescinded, this affords the vendor an alternative remedy, so that he may either affirm the contract and re-sell under it, or rescind the contract and sell under his absolute title. If he acts under the contract he must bring the deposit into account in his claim for the deficiency; if he sells as owner he may retain the deposit, but loses his claim for the deficiency.

Notes. Followed: *Soper v. Arnold* (1887), 35 Ch.D. 384. Applied: *Levy v. Stogdon*, [1898] 1 Ch. 478. Followed: *Hall v. Burnell*, [1911-13] All E.R.Rep. 631. Considered: *Stickney v. Keeble*, [1914-15] All E.R.Rep. 73. Applied: *Mayson v. Clouet*, [1924] A.C. 980. Considered: *Chillingworth v. Esche*, [1923] All E.R.Rep. 97; *Farr, Smith & Co., Ltd. v. Messers, Ltd.* (1927), 44 T.L.R. 48; *John Barker & Co. v. Littman*, [1941] Ch. 405; *Smith v. Hamilton*, [1950] 2 All E.R. 928. Applied: *Gallagher v. Shilcock*, [1949] 1 All E.R. 921. Referred to: *Soper v. Arnold* (1887), 37 Ch.D. 96; *Bishop v. Taylor* (1891), 60 L.J.Q.B. 556; *Cornwall v. Henson*, [1900] 2 Ch. 298; *Jackson v. De Kadich* (1904), 48 Sol. Jo. 687; *Sprague v. Booth*, [1909] A.C. 576; *Harrison v. Holland and Hannen and Cubitts* (1921), 91 L.J.K.B. 337; *Monnickendam v. Leanse* (1923), 39 T.L.R. 445; *Cohen v. Sellar*, [1926] All E.R.Rep. 312; *Aktieselskabet Reidar v. Arcos, Ltd.*, [1926] All E.R.Rep. 140; *Stockloser v. Johnson*, [1954] 1 All E.R. 630.

As to forfeiture of a deposit on an uncompleted contract, see 34 HALSBURY'S LAWS (3rd Edn.) 322-324; and for cases see 40 DIGEST (Repl.) 241 et seq.

Cases referred to:

- (1) *Palmer v. Temple* (1839), 9 Ad. & El. 508; 1 Per. & Dav. 379; 8 L.J.Q.B. 179; 112 E.R. 1304; 40 Digest (Repl.) 244, 2053.
- (2) *Hinton v. Sparkes* (1868), L.R. 3 C.P. 161; 37 L.J.C.P. 81; 17 L.T. 600; 16 W.R. 360; 40 Digest (Repl.) 246, 2065.
- (3) *Collins v. Stimson* (1883), post p. 382; 11 Q.B.D. 142; 52 L.J.Q.B. 440; 48 L.T. 828; 47 J.P. 439; 31 W.R. 920, D.C.; 40 Digest (Repl.) 246, 2071.
- (4) *Depree v. Bedborough* (1863), 4 Giff. 479; 3 New Rep. 187; 33 L.J.Ch. 134; 9 L.T. 532; 12 W.R. 191; 66 E.R. 795; sub nom. *Depree v. Bedborough, Re Depree's Will and Clerkenwell Improvement Act*, 1861, *Griffiths v. Bedborough*, 9 Jur.N.S. 1317; 40 Digest (Repl.) 244, 2054.
- (5) *Re Parnell, Ex parte Barrell* (1875), 10 Ch. App. 512; 44 L.J.Bcy. 138; 33 L.T. 115; 23 W.R. 846, L.J.J.; 40 Digest (Repl.) 245, 2055.
- (6) *Ockenden v. Henly* (1858), E.B. & E. 485; 27 L.J.Q.B. 361; 31 L.T.O.S. 179; 4 Jur.N.S. 999; 120 E.R. 590; 40 Digest (Repl.) 141, 1081.
- (7) *Wilde v. Fort* (1812), 4 Taunt. 334; 128 E.R. 359; 40 Digest (Repl.) 90, 675.
- (8) *Stowell v. Robinson* (1837), 3 Bing.N.C. 928; 3 Hodg. 197; 5 Scott, 196; 6 L.J.C.P. 326; 132 E.R. 668; 40 Digest (Repl.) 122, 958.
- (9) *Noble v. Edwardes, Edwardes v. Noble* (1877), 5 Ch.D. 378; 37 L.T. 7, C.A.; 40 Digest (Repl.) 233, 2354.

Also referred to in argument:

- Casson v. Roberts* (1862), 31 Beav. 613; 1 New Rep. 9; 32 L.J.Ch. 105; 7 L.T. 588; 27 J.P. 73; 8 Jur.N.S. 1199; 11 W.R. 102; 54 E.R. 1277; 40 Digest (Repl.) 248, 2086.
- Laird v. Pim* (1841), 7 M. & W. 474; 8 Dowl. 860; H. & W. 11; 10 L.J.Ex. 259; 171 E.R. 852; 40 Digest (Repl.) 282, 2350.
- Icely v. Grew* (1836), 6 Nev. & M.K.B. 467; 40 Digest (Repl.) 141, 1080.
- Mocser v. Wisker* (1871), L.R. 6 C.P. 120; 40 L.J.C.P. 94; 24 L.T. 134; 19 W.R. 351; 40 Digest (Repl.) 247, 2076.
- Southcomb v. Bishop of Exeter* (1847), 6 Hare, 213; 16 L.J.Ch. 378; 9 L.T.O.S. 293; 12 Jur. 744; 67 E.R. 1145; 40 Digest (Repl.) 262, 2202.
- Gee v. Pearce* (1848), 2 De G. & Sm. 325; 64 E.R. 146; 40 Digest (Repl.) 245, 2058.

Appeal from a decision of KAY, J., in an action for specific performance.

By an agreement, dated Mar. 24, 1881, and made between the defendant, George Hindes Smith, of the one part, and Thomas Heslop Howe, one of the plaintiffs, of the other part, the defendant agreed to sell and T. H. Howe agreed to purchase, "for the price or sum of £12,500, £500. part thereof, having been paid on the signing of this agreement, as a deposit and in part payment of the purchase money."

A certain freehold pieces of land, free from encumbrances. The balance of the purchase money was to be paid on April 24, 1881, when the purchase was to be completed, the rents and outgoings up to that time being received and paid by the vendors. In case of delay from any cause, except the default of the vendor, the purchaser was to pay interest at 5 per cent. from that day till actual completion. Clause 8 was as follows :

B "If the purchaser shall fail to comply with this agreement the vendor shall be at liberty to re-sell the premises in any manner, and the deficiency on such second sale thereof, with all expenses attending the same, shall be made good by the defaulter at this present sale, and be recoverable as liquidated damages. This stipulation shall not prejudice the right of the vendor to a specific performance of this contract, nor shall he be bound to tender a conveyance to the purchaser."

C By a letter written at the same time, the vendor's solicitor agreed that the clause as to re-sale should not be put in force till the lapse of six weeks from April 24. On April 24 the purchaser had not sent the draft conveyance to the vendor's solicitor. The latter pressed for completion, and on June 20 it was agreed that the purchaser should have a month's further time to complete the contract on his paying certain costs. The contract was not completed, and the vendor afterwards declined to complete on the ground of the purchaser's delay. T. H. Howe, having sold his interest in the purchase to N. E. Howe, T. H. Howe and N. E. Howe on July 25, 1881, commenced an action against the vendor for specific performance of the agreement, and an injunction to restrain him from selling or conveying the property to any persons other than the plaintiffs. About six months afterwards the vendor re-sold the property at the original price. KAY, J., dismissed the action with costs on the ground of the purchaser's delay, and the plaintiffs appealed.

E After the arguments as to the right of the plaintiffs to specific performance, the court allowed the plaintiffs to raise a claim for the return of the deposit.

F W. Pearson, Q.C., and C. Batten for the plaintiffs.
Graham Hastings, Q.C., and Kingdon for the defendant.

At the conclusion of the arguments the court delivered judgment affirming the decision of KAY, J., that the plaintiffs were not entitled to specific performance, but reserved judgment on the question whether they were entitled to the return of the deposit.

G May 29, 1884. The following judgments were read.

COTTON, L.J.—This is an action brought by a purchaser and his sub-purchaser for the specific performance of a contract for the purchase and sale of land. At the hearing of the action, KAY, J., decided the only point raised by the plaintiffs, by the pleadings, viz., that in consequence of the delay the plaintiffs were not entitled to the equitable remedy of specific performance, which is only granted to those who are ready and prompt, and on appeal we affirmed this decision.

H But at the hearing of the appeal counsel for the plaintiffs asked liberty to raise a claim to the return of the deposit, the deposit being £500, which claim had not been raised in the court below, and we gave the leave, and considered the necessary amendments as having been made. The claim for this return of the deposit of I £500 is a claim which generally arises at common law. It has also arisen in bankruptcy, but in equity it has not arisen except with reference to sales under the jurisdiction of the court, and that accounts for the little authority there is on the point. The first thing we must look at is the contract. The contract contains no clause at all as to what is to be done with the deposit if the contract is not performed. It states that £500, part of the purchase money of £12,500, has been paid as a deposit, and in part payment of the purchase money. There was nothing else which was material except cl. 8, which was relied on (having regard to a case which I shall refer to) as giving the plaintiff the right to the return of the deposit.

It was contended that, having regard to *Palmer v. Temple* (1), this clause had fixed what was to be the penalty imposed on the purchaser if he made default—that this was to be the only liability in the case of default, and, therefore, that the deposit must be returned to the purchaser, the person who made default, of course subject to any claim which there might be to have any sum deducted under the sale. That case did, no doubt, lay down that, under that contract, the parties had settled what was to be the result of a default, but that was on a somewhat different provision from the claim in this case. It was under a proviso which laid down that, if either vendor or purchaser made default, then a sum of £1,000 should be paid as liquidated damages. It may be that that induced the court to come to the decision which they arrived at in that case—that that prevented the vendor, on the default of the purchaser, from retaining the deposit in consequence of the default of the purchaser. That case turned on the express terms of that proviso, which is different from the proviso in this case. If so, of course it is no authority here; but if that case does lay down (which I do not think it could have done), that such a clause, however varied in terms, would prevent the vendor, on the default of the purchaser, from retaining the deposit, I cannot agree with it, and do not feel bound to follow it.

In my opinion, this is a clause which merely fixes the amount which the vendor is to be entitled to if he follows the course which is there pointed out. It fixes the amount which he is to claim in that event; but, in my opinion, if the vendor had, irrespective of that clause, a right to retain the deposit under the circumstances existing in the present case, this clause would not give the purchaser the right to recover the deposit. The mere fact that there has been a re-sale, even if it were under this clause, which is in dispute, can, in my opinion, make no difference if the purchaser has made such a default as precludes him from demanding the transfer of the estate. That being so, when the vendor re-sold the estate he was only selling that which the purchaser had no possible right to demand, and his doing so cannot, in my opinion, affect the rights of the vendor and purchaser to the deposit.

But there is something more than that. In that case, undoubtedly, the judges did say that, independently of contract, the vendor cannot, on the default of the purchaser, retain the deposit; and there are similar expressions in other cases to that effect. There is a similar expression of opinion in *Hinton v. Sparkes* (2), and I think there are similar expressions of opinion in other cases at common law. But that, as I understand SUGDEN (LORD ST. LEONARDS), in his book on VENDORS AND PURCHASERS (14th Edn.), p. 40, is not in accordance with his view, for what he says is this:

“Where a purchaser is in default, and the seller has not parted with the subject of the contract, it is clear that the purchaser could not recover the deposit; for he cannot, by his own default, acquire a right to rescind the contract.”

Then he goes on to state his opinion that the mere re-sale of the estate after the purchaser's default cannot in any way affect the right of the deposittee to retain the deposit. Then we have *Collins v. Stimson* (3). There POLLOCK, B., refused to order the return of the deposit under circumstances somewhat different from these. What he says is this (as reported at 11 Q.B.D. at pp. 143, 144):

“According to the law of vendor and purchaser, the inference is that such a deposit is paid as a guarantee for the performance of the contract, and where the contract goes off by default of the purchaser, the vendor is entitled to retain the deposit.”

That was the grand principle of his decision.

But the matter does not quite stop there. There is a decision under somewhat different circumstances from the present case in *Depree v. Bedborough* (4), where there was a purchase under a sale by decree of the court. I will not refer to that case further than by saying that it is in accordance with a subsequent decision of

A the Court of Appeal in *Re Parnell, Ex parte Barrell* (5). There the purchaser had become bankrupt, and the trustee in bankruptcy had disclaimed the contract under which he sought to recover the deposit. That was refused. JAMES, L.J., says (10 Ch. App. at p. 514):

B "The trustee in this case has no legal or equitable right to recover the deposit. The money was paid to the vendor as a guarantee that the contract should be performed. The trustee refuses to perform the contract, and then says, 'Give me back the deposit.' There is no ground for such a claim."

There is a variance, no doubt, in the expressions of opinion, if not in the decisions, with reference to the return of the deposit; but I think that the judgment of JAMES, L.J., gives us the principle on which we should deal with the case.

C What is the deposit? It is in the contract described as a deposit and a part payment of the purchase money. The deposit, as I understand it, and using the words of JAMES, L.J., is a guarantee that the contract shall be performed. If the sale goes on, of course not only in accordance with the words of the contract, but in accordance with the intention of the parties in making the contract, the deposit goes in part payment of the purchase money for which it is deposited; but if, on the default of the purchaser, the contract goes off—that is to say, if he repudiates the contract—then, according to JAMES, L.J., neither he, nor those claiming through him, can have any right to recover the deposit. It may not be that in all cases where this court would refuse specific performance the vendor ought to be entitled to retain the deposit. It may well be that there may be circumstances which would justify this court in declining, and require the court, according to its ordinary rules, to refuse, specific performance, in which it could not be said that the purchaser had repudiated the contract, or that he had entirely put an end to it so as to enable the vendor to retain the deposit. In my opinion, in order to enable the vendor so to act, there must be those acts on the part of the purchaser which not only amount to such delay as to deprive him of the equitable remedy of specific performance, but which make his conduct amount to a repudiation on his part of the contract. In those circumstances, in my opinion, the rule is correctly laid down in the judgment of JAMES, L.J.—of course the case there was stronger than that which we have now to deal with—where the representative of the purchaser had neither in law nor in equity the right to the return of the deposit.

E What are the facts here? The contract was to be performed, according to the arrangement, on April 24. It is not necessary now to enter into the question of how far time would be considered as of the essence of the contract, because, since the Supreme Court of Judicature Act, 1873, when the question whether time is of the essence of the contract arises, all contracts must be governed by the rules of the courts of equity concerning that subject. What took place was this. Not only was the contract not performed on that day, but there was a delay from time to time, the purchaser asking for, and at one time, under hard terms of payment of costs, obtaining an extension of the time. He obtained further time, knowing that the vendor considered it of importance, as it was of importance, that the contract should be performed, if not to the very day, at least within a reasonable time. It was not performed within a reasonable time, and from the conduct of the purchaser, as I read the letters and understand what took place, I come to the conclusion that he never was, up to or even at the time when he brought this action, ready with the money to perform the contract. He was not ready with the money in order to purchase the estate, and, at the time when the action was commenced, if the vendor had said: "Where is your money; produce it, and then I will make the conveyance," he would not have produced the money, nor would the person to whom he sold that contract. In my opinion, without at all laying down that wherever the court refuses specific performance it will allow the vendor to retain the deposit, in this case the purchaser has so acted as to repudiate, on his part, the contract, and he cannot, under those circumstances, take advantage of his

own default to recover this deposit from the vendor. Therefore, on this point A
also, the appeal fails.

BOWEN, L.J.—I am of the same opinion. The purchaser in this case had no right, according to our decision pronounced on a previous day, to insist on the specific performance of the contract for the sale of the property. But it was urged at the last moment by his counsel that, at all events in the alternative, he must be entitled to the return of his deposit money. Treating the pleadings as amended for that purpose, we agreed to consider that alternative claim as if it had been raised on the pleadings in the way in which, whatever may have been the practice before the Judicature Act, I myself can see no reason why it should not be raised now. B

We have, therefore, to consider whether, under the circumstances of this case, the purchaser has lost his right to the return of this deposit money. The question as to the right of the purchaser to the return of the deposit money must, in each case, be a question, to my mind, of the conditions of the contract. In principle it ought to be so, because, of course, persons may make exactly what bargain they please as to what is to be done with the money deposited with one of the parties, or, where one of the parties is stakeholder, to abide the decision of the question with regard to the contract. The parties may make what bargain they please, and we have to look to the documents to see what bargain was made. If any authority were wanted—I do not think it is—for that, which is a question of construction, it would be found in *Palmer v. Temple* (1), one of the cases to which **COTTON, L.J.**, has referred, and which, whatever may be the value of the case as an authority on the construction of the contract in the case—as to which I agree with everything that has fallen from **COTTON, L.J.**—does not seem to me to be at variance with the principle that in each case we must consider what was the bargain. C D E

In that case it was said (9 Ad. & El. at p. 520):

“The ground on which we rest this opinion is, that, in the absence of any specific provision, the question whether the deposit is forfeited depends on the intent of the parties, to be collected from the whole instrument.” F

In the present case we have, in the first place, turning to the language of the instrument, a description of the manner in which the money is staked or deposited. It is a deposit and it is to be both a deposit, and in the nature of part payment. and there is, further, a special covenant to which one ought to look to see whether any light is thrown on the language of the special covenant that the money is paid over as a deposit. Passing for a moment the special covenant, which I think does not really deprive the deposit in this case of the character which it would bear if there was no special covenant contained in the contract, that covenant in the contract for the sale merely fixes the amount which the vendor is to receive in the event of his insisting on his rights under the special covenant. and it seems to me that we have to consider what in ordinary parlance, and as used in an ordinary contract of sale, is the meaning which business persons would attach to the term “deposit.” G H

Without going at length into the history, and accepting all that has been said and will be said in this court on that point, shortly it comes to this, that a deposit, if nothing more is said about it, is, according to the ordinary interpretation by business men a security for the completion of the purchase. But, in what sense is it a security for the completion of the purchase? It is quite certain the purchaser cannot insist on abandoning his contract, and yet recover the deposit, because that would be to enable him to take advantage of his own wrong. Counsel for the present purchaser says the rule is different when the purchaser insists, not on abandoning his contract, but, on the contrary, is desirous at the moment he appears before the court of completing it, and, therefore, neither the principle nor the decision applies—that this is not a case where the purchaser is receding from the contract, but, on the contrary, that he is seeking to enforce it. It seems to me I

A the answer to that argument is that, although in terms in a case like the present the purchaser may appear to be insisting on his contract, in reality he has so conducted himself under it as to have refused, and has given the other side the right to say that he has refused performance. He may look as if he wished to perform, but in reality he has put it out of his power to do so—he has fallen from his contract.

B In every case, at law, it seems to me the question whether time is of the essence of the contract must depend, just as the question of the deposit must depend, on the contract itself. It is not necessary, in the present instance, to consider whether, under this special contract, time was of the essence of the contract or not, because the Judicature Act has placed the matter, as regards such propositions, on the footing on which it would have been treated in equity before the Judicature Act. But it is obvious that the party may lose his right to insist on a specific performance before an equitable tribunal without at the same time having necessarily so acted as to justify the other side in saying the contract is altogether at an end. As I understand, speaking with a due consciousness of my own ignorance on the point, all the court of equity does when it refuses specific performance on the ground of lapse of time, is to leave the parties to their remedy at law. It D refuses it because it would be unfair that the relief should be given. It does not follow, as a matter of law, on principle, that, because specific performance is refused, therefore the whole contract is at an end in law. We have to look to the conduct of the parties and to the contract itself, and put the two things together to see whether the purchaser has acted, not merely so as to break his contract, but to entitle the other side to say he has repudiated and no longer stands by it. It E applies the principle of the decision no more than is necessary to show that there must be a special or a reasonable performance which entitles him to deny the repudiation of the contract.

F Looking to see whether the conduct of the purchaser has not in the present instance brought him within that definition, I think it is impossible, reviewing the case from first to last, to doubt that he has so dealt with his bargain as to give the vendor a right to allege, if he chooses, that the contract is at an end, and the purchaser has receded from the bargain, and that it is just that the vendor should say that the purchaser has receded from the bargain. For the purposes of the case the purchaser has receded from the bargain, and the deposit money is liable to be retained by the vendor. Therefore, in my opinion, the appeal fails.

G **FRY, L.J.**, stated the facts and continued: The question then arises, which has been argued before us, although not before KAY, J., whether or not the purchaser is entitled to recover the £500 paid on the signing of the contract. The £500 was paid, in the words of the contract, as “a deposit and in part payment of the purchase money.” What is the meaning of this expression? The authorities seem to leave the matter in some doubt. Some lean in the direction of the view that, H in the absence of express stipulation, the deposit is not forfeited by mere non-performance.

I Thus, in *Palmer v. Temple* (1), a sum of £300 was paid as in the present case, by way of deposit and in part payment, and the agreement stipulated that, if either party should refuse to perform the agreement, he should pay £1,000 to the other party as liquidated damages. The purchaser made default, the vendor re-sold the estate, and the Court of Queen’s Bench held that the vendor’s remedies were restrained by the contract; that he might have sued for the penalty, and recovered such damages as a jury might award. **LORD DENMAN, C.J.**, said (9 Ad. & El. at pp. 520, 521):

“But he cannot retain the deposit, for that must be considered, not as an earnest to be forfeited, but as part payment. But the very idea of payment falls to the ground when both have treated the bargain as at an end; and from that moment the vendor holds the money advanced to the use of the purchaser.”

It is to be observed that the Lord Chief Justice does not seem to have given any force to the words of the contract, which showed that the money was paid by way of deposit as well as in part payment.

In *Ockenden v. Henly* (6) the question was whether, in ascertaining the deficiency on a re-sale, credit was to be given for the deposit or not; and there LORD CAMPBELL, C.J., in delivering the judgment of the court, said (E.B. & E. at pp. 492, 493):

"Now, it is well settled that, by our law, following the rule of the civil law, a pecuniary deposit upon a purchase is to be considered as a payment in part of the purchase money, and not as a mere pledge: SUGDEN ON VENDORS AND PURCHASERS (13th Edn.), ch. 1, s. 3, art. 18. Therefore, in this case, had the deposit been paid, the balance only of the purchase money would have remained payable. What, then, according to condition 7, is the deficiency arising upon the re-sale which the seller is entitled to recover? We think the difference between the balance of the purchase money on the first sale and the amount of the purchase money obtained on the second sale; or, in other words, the deposit, although forfeited so far as to prevent the purchaser from ever recovering it back, as, without a forfeiture, he might have done—*Palmer v. Temple* (1), still is to be brought by the seller into account if he seeks to recover as for a deficiency on the re-sale."

On the other hand, in *Collins v. Stimson* (3), POLLOCK, B., said (11 Q.B.D. at pp. 143, 144):

"According to the law of vendor and purchaser the inference is that such a deposit is paid as a guarantee for the performance of the contract, and, where the contract goes off by default of the purchaser, the vendor is entitled to retain the deposit."

These authorities appear to afford no certain light to answer the inquiry whether, in the absence of express stipulation, money paid as a deposit on the signing of a contract can be recovered by the payer if he has made such default in performance of his part as to have lost all right to performance by the other party to the contract, or damages from him for non-performance. Money paid as a deposit must, I conceive, be paid on some terms implied or expressed. In this case no terms are expressed, and we must, therefore, inquire what terms are to be implied. The terms most naturally to be implied appear to me, in the case of money paid on the signing of a contract, to be that, in the event of the contract being performed, it shall be brought into account, but that, if the contract is not performed by the payer, it shall remain the property of the payee. It is not merely a part payment, but is then also an earnest to bind the bargain so entered into; and creates, by the fear of its forfeiture, a motive in the payer to perform the rest of the contract.

The practice of giving something to signify the conclusion of the contract—sometimes a sum of money, sometimes a ring or other object—to be re-paid or re-delivered on the completion of the contract, appears to be one of great antiquity, and very general prevalence. It may not be unimportant to observe, as evidence of this antiquity, that our own word "earnest" has been supposed to flow from a Phœnician source, through the ἀρραβών of the Greeks, the "arra" or "arrha" of the Latins, and the "arrhes" of the French. It was familiar to the law of Rome; and without going into the distinctions of that law on the subject (see VINNIUS on JUSTINIAN'S INSTITUTES, lib. iii., tit. 24; TRAITÉ DU POTHIER, CONTRAT DE VENTE, part vi., ch. 1, art. 3), it will be enough to observe that the general rule appears to have been that expressed in the INSTITUTES, lib. iii., tit. 24 [tit. 23 in T. E. HOLLAND'S text]:

"Is qui recusat adimplere contractum, si quidem est emptor, perdit quod dedit si vero venditor duplum restituere compellitur, licet super arrhis nihil expressum sit."

Furthermore the earnest did not lose that character, because the same thing might also avail as part payment. VINNIUS says:

- A "Datur autem arrha vel simpliciter, ut sit argumentum duntaxat et probatio emptonis contractæ, veluti si annulus detur; vel ut simul postea cedat in partem pretii, data certa pecunia."
- (VINNIUS ON JUSTINIAN, iii., tit. 24, p. 671, pl. 8, in 1726 Edn.). From the Roman Law the principles relating to the earnest appear to have passed to the early jurisprudence of England. BRACTON (Lib. ii., cap. 27, p. 490, Twiss's edition) says:
- B "Item cum arrarum nomine aliquid datum fuerit ante traditionem, si emptorem emptionis pœnituerit, et a contractu resilire voluerit, perdat quod dedit; si autem venditorem, quod arrarum nomine receperit, emptori restituat duplicatum."
- C Though the liability of the vendor to return to the purchaser twice the amount of the deposit, has long since departed from our law, the passage in question seems an authority for the proposition that the earnest is lost by the party who fails to perform the contract. That earnest and part payment are two distinct things is apparent from s. 17 of the Statute of Frauds, which deals with them as separate acts, each of which is sufficient to give validity to a parol contract [s. 17 repealed; see Sale of Goods Act, 1893, s. 4, itself repealed by Law Reform (Enforcement of
- D Contracts) Act, 1954, s. 2].
- E Taking these early authorities into consideration, I think we may conclude that the deposit in the present case is the earnest or "arrha" of our earlier writers; that the expression used in the present contract, that the money is paid "as a deposit and in part payment of the purchase money," relates to the two alternatives, and declares that, in the event of the purchaser making default, the money is to be forfeited, and that, in the event of the purchase being completed, the sum is to be taken in part payment. Such being my view of the nature of the deposit, it appears to me to be clear that the purchaser has lost all right to recover it if he has lost both his right to specific performance in equity and his right to sue for damages for its non-performance at law. That the purchaser has, by his delay, lost all right to specific performance, we have already decided. It remains to inquire whether he
- F has lost all right to sue for damages for its non-performance.
- In my opinion, the time fixed by a contract for the payment of the balance of the purchase money and the completion of the contract was, according to the law as it stood before the Judicature Act, 1873, of the essence of the contract, so that non-payment on that day, provided it was not caused by the default of the vendor, authorised the vendor at law to treat the contract as rescinded. *Wilde v. Fort* (7),
- G *Stowell v. Robinson* (8), *Noble v. Edwardes* (9), and SUGDEN ON VENDOR AND PURCHASER, ch. 6, s. 1, are some among many authorities to which I might refer in support of these propositions. Section 25 (7) of the Supreme Court of Judicature Act, 1873, enacted that stipulations in contracts as to time, which would not before the passing of that Act have been deemed to be of the essence of such contracts in a court of equity, should receive in all courts the same construction and effect as
- H they would theretofore have received in equity [see now Supreme Court of Judicature (Consolidation) Act, 1925, s. 44]. The effect of this clause is, in my opinion, that the purchaser seeking damages is no longer obliged to prove his willingness and readiness to complete on the day named, but may still recover if he can prove such readiness and willingness within a reasonable time after the stipulated day; and the inquiry, therefore, arises whether the purchaser in the present case could
- I aver and prove such readiness and willingness within a reasonable time. The contract was entered into on Mar. 24, April 24 being fixed for completion; but, by a letter written at the same time, the vendor's solicitor agreed that the clause for re-sale should not be put in force till the lapse of six weeks from April 24. This was not a stipulation postponing the time for completion generally, but merely limiting the exercise of a consequential power. April 24 arrived, but the draft conveyance had not been sent, and the vendor pressed for completion, but in vain. It appears that on June 20 the vendor agreed to give a month's time for completion on the purchaser agreeing to pay certain costs (to which the purchaser assented).

Having regard to all that had occurred before, I consider that the expiration of this month was the latest time at which the purchaser could require the vendor to accept his purchase money and complete. The month expired and no payment was made, and, though this action was begun shortly afterwards, I do not find that any tender of payment has ever been made. A

I conclude, therefore, that the purchaser could not show a readiness and willingness to complete either on the day fixed or within a reasonable time after; but I find, on the contrary, such a protracted default on the purchaser's part, notwithstanding the urgency of the vendor, as, in my opinion, justified the vendor in treating the purchaser as refusing to complete (notwithstanding his protestations of good intentions for the future), and as further justified the vendor in treating the contract as rescinded. In a word, the purchaser has, in my opinion, been guilty of such delay, whether measured by the rules of law or of equity, as deprives him of his right to specific performance and of his right to maintain an action for damages, and under these circumstances I hold that the purchaser has no right to recover his deposit. B C

Yet another point has been raised and demands decision. Clause 8 of the agreement gives, as I have already stated, a power to the vendor to re-sell if the purchaser fails in his performance, and declares that the deficiency on such second sale shall be made good by the defaulting purchaser and be recoverable as liquidated damages. In the present case the defendant, the vendor, declined to perform the contract on the ground of delay on the part of the plaintiff. The plaintiff brought this action, and about six months subsequently the vendor re-sold the property at the original price, and it is contended by the plaintiff that the defendant thereby lost all right of retaining the deposit. If the vendor had chosen to re-sell under this power, and to sue the purchaser for the deficiency, he would, in my opinion, and in accordance with *Ockenden v. Henly* (6), have been obliged to bring the deposit into account, but that is not the course which he has pursued. It appears to me that, when the purchaser had failed on his part down to the last moment which law or equity gave to him, the vendor's title was absolute both to the whole legal and equitable estate in the land sold, and also, by force of the terms of the deposit, to the deposited money also, and that the purchaser could recover no right in this deposit money because the vendor chose to sell his land, as he was entitled to do under his title as absolute legal and equitable owner. The observations of SUGDEN on this subject (*VENDOR AND PURCHASER* (14th Edn.), p. 40) appear to me very cogent. Whether a clause such as cl. 8 in the present contract gives the vendor a power of re-sale for a default in performance on the very day named it is not now necessary to inquire. But, in my opinion, where there has been such default as justifies the vendor in treating the contract as rescinded, it affords the vendor an alternative remedy, so that he may either affirm the contract and sell under this clause, or rescind the contract and sell under his absolute title. If he act under the clause, he must bring the deposit into account in his claim for the deficiency; if he sell as owner he may retain the deposit, but loses his claim for the deficiency under the clause in question. For these reasons I conclude that the appeal must be dismissed with costs. D E F G H

Appeal dismissed.

Solicitors: *C. C. Parr; W. White.*

[*Reported by FRANK EVANS, ESQ., Barrister-at-Law.*] I

A

GRAFF v. EVANS

[QUEEN'S BENCH DIVISION (Field, J., and Huddleston, B.), February 28, 1882]

[Reported 8 Q.B.D. 373; 51 L.J.M.C. 25; 46 L.T. 347;
46 J.P. 262; 30 W.R. 380]

B

Licensing—Club—Supply of liquor to members—Members' club—Need for club to hold licence.

C

A bona fide members' club consisted of about 1,100 members, who paid an entrance fee and periodical subscriptions, the objects of the club being social intercourse and mutual and moral improvement. Trustees of the club property were appointed, in whom, by one of the rules, the property of the club was vested; there was a managing committee to conduct the general business of the club; and the appellant was the manager of the club acting for the committee. Members could obtain food and refreshments in the club, and were also supplied with wine, beer, and spirits for consumption either on or off the club premises, the price charged for liquors in the latter case being 33 per cent. above the cost price. The produce of these transactions went to the funds of the club, which had no licence to sell. In the ordinary course of his duty as manager the appellant supplied, at the club bar, a bottle of whisky and a bottle of beer to a member, for consumption off the club premises, and received from him 3s. 11d. in payment for the same. On the complaint of the respondent, he was convicted and fined 20s. by a metropolitan magistrate for "selling intoxicating liquors by retail without being duly licensed, contrary to s. 3 of the Licensing Act, 1872."

D

E

Held: the members were the joint owners of all the property of the club; when the member in question obtained the liquor for which he had asked, and paid a price for it, he already had a legal interest in the liquor and he then purchased the interest of the other members of the club; that transaction did not constitute a sale of the liquor; and, therefore, the appellant had been wrongly convicted.

F

Notes. Followed: *Ranken v. Hunt* (1894), 10 R. 249. Distinguished: *Mullinager R.D.C. v. Rowles* (1912), 6 Tax Cas. 85. Applied: *Metford v. Edwards*, [1914-15] All E.R.Rep. 653; *Wurzel v. Houghton Main Hope Coal Delivery Service, Ltd.*, *Wurzel v. Atkinson*, [1936] 3 All E.R. 311; *Trebanog Working Men's Club and Institute, Ltd. v. Macdonald, Monkwearmouth Conservative, Ltd. v. Smith*, [1940] 1 All E.R. 454. Referred to: *Newell v. Hemingway* (1888), 58 L.J.M.C. 46; *Bowyer v. Percy Supper Club* (1893), 69 L.T. 447; *Woodley v. Simmonds* (1896), 60 J.P. 150; *I.R.Comrs. v. Tod*, [1898] A.C. 399; *Davies v. Burnett*, [1902] 1 K.B. 666; *Humphrey v. Tudgay*, [1915] 1 K.B. 119; *A.-G. v. Swan*, [1922] 1 K.B. 682.

G

H

As to the application of the Licensing Acts to members' clubs, see 5 HALSBURY'S LAWS (3rd Edn.) 279, 280; and for cases see 8 DIGEST (Repl.) 671-674. For the Licensing Act, 1953, s. 120 (1), see 33 HALSBURY'S STATUTES (2nd Edn.) 250.

Case referred to:

(1) *R. v. Wilkinson* (1864), 10 L.T. 370.

I

Also referred to in argument:

R. v. Burgess (1863), Le. & Ca. 299; 2 New Rep. 85; 32 L.J.M.C. 185; 8 L.T. 255; 27 J.P. 388; 9 Jur.N.S. 582; 11 W.R. 602; 9 Cox, C.C. 302, C.C.R.; 15 Digest (Repl.) 1074, 10,592.

R. v. Webster (1861), Le. & Ca. 77; 31 L.J.M.C. 17; 5 L.T. 327; 26 J.P. 212; 7 Jur.N.S. 1208; 10 W.R. 20; 9 Cox, C.C. 13, C.C.R.; 15 Digest (Repl.) 1074, 10,593.

Calye's Case (1584), 8 Co. Rep. 32 a.; 77 E.R. 520; sub nom. *Windham and Meads Case*, 4 Leon. 96; 29 Digest (Repl.) 2, 1.

Case Stated by a metropolitan magistrate.

A
A complaint was preferred by the respondent against the appellant under s. 3
of the Licensing Act, 1872 [see now Licensing Act, 1953, s. 120 (1)], that he, the
appellant, did on May 4, 1881, in the parish of St. George, Hanover Square, in the
county of Middlesex, unlawfully sell and expose for sale by retail intoxicating
liquors at a time when he did not hold a justices' licence authorising him to hold
an excise licence for the sale of that intoxicating liquor. At the hearing it was
B
proved or admitted that the Grosvenor Club, situate at 200, Buckingham Palace
Road, was a bona fide club properly constituted. Trustees of the club property
were appointed, and there was a managing committee to conduct the general busi-
ness of the club. The appellant Graff was the manager of the club, acting for the
committee. There were about 1,100 members of the club, who paid an entrance
fee and periodical subscriptions. The objects of the club were social intercourse,
C
mutual and moral improvement, aided by lectures, and rational recreation. One
object was to keep the members away from the public-house. They could obtain
food and refreshments in the club, and also wine, beer, and spirits on payment.
The produce of such sales went to the funds of the club. The club had no licence
to sell liquor. On May 4, 1881, one James Foster, a member of the club and also
a licensed victualler, purchased at the bar of the club, a bottle of whisky and a
D
bottle of pale ale, and paid 3s. 11d. for the two. The barman wrapped them up
in paper, and Foster, who had a friend not a member of the club with him, carried
them away out of the club openly and without concealment. It was also found
that liquor to the value of £200 was sold annually to the members for consumption
off the premises, and that there was a profit on such sales to the amount of 33 per
cent. on the original cost; but it was contended on the appellant's part that they
E
did not amount to a sale of the whisky and ale within the meaning of s. 3 of the
Act of 1872, inasmuch as the sale was to a member of the club; that liquor could
be sold to members of the club for consumption, either on or off the premises; that
one object of the promoters of the club was to enable members to buy for consump-
tion off the premises; that the members were partners in the club property, and,
therefore, that the member was only buying his own liquor, and this did not con-
F
stitute a sale within the meaning of the Act. On the part of the respondent it
was contended that the property in the club was vested in the trustees, and that
the members of the club were not co-partners. The respondent also contended that
the club was not legally entitled to sell liquors either on or off the premises without
a licence; but the complainant, who was chairman of the Westminster Licensed
Victuallers Protection Society, had no wish to interfere so long as the liquor was
G
bought by a member of the club and consumed on the premises.

It appeared to the learned magistrate that an ordinary club, such as the Gros-
venor, was not a partnership in the legal sense of the word, not being an associa-
tion formed for the purpose of realising a joint profit, though the members of it
might be joint owners. The answer to the question whether or not what had
occurred amounted to a trading within the meaning of the Act appeared to him
H
to depend upon another, viz.: Did the club derive a profit from their outside selling?
If the price charged was only the strict cost price to the club, and no profit was
made, it would not amount to a sale within the Act; it would only be a mode of
subdivision among the members; the club committee would only be the agents of
the members to purchase, and the member in that case would merely repay his
agent the cost price; the transaction would be similar to that of a subscription
I
dinner or picnic, where one man provided the wine and beer for all, and each
afterwards contributed in proportion to what he took. But, if a profit was made by
the first buyer by charging more than the cost price to the consumer, that would
amount to a sale. In the present case a considerable profit, as much as 33 per
cent. on the original cost, resulted to the club. In answer to the objection made
on behalf of the appellant that the profit did not benefit any individual in a
pecuniary way, but only helped to maintain the club, it appeared to be equally a
profit of which the members had the advantage. Foster, though a member, bought

A the liquor in his individual and separate capacity, and was liable for the amount to the committee. Even if a partnership were admitted, it would make no difference in this respect. The learned magistrate, therefore, came to the conclusion that the sale in question was a sale within the meaning of the Act, and convicted the appellant, fining him 20s.

B The question for the opinion of the court was whether the sale in question of whisky and ale to Foster was a sale of intoxicating liquor by retail within the meaning of s. 3 of the Act of 1872, requiring the seller to be duly licensed?

By s. 3 of the Licensing Act, 1872 :

C "No person shall sell or expose for sale by retail any intoxicating liquors without being duly licensed to sell the same; any person selling or exposing for sale by retail any intoxicating liquors which he is not licensed to sell by retail, or selling or exposing for sale any intoxicating liquor at any place where he is not authorised by his licence to sell the same, shall be subject to the following penalties, that is to say. . . ."

Sir Farrer Herschell, Q.C., and A. L. Smith for the appellant.

D *Staveley Hill, Q.C.* (with him *Sir Hardinge Giffard, Q.C., and Bremner*), for the respondent.

F **FIELD, J.**—I have come to the conclusion that the question which the learned magistrate has asked us in this case must be answered in the negative. In the first place, the word "sale" in the earlier part of the question put to us is introduced there by the magistrate merely as a convenient term whereby to express the transaction in question. The Licensing Act, 1872, within which this transaction is said to come, introduces for the first time the words with which we have to deal today; and though provisions respecting the "sale" of intoxicating liquors and the regulation of public-houses are common enough in various Acts of Parliament since 1828, yet by s. 3 of the Act of 1872 a new and distinct offence was created. That section is one creating an offence and imposing a penalty for the commission of it, and, therefore, before adjudging a person to be liable to that penalty, we must look carefully to see whether, upon a fair and strict construction of the language of the section in question, the person upon whom it is sought to impose the penalty has committed the offence, and so brought himself within the grasp of the section.

G The facts are very short and are very clearly stated in the Case. The club in question is admittedly a bona fide club, having trustees in whom by the rules of the club all the club property is vested, no doubt for the express purpose of enabling them to take such legal proceedings, either civil or criminal, as may be necessary for the protection of the goods and property of the club. But though the general property in the goods of the club is thus vested in the trustees, there are other special properties in such goods also created and vested in certain officers of the club other than the trustees. There is, for instance, a special property in the committee and a special property in the funds of the club vested in the treasurer, while Mr. Graff, the manager, has a special property in the provisions and liquors, so that he may be able to part with them without the necessity of having to obtain the consent of the trustees upon every transaction of that nature. He is the manager of the club, acting, not for the trustees, but for the committee who are his masters, as also in a certain sense are all the members of the club. The committee, I take it, purchase the goods for the use of the club, and pay for them by cheques upon the club funds. The members, it seems, can obtain food and wine and other liquors in the club on payment for the same, the produce thereby realised going to the general funds of the club. The case finds that the sales of liquors to club members for consumption off the premises amounted annually to £200, and that there was an annual profit on such sales to the amount of 33 per cent. on the original cost of the articles. If that had been found to be "profit" in the ordinary commercial sense of the word as a "trade profit," it would, no

doubt, have been a considerable element in the consideration of the present question; but it is clear, I think, that the learned magistrate did not use the word "profit" in the sense of its being such a profit as an ordinary retail trader would make, but simply that, whereas the liquors had cost, say, £100, the members of the club would have to pay £133 for them, that extra sum being the fair and just amount to be paid by the members who consumed the liquors in order to cover the expenses of that particular branch of the establishment, which it would not be fair to put upon those members who did not make use of any intoxicating liquors. That, I think, is the meaning of the finding of the learned magistrate with respect to this matter of the profit of 33 per cent. on the sales of liquor. A B

I agree with the learned magistrate that this is not a partnership, but that the members are joint owners of the club property. The true conclusion is, I think, that the members of the club are joint owners of the general property in all the goods of the club, and that the trustees are their agents with respect to such general property, notwithstanding that there are other agents such as the committee and the managers, etc., who have certain special properties in some of the goods vested in them. I am not able to follow the reasoning of the magistrate with regard to the question, whether or not there was a "sale" within the Act, depending upon the price charged and upon whether the club derived or made a profit upon the sale of these liquors. It does not appear to me to be at all material whether the sum which a member pays for the liquor supplied to him is more or less than or equal to its cost price. The transaction is not, in my opinion, made either more or less a "sale" within the statute by reason of any such variation in the price paid for the liquor by the members. The learned magistrate seems to have thought that, if the price charged to the members were exactly equal to the cost price of the article, it would not be a sale within the statute, but that if the price charged to him were more than the cost price, then it would be such a sale. I am unable, as I have said, to follow the reasoning by which he has arrived at that conclusion. C D E

We have to find out, if possible, the meaning of the legislature from the language they have used; and looking at that language, it is clear that they were of opinion that it was very undesirable that intoxicating liquor should be sold anywhere without a licence. The section is limited to a "sale of intoxicating liquors by retail." Who then is it that the legislature is here striking at? Clearly it is at the trader who gains a profit by selling liquor by retail. The wholesale dealer who distributes the liquor on a large scale is not touched at all. Did then Graff, the manager, who, if not with his own hand, at all events by that of his subordinate, the barman, supplied the member with this liquor, sell the same by retail so as to bring the transaction within the section? I do not think that he did. A sale involves in it something in the nature of a bargain. Here there was no bargaining nor any contract between the members and Graff with respect to this liquor. It is part of the terms of membership that every member shall be entitled to obtain a bottle of wine or other liquor on payment of the price fixed for it by the committee. Foster was acting solely upon and within his right as a club member, not by reason of any new contract, but by reason of his old contract of association, by which, upon his subscribing a certain yearly or other periodical sum to the funds of the club, he became entitled to have liquor supplied to him as a member at a certain price. There was no contract of sale, nor could Graff, in my judgment, have maintained an action against Foster as for goods sold and delivered in respect of these bottles of whisky and ale. There were no two parties to any contract, because Foster was a vendor, at all events of a portion of what has been contended was sold to him, as well as a buyer. Looking at the transaction as a purchase by one member of the shares of all the other members in the liquors, Foster was as much a co-owner as a vendor. It was, I think, a transfer of a special property or partial interest in the liquor to Foster; but it was not a sale, or, in the wider language used elsewhere in the Act, "a transaction in the nature of a sale," within the meaning of s. 3. I have, therefore, come to the conclusion that the conviction must be reversed, and that this appeal must consequently be allowed with costs. F G H I

A **HUDDLESTON, B.**—I am of the same opinion. I quite agree with counsel for the appellant that s. 3 applies equally to liquor sold for consumption either on or off the club premises. The question before us is one of very considerable importance, for, if this conviction be right, it follows as a logical consequence that every club in the kingdom is liable to penalties in respect of every glass of wine, spirits, or beer that is consumed on the premises. It is, I think, worthy of consideration
B that those who have framed the various Licensing Acts since the year 1828 never considered or intended that clubs should come within them. There is, no doubt, much force in what the learned magistrate has said in putting forward his view of the case; but, with the greatest possible respect for him, I cannot agree with the conclusion to which he has come; and in answer, therefore, to the question which he asks, I say that I do not think there has in fact been in this case a sale of
C intoxicating liquors by retail within the meaning of s. 3 of the statute.

At the time Mr. Foster applied at the bar of the club for this liquor, it seems clear to me that he possessed a property, or at any rate an interest, in the liquors which were then supplied or transferred to him—an interest which counsel for the respondent correctly designated as a one eleven-hundredth part or share therein. What then did he get from the barman who served him? He got from him, on
D payment of the price, the interest of the 1,099 other members of the club, who thereby transferred their rights to him. Taking the definition of a sale to be found in almost all the text writers, namely, that it is “a transfer of the absolute or general property in a thing for a price in money,” I say that here there was no transfer of the absolute or general property in these liquors, but a transfer of a special interest in them—a transfer, that is, of the interest of the other 1,099
E members of the club.

That, in my opinion, is the result of the transaction; and, looking at it in the broadest light in which such a matter ought to be viewed, I cannot think that it was a sale by retail of intoxicating liquors within the meaning of the Act of Parliament. It is obvious from *R. v. Wilkinson* (1) that clubs of this description could not obtain a licence, and when they part with a portion of their property to a
F member in the way stated in the Case, I do not think it is a sale within the Act, and I am, therefore, of opinion that this appeal must be allowed.

Appeal allowed.

Solicitors: *Lewis & Lewis; A. J. Bristow.*

[*Reported by* HENRY LEIGH, Esq., *Barrister-at-Law.*]

SEWARD v. THE VERA CRUZ (OWNER). THE VERA CRUZ

[HOUSE OF LORDS (The Earl of Selborne, L.C., Lord Blackburn and Lord Watson), November 28, December 1, 2, 1884]

[Reported 10 App. Cas. 59; 54 L.J.P. 9; 52 L.T. 474; 49 J.P. 324; 33 W.R. 477; 1 T.L.R. 111; 5 Asp.M.L.C. 386]

Fatal Accident—Negligence—Collision at sea—Jurisdiction of Admiralty Court—“Claim for damage done by a ship”—Action in rem on behalf of relations of deceased—Competency.

An action under the Fatal Accidents Acts brought for the benefit of the relations of a person whose death is alleged to have been caused by the negligence of the defendant is a purely personal action; if the death occurred at sea as the result of a collision between two ships the claim under the Fatal Accidents Act is not a claim “for damage done by a ship” within s. 7 of the Admiralty Court Act, 1861 [now the Administration of Justice Act, 1956, s. 1 (1) (d)]; and, therefore, an action could not be brought to enforce the claim in rem against the owner of the ship alleged to be to blame for the collision.

Notes. Distinguished: *The Englishman and The Australia*, [1894] P. 239. Considered: *The Theta*, [1894] P. 280; *Adam v. British and Foreign Steamship Co.*, [1898] 2 Q.B. 430. Distinguished: *The Swift*, [1901] P. 168. Considered: *White-chapel Board of Works v. Crow* (1901), 84 L.T. 595. Explained: *Davidson v. Hill*, [1900-3] All E.R.Rep. 997. Considered: *Cavendish v. Strutt*, [1904] 1 Ch. 524; *Headland v. Coster*, [1905] 1 K.B. 219; *The Circe*, [1906] P. 1; *Bristol Corp'n. v. Canning* (1906), 95 L.T. 183; *Clark v. London General Omnibus Co.*, [1906] 2 K.B. 648; *Jackson v. Watson*, [1909] 2 K.B. 193. Applied: *British Association of Glass Bottle Manufacturers v. Nettlefold* (1911), 27 T.L.R. 527. Followed: *The Amerika*, [1914] P. 167. Considered: *British Columbia Electric Rail. Co. v. Gentile*, [1914] A.C. 1034. Distinguished: *Hobson v. Leng*, [1914] 3 K.B. 1245. Applied: *Flanagan v. Shaw*, [1920] 3 K.B. 96. Considered: *Nicolle v. Nicolle*, [1922] 1 A.C. 284; *Parry v. Harding*, [1925] 1 K.B. 111; *The Minerva*, [1933] All E.R.Rep. 870; *A.-G. v. Canter*, [1939] 1 All E.R. 13; *R. v. National Arbitration Tribunal, Ex parte Imperial Tobacco Co.*, [1943] 2 All E.R. 162; *Walker v. Hemmant*, [1943] 2 All E.R. 160; *Harlow v. Minister of Transport*, [1950] 2 All E.R. 1005. Referred to: *Kelly v. Isle of Man Steam Packet Co.* (1894), 71 L.T. 731; *The Tynwald*, [1895] P. 142; *Williams v. Mersey Docks and Harbour Board*, [1905] 1 K.B. 804; *R. v. Local Government Board, Ex parte South Stoneham Union*, [1908] 2 K.B. 368; *Retter v. Walker* (1910), 74 J.P.Jo. 483; *Date v. Gas Coal Collicries*, [1915] 2 K.B. 454; *Admiralty Comrs. v. Steamship Amerika*, [1917] A.C. 38; *Starr Estate Co. v. Blackpool Corp'n.* (1920), 19 L.G.R. 9; *Harper v. Hedges*, [1923] 2 K.B. 314; *McColl v. Canadian Pacific Railway*, [1923] A.C. 126; *Nunan v. Southern Rail. Co.*, [1923] All E.R.Rep. 21; *The Molière* (1924), 41 T.L.R. 154; *Grein v. Imperial Airways, Ltd.*, [1936] 2 All E.R. 1258; *Bishop of Gloucester v. Cunningham*, [1943] 1 All E.R. 61.

As to the jurisdiction of the Admiralty Division with regard to damage by collision, see 1 HALSBURY'S LAWS (3rd Edn.) 59-63; and for cases see 1 DIGEST (Repl.) 168-172. For Administration of Justice Act, 1956, see 36 HALSBURY'S STATUTES (2nd Edn.) 3.

Cases referred to:

- (1) *The Franconia* (1877), 2 P.D. 163; 46 L.J.P. 33; 36 L.T. 640; 3 Asp.M.L.C. 435; 25 W.R. 796, C.A.; 1 Digest (Repl.) 169, 556.
- (2) *Hawkins v. Gathercole* (1855), 6 De G.M. & G. 1; 3 Eq. Rep. 348; 24 L.J.Ch. 332; 24 L.T.O.S. 281; 19 J.P. 115; 1 Jur.N.S. 481; 3 W.R. 194; 43 E.R. 1129, L.J.J.; 42 Digest 636, 394.

- A (3) *Pym v. Great Northern Rail. Co.* (1862), 2 B. & S. 759; 31 L.J.Q.B. 249; 6 L.T. 537; 8 Jur.N.S. 819; 10 W.R. 737; 121 E.R. 1254; affirmed (1863), 4 B. & S. 396; 2 New Rep. 455; 32 L.J.Q.B. 377; 8 L.T. 734; 10 Jur.N.S. 199; 11 W.R. 922; 122 E.R. 508, Ex. Ch.; 36 Digest (Repl.) 208, 1093, 1097.
- (4) *Smith v. Brown* (1871), L.R. 6 Q.B. 729; 40 L.J.Q.B. 214; 24 L.T. 808; 36 J.P. 264; 19 W.R. 1165; 1 Asp.M.L.C. 56; 1 Digest (Repl.) 169, 555.
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Also referred to in argument :

- The Volant* (1842), 1 Wm. Rob. 383; 1 Notes of Cases, 503; 5 L.T. 185, 525; 6 Jur. 540; 1 Digest (Repl.) 163, 507.
- The Hercules* (1819), 2 Dods. 353; 1 Hag. Adm. 143, S.C.; 1 Digest (Repl.) 183, 689.
- C *The Ruckers* (1801), 4 Ch. Rob. 73; 1 Digest (Repl.) 123, 88.
- The Lagan* (1838), 3 Hag. Adm. 418; 1 Digest (Repl.) 135, 207.
- The Bilbao* (1860), Lush. 149; 3 L.T. 338; 1 Mar.L.C. 5; 1 Digest (Repl.) 163, 510.
- Read v. Great Eastern Rail. Co.* (1868), L.R. 3 Q.B. 555; 9 B. & S. 714; 37 L.J.Q.B. 278; 18 L.T. 822; 33 J.P. 199; 16 W.R. 1040; 36 Digest (Repl.) 216, 1142.
- D *Harmer v. Bell, The Bold Buccleugh* (1852), 7 Moo.P.C.C. 267; 19 L.T.O.S. 235; 13 E.R. 884, P.C.; 41 Digest 927, 8168.
- The Two Ellens* (1872), L.R. 4 P.C. 161; 8 Moo.P.C.C.N.S. 398; 41 L.J.Adm. 33; 26 L.T. 1; 20 W.R. 592; 1 Asp.M.L.C. 308; 17 E.R. 361, P.C.; 1 Digest (Repl.) 151, 374.
- E *The Malvina* (1863), 1 Moo.P.C.C.N.S. 357; Brown & Lush. 57; 8 L.T. 403; 9 Jur.N.S. 527; 11 W.R. 576; 1 Mar.L.C. 341; 15 E.R. 736, P.C.; 1 Digest (Repl.) 165, 524.
- The Diana* (1862), Lush. 539; 32 L.J.P.M. & A. 57; 7 L.T. 397; 9 Jur.N.S. 26; 11 W.R. 189; 1 Mar.L.C. 261; 1 Digest (Repl.) 164, 521.
- The Clara Killam* (1870), L.R. 3 A. & E. 161; 39 L.J.Adm. 50; 23 L.T. 27; 19 W.R. 25; 3 Mar.L.C. 463; 1 Digest (Repl.) 165, 531.
- F *The Sylph* (1867), L.R. 2 A. & E. 24; 37 L.J.Adm. 14; 17 L.T. 519; 3 Mar.L.C. 37; 1 Digest (Repl.) 168, 549.
- The Beta* (1869), 6 Moo.P.C.C.N.S. 55; L.R. 2 P.C. 447; 38 L.J.Adm. 50; 20 L.T. 988; 17 W.R. 933; 16 E.R. 647, P.C.; 1 Digest (Repl.) 168, 550.
- The Sarah* (1862), Lush. 549; 1 Digest (Repl.) 123, 85.
- G *The Uhla* (1867), L.R. 2 A. & E. 29, n.; 37 L.J.Adm. 16 n.; 19 L.T. 89; 3 Mar.L.C. 148; 1 Digest (Repl.) 165, 525.
- The Excelsior* (1868), L.R. 2 A. & E. 268; 37 L.J.Adm. 54; 19 L.T. 87; 3 Mar.L.C. 151; 41 Digest 705, 5404.
- The Industrie* (1871), L.R. 3 A. & E. 303; 40 L.J.Adm. 26; 24 L.T. 446; 19 W.R. 728; 1 Asp.M.L.C. 17; 1 Digest (Repl.) 162, 503.
- H *The Guldfaxe* (1868), L.R. 2 A. & E. 325; 38 L.J.Adm. 12; 19 L.T. 748; 17 W.R. 578; 3 Mar.L.C. 201; 1 Digest (Repl.) 169, 553.
- The Explorer* (1870), L.R. 3 A. & E. 289; 40 L.J.Adm. 41; 23 L.T. 604; 19 W.R. 166; 3 Mar.L.C. 507; 1 Digest (Repl.) 169, 554.

Appeal from a decision of the Court of Appeal (SIR BALIOL BRETT, M.R., BOWEN and FRY, L.JJ.), reported 9 P.D. 96, reversing a judgment of BUTT, J., in an action brought in rem against the owner of the *Vera Cruz*, a Spanish vessel, and her freight and cargo, by the appellant, as administratrix of William Seward, her husband, to recover damages under the Fatal Accidents Act, 1846, for the loss of her husband and son, who were drowned in consequence of a collision between the *Vera Cruz* and the British vessel *Agnes*, in the Mersey, in August, 1882.

The *Vera Cruz* was arrested at Liverpool in July, 1883. The defendant appeared under protest, and contended that the Admiralty Court had no jurisdiction to entertain the action, but BUTT, J., held himself bound by the decision of the Court of Appeal in *The Franconia* (1), and decided in favour of the jurisdiction.

This decision was reversed by the Court of Appeal, that court holding that they were not bound by the decision in *The Franconia* (1), as the court was equally divided in that case. The plaintiff appealed to the House of Lords. A

Gainsford Bruce, Q.C., and *French* for the appellant.

Dr. Phillimore and *Bucknill*, for the respondent, were not called on to argue.

THE EARL OF SELBORNE, L.C.—Both counsel for the appellant have argued this case with so much ability that your Lordships have received all that assistance which it would be possible for counsel to give in order to appreciate the question to be now decided, and, therefore, as the result has been to satisfy your Lordships that the judgment appealed from is right notwithstanding the very considerable conflict of opinion and authority which there was upon the point before, it does not seem to your Lordships necessary to call upon the learned counsel on the other side. B C

This is an action in rem essentially. By the rules of court there are certain provisions made for actions in rem in the Probate, Divorce, and Admiralty Division as distinct from the ordinary class of actions. Although it might have been possible to bring an ordinary action, in all respects of the same kind as could be brought in the Queen's Bench Division, in the Probate, Divorce, and Admiralty Division, and though I should be far from entertaining any doubt as to the jurisdiction of that Division to deal with such an action in this, as in any other case (but not more in this than in any other case) if no objection were taken, and no transfer asked for or made, yet this is not an action of that kind. This is an action brought in a form appropriate to actions in rem in the Admiralty Division, of the same kind as might have been brought in the Court of Admiralty before the Judicature Acts were passed, and this question must be determined exactly in the same manner as if the action had been so brought, and as if the Judicature Acts had never been enacted. D E

The question whether such an action lies or not depends altogether upon the construction and effect of ss. 7 and 35 of the Admiralty Court Act, 1861. What is noticeable is that most of the sections are expressed in definite terms, leaving no opening for any doubt or question as to the particular cases in which a new jurisdiction is to be given, or an old jurisdiction extended to the Admiralty Court. But s. 7 is expressed in perfectly general words: F

"The High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship."

The question which your Lordships have to determine is what is meant by these words "claim for damage done by any ship," whether they can, according to sound principles of construction, be held to include such causes of action as arise under Lord Campbell's Act when death has occurred by reason of the "wrongful act, neglect, or default" of some other person. Section 7 must be construed with s. 35, on which no doubt this action is founded: G

"The jurisdiction conferred by this Act on the High Court of Admiralty may be exercised either by proceedings in rem or by proceedings in personam." H

That section undoubtedly, according to the natural meaning of the words, shows that, while an option to proceed in rem or in personam is given as to the jurisdiction conferred by the Act, yet from the very nature of such an option every case provided for by the Act is regarded as a proper case for a proceeding in rem, and accordingly the appellant, considering that s. 7 brought cases under the Fatal Accidents Act, 1846, within the purview of the Admiralty jurisdiction, upon that hypothesis held it to mean such actions as were capable of being brought by a proceeding like the present in rem. If the action cannot be so brought, then I apprehend it will follow ex converso that s. 7 does not extend to this description of claim. I

One thing is quite clear, and that is that whether this particular kind of action can be brought within those words does not depend upon any expressed intention of the legislature to bring it within the clause, for there is not the slightest refer-

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ence in that clause to any particular case or class of cases. If it necessarily or properly comes within the words "any claim for damage done by any ship," according to the reasonable construction of those words in connection with the clause which authorises proceedings in rem to enforce such claim, then no doubt the words, being general, would include it; but express or special inclusion is certainly not indicated. Upon that point I cannot but observe that the argument founded on s. 13 of the Act [repealed] seems to me not to assist the appellant, because, when the legislature did intend, under certain special conditions, to deal with cases of which this might be one, it has done so, and that in so many words, and a reference to the jurisdiction given to the Court of Chancery in England by the ninth part of the Merchant Shipping Act, 1854, makes the intention definite and clear. But there is nothing of that kind in this section, and unless the proposition can be made out that this kind of action necessarily, or at all events legitimately, falls within the words "claim for damage done by any ship," there is not the smallest indication of any intention of the legislature to include it.

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It must be remembered that the Fatal Accidents Act, 1846, is the source of the right, if the right exists, and we must look to that Act to see whether a claim made under that Act can naturally or properly be described as a "claim for damage done by any ship." The first observation which occurs is this—there is not a word about ships in the Act of 1846. It is an Act which deals with a category of cases, which may include injuries done by persons responsible for the navigation of ships to persons suffering by faults in that navigation, but it only includes them as part of a much larger and more general category of cases, and without any express reference to or mention of any particular case which may fall under that category. Therefore, no one can say that the Act relates expressly to claims for damage done by ships, and s. 7 of the Act of 1861 relates to that and to nothing else. Maritime damage by ships is the subject of that legislation; general injuries resulting in loss of life by wrongful acts and so forth, are the subject of the other. It is not very likely that when the legislation goes on such different lines it should be intended indirectly to affect by the one legislation, and in a peculiar manner, a particular case which may or may not arise under the other legislation.

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But that is not all. Inasmuch as there can be no right of action whatever unless it comes within the terms of the Fatal Accidents Act, let us see whether those are terms which can be brought reasonably and naturally and consistently within the interpretation sought to be imposed on s. 7 of the Act of 1861, which statute turns the action into an action in rem at the option of the plaintiff. What are the words?

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"Whensoever the death of a person shall be caused by a wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured . . ."

"Wrongful act, neglect or default" are all words plainly applicable only to a person doing an act or guilty of a neglect or default and not to an inanimate instrument or thing like a ship, and "maintain an action and recover damages" plainly points to a common law action. It is to my mind, as plain as possible, that the action given by the Act of 1846 is a personal action given for a personal injury inflicted by a person who would have been liable to an action for damages, manifestly in the common law courts if the death had not ensued. The Act gives a new cause of action clearly, and does not merely remove the operation of the maxim, *actio personalis moritur cum persona*, because the action is given in substance, not to the person representing in point of estate the deceased man, who would naturally represent him as to all his own rights of action which could survive, but to his wife and children, no doubt suing in point of form in the name of his executor. Not only so, but the action is not an action which he could have brought if he had survived the accident, for that would have been an action for such injury as he

had sustained during his lifetime; but death is essentially the cause of the action, an action which he never could have brought under circumstances which, if he had been living, would have given him, for an injury short of death which he might have sustained, a right of action, which might have been barred either by contributory negligence, or by his own fault, or by his own release, or in various other ways. [The defence of contributory negligence was abolished by the Law Reform (Contributory Negligence) Act, 1945].

Every word of that legislation being, as it appears to me, legislation for the general case, and not for particular injury by ships, points to a common law action, points to a personal liability, and a personal right to recover, and is absolutely at variance with the notion of a proceeding in rem. But the matter does not stop there, because the peculiarity of the legislation is that [s. 2], the action being given for the benefit of the "wife, husband, parent and child" of the dead person.

"the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties in such shares as the jury by their verdict shall find and direct."

It is assumed that there would be a jury, and there are other provisions, one as to the time within which the action is to be brought [s. 3], another as to what the plaintiff is to do [s. 4]:

"In every such action the plaintiff on the record shall be required, together with the declaration, to deliver to the defendant or his attorney, a full particular of the person or persons for whom and on whose behalf such action shall be brought, and of the nature of the claim . . ."

The proposition is too clear to admit of dispute, that, if s. 7 of the Act of 1861 has the effect of transferring that action to the Court of Admiralty to be brought under the Admiralty rules and system, tried without a jury, and enforced in rem and not in personam, without making any person individually a defendant as liable to an action for damages, without making any person a defendant on the record and declaring against him, to whom or to whose attorney full particulars can be delivered, and so on, the Act of 1861 has materially varied the effect of the Act which gives the right of action. If anything be certain it is that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so. For that principle I may refer to *Hawkins v. Gathercole* (2). That case arose under the Judgments Act, 1838, s. 13 [replaced by Law of Property Act, 1925, s. 195] which provided that a judgment should be binding (inter alia) on all the interest of the debtor in "lands, tenements, rectories, advowsons, tithes, rents, and hereditaments," and that for the amount of the judgment these different descriptions of property to which he might be entitled should be charged in the same manner as if

"the person against whom such judgment shall have been entered up had power to charge the same hereditaments, and had by writing under his hand agreed to charge the same with the amount of such judgment debt."

The question arose as to an ecclesiastical benefice. By the restraining Act of Elizabeth [13 Eliz. 1, c. 20 (1571), repealed by Statute Law Revision Act, 1948] a clergyman had no power to charge his benefice, but LORD CRANWORTH thought when the case came before him in the first instance that those words in s. 13, in favour of the creditor, did away with the effect of the Act of Queen Elizabeth, and put the clergyman in the situation of a man who could charge and who had charged.

A But that decision was reversed. It was held that all those general words about tithes and rectories and so on in the Act of 1838 were capable of a reasonable application to subjects not affected by any particular legislation, and that the statute of Elizabeth not being referred to in any way, the Act being in *diversa materia*, and not containing the slightest indication of any such intention, was not unnecessarily to be repealed or altered by such general words. I need not read
B more from the case than the words of TURNER, L.J. (6 De G.M. & G. at p. 31):

“Can the statute of Elizabeth be held to be practically repealed by such general words as are contained in s. 13 of this statute? I venture to think that it cannot, grounding that opinion upon the authorities to which I have generally referred, and adding to them the eleventh case in JENKINS’ fifth century [EIGHT CENTURIES OF REPORTS] in which it is thus said: ‘A special statute does not derogate from a special statute without express words of abrogation.’ ”
C

To me it seems to be not only easy, but right, to construe the words in the Admiralty Court Act, 1861, in a sense in which they are quite inapplicable to this particular cause of action, and leave all the provisions of the Fatal Accidents
D Act, 1846, in full force and effect, not modified or interfered with, because in truth “damage done by any ship” was a form of expression naturally applicable to that description of damage—maritime damage—as to which, in cases falling within the jurisdiction of the Admiralty Court, the ship was treated as, so to say, in *delicto*, and was liable to a proceeding in *rem*, such as s. 35 of the Act contemplated. I think that I have said all that is really necessary.

E The argument from the Merchant Shipping Act, as it appears to me, manifestly fails. There, where the legislature did intend for the purpose of giving effect to the limited liability of shipowners and administering a fund brought into court to answer that liability, that this description of claim against the owners of the ship should be brought into account as well as other claims, it made provisions giving a jurisdiction to the Court of Chancery which has since been transferred to the Court
F of Admiralty. It made provision giving a jurisdiction in those cases to the Court of Chancery in order to effect the express and manifest intention of the legislature for that particular and limited purpose, and it would involve so much and only so much modification of the provisions of the Fatal Accidents Act, 1846, as might be necessary to give effect to the intention so declared [see Merchant Shipping Act, 1894, as amended by the Merchant Shipping Act, 1906, s. 69, Merchant
G Shipping Act, 1948, s. 4 (3), and Merchant Shipping (Liability of Shipowners and Others) Act, 1958]. But there is nothing of that kind here. What you have bearing upon that subject is in the enactment which applies only to the case of competing claims, and the case where the rule of limited liability is to be applied and a fund is brought into court to answer it. That is not the case here. The judgment appealed from appears to me to be entirely right, and I move your Lordships to
H dismiss the appeal with costs.

LORD BLACKBURN.—I am entirely of the same opinion. Before the Fatal Accidents Act, 1846, where a person had been injured from any of the causes mentioned in s. 1 of the Act, and had died, the maxim *actio personalis moritur cum persona* applied, he could not sue, for he was dead, and it did not survive
I to anybody whomsoever to sue for the damages occasioned by the accident which had caused injury to him resulting in death. That the legislature, at the instance of LORD CAMPBELL, thought fit to alter; and I think that when the Act of 1846 is looked at it is plain enough that, if a person dies under the circumstances mentioned when he might have maintained an action if it had been for an injury to himself which he had survived, a totally new action is given against the person who would have been responsible to the deceased if the deceased had lived, an action which, as it is pointed out in *Pym v. Great Northern Rail. Co.* (3), is new in its species, new in its quality, new in its principle, in every way new, and one

which can only be brought if there is any person answering the description of the widow, parent, or child, who suffers pecuniary loss by the death. A

That is a personal action, if personal action there ever can be. It is quite plain (it does not require much more than to state it) that if a man who has the custody and management of a ship manages it in such a way that by his negligence, or from any other cause which is mentioned in s. 1, a person is killed, that man is liable under the Act of 1846, and also if that man is a servant acting for a superior (the shipowner is generally speaking the person), if he is the servant of the shipowner who is the principal, the shipowner is answerable under this cause of action. That being so, the legislature by the Merchant Shipping Act, 1854, when they were renewing former enactments which limited the liability of a shipowner according to the value of his ship, thought fit to say that, if the owner of the ship was as such made liable under the Act of 1846 (for that is what they meant), it shall be included in those claims which are to be divided rateably according to the value of the ship to which the liability of the shipowner is limited; and a jurisdiction was given by s. 514 to the Court of Chancery to enforce the limitation of the liability, and for that purpose it had various collateral powers. That was the state of things in 1854 and down to 1861, and I think there cannot be the least doubt that at that time the remedy which the widow, parent, or child would have, the action being brought in form by the administrator with all the provisions which have been already read, providing that the matter should be properly done, would be a personal action, and a personal action only; and whether the liability of the person who was sued was because he was the owner of the ship, in which case he would have a limit to his liability under the Act of 1854, or because he was the owner of a stage coach, it would be a personal liability only. B C D E

The legislature undoubtedly had full power to enact that the Court of Admiralty should have what jurisdiction they chose to give it. The question depends on the construction of s. 7 of the Admiralty Court Act, 1861, the words there used being that the Court of Admiralty shall have jurisdiction over any claim for damage done by any ship. That being so, what do these words mean? If the question now raised had been that which the Court of Queen's Bench, of which I was a member, treated as raised in *Smith v. Brown* (4)—that was a case under Lord Campbell's Act and under Lord Campbell's Act only, but it was treated as general—if the question now raised had been whether personal damage to a man who lived was within s. 7 of the enactment, I should have had, as I then had, some doubt about the matter, and it would have carried me so far that, if that had been the question now raised, I certainly should have wished to hear the case argued out to the end before giving an opinion upon it one way or the other. But the question raised here being exclusively whether the liability of a shipowner as a person, under the Act of 1846, to make good damages for the negligence of his servant, the master of the ship, comes within the words "damage done by any ship," I decidedly say that I do not think it does. The legislature, in using such general words as those, cannot have had in contemplation all the numerous and important subjects which, had they been considering the Act of 1846, they would have had. For instance, no one seems to have thought of the case of a Swedish ship or a French ship on the high seas causing the drowning of an Englishman, and afterwards coming to England. There would have been a very serious international question raised in that case whether the English legislature had enacted (as it beyond doubt had full power to enact) that when the ship came to England there should be power to enforce against the Frenchman or the Norwegian reparation for the loss of life which his own law did not give, though the accident which caused it happened on the high seas. In the present case the Spaniard's ship was in the Mersey, in English waters, when the occurrence took place; but the point upon the construction of the Act of 1861 would have been just the same if the collision by which the accident had occurred had been in the Bay of Biscay. There would have been no difference that I can perceive in the matter, and that is obviously a very serious question indeed which should be carefully considered in inquiring whether the F G H I

- A legislature, when passing that Act, intended it to have any such meaning. That is no reason for saying that, if the words of the statute plainly and obviously have that meaning and show that that was intended, foolish and rash and improvident as we may think it to have been, we must not give them that effect. But when the question comes to be whether there are words in any way pointing to liability under the Fatal Accidents Act, 1846, or to the defendant's liability under that Act, that seems to me to be a very strong argument indeed for saying that the words are not to be so construed, and consequently that the Court of Admiralty had not in 1862 any such jurisdiction as is now claimed.

- LORD WATSON.—Notwithstanding the very full and able argument which has been addressed to the House by the counsel for the appellant, I entertain no doubt that a right of action such as is given by the Fatal Accidents Act, 1846, in a case like the present is not a "claim for damage done by a ship" within the meaning of s. 7 of the Admiralty Court Act, 1861. Upon that ground, and upon that ground only, I am of opinion with your Lordships that the appeal ought to be dismissed.

Appeal dismissed.

- Solicitors: *Leslie & Hardy*, for *Bradshaw & Townsend*, Barrow-in-Furness; *Gregory, Rowcliffes & Co.*, for *Hill, Dickinson & Co.*, Liverpool.

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

E

SEWELL & NEPHEW v. BURDICK

- F [HOUSE OF LORDS (the Earl of Selborne, L.C., Lord Blackburn, Lord Bramwell and Lord FitzGerald), November 4, 6, 7, December 5, 1884]

[*Reported* 10 App. Cas. 74; 54 L.J.Q.B. 156; 52 L.T. 445; 33 W.R. 461; 1 T.L.R. 128; 5 Asp.M.L.C. 376]

- G *Shipping—Bill of lading—Endorsement in blank—Security for loan—Liability of holder to shipowner for freight—Bills of Lading Act, 1855 (18 & 19 Vict., c. 111), s. 1.*

- H The effect of an endorsement in blank on a bill of lading and the deposit of the bill with a holder by way of security for a loan while the goods are in transitu is not to pass to the holder the whole legal title of the goods, but only to pledge them, passing at law a special property in the goods and leaving the general property in the shipper. Therefore, the holder of such a bill in such circumstances is not an endorsee to whom the property in the goods has passed within s. 1 of the Bills of Lading Act, 1855, and so is not liable, by reason of such endorsement only, to an action for freight by the shipowner.

- I **Notes.** Considered: *Ardennes (Owner of cargo) v. Ardennes (Owners)*, [1950] 2 All E.R. 517. Referred to: *Allen v. Coltart* (1883), 11 Q.B.D. 782; *The Rona* (1884), 51 L.T. 28; *Rew v. Payne, Douthwaite & Co.* (1885), 53 L.T. 932; *Rodonachi v. Milburn* (1886), 18 Q.B.D. 67; *Bristol and West of England Bank v. Midland Railway*, [1891] 2 Q.B. 653; *Montgomery v. Hutchins* (1905), 94 L.T. 207; *Temperley Steamship Co. v. Smyth*, [1905] 2 K.B. 791; *Burgos v. Nascimento, McKean and Claimant* (1907), 100 L.T. 71; *Calcutta Steamship Co. v. Weir*, [1910] 1 K.B. 759; *The Odessa, The Woolston*, [1916] A.C. 145; *Armour v. Leopold Walford (London)*, [1921] 3 K.B. 473; *Brandt v. Liverpool, Brazil and River Plate Steam Navigation Co.*, [1923] All E.R.Rep. 656.

As to transfers of bills of lading, see 35 HALSBURY'S LAWS (3rd Edn.) 344 et seq.; and for cases see 41 DIGEST 384 et seq. For Bills of Lading Act, 1855, see 23 HALSBURY'S STATUTES (2nd Edn.) 382.

Cases referred to:

- (1) *Lickbarrow v. Mason* (1787), 2 Term Rep. 63; reversed sub nom. *Mason v. Lickbarrow* (1790), 1 Hy. Bl. 357, Ex. Ch.; on appeal (1793), 4 Bro. Parl. Cas. 57; 6 East, 20 n.; 2 E.R. 39, H.L.; subsequent proceedings (1794), 5 Term Rep. 683; 101 E.R. 380; 41 Digest 384, 2292; 385, 2295. B
- (2) *Glyn, Mills & Co. v. East and West India Dock Co.* (1880), 6 Q.B.D. 475; 50 L.J.Q.B. 62; 43 L.T. 584; 4 Asp.M.L.C. 345; on appeal (1882), post p. 674; 7 App. Cas. 591; 52 L.J.Q.B. 146; 47 L.T. 309; 31 W.R. 201; 4 Asp.M.L.C. 580, H.L.; 41 Digest 393, 2362. C
- (3) *Re Westzinthus* (1833), 5 B. & Ad. 817; 2 Nev. & M.K.B. 644; 3 L.J.K.B. 56; 110 E.R. 992; 39 Digest 633, 2304.
- (4) *Harris v. Birch* (1842), 9 M. & W. 591; 1 Dowl.N.S. 899; 11 L.J.Ex. 219; 152 E.R. 249; 35 Digest (Repl.) 359, 629.
- (5) *Jenkyns v. Brown* (1849), 14 Q.B. 496; 19 L.J.Q.B. 286; 14 L.T.O.S. 395; 14 Jur. 505; 117 E.R. 193; 39 Digest 514, 1310.
- (6) *Meyerstein v. Barber* (1866), L.R. 2 C.P. 38; 36 L.J.C.P. 48; 15 L.T. 355; 12 Jur.N.S. 1020; 15 W.R. 173; 2 Mar.L.C. 420; on appeal (1867), L.R. 2 C.P. 661; 36 L.J.C.P. 289; 16 L.T. 569, Ex. Ch.; on appeal sub nom. *Barber v. Meyerstein* (1870), L.R. 4 H.L. 317; 39 L.J.C.P. 187; 22 L.T. 808; 18 W.R. 1041; 3 Mar.L.C. 449, H.L.; 41 Digest 394, 2371.
- (7) *Snee v. Prescott* (1743), 1 Atk. 245; 26 E.R. 157, L.C.; 39 Digest 629, 2261. E
- (8) *Spalding v. Ruding* (1843), 6 Beav. 376; 12 L.J.Ch. 503; 1 L.T.O.S. 384; 7 Jur. 733; 49 E.R. 871; on appeal (1846), 15 L.J.Ch. 374, L.C.; 39 Digest 634, 2305.
- (9) *Kemp v. Falk* (1882), 7 App. Cas. 573; 52 L.J.Ch. 167; 47 L.T. 454; 5 Asp.M.L.C. 1; sub nom. *Re Kiell, Kemp v. Falk*, 31 W.R. 125, H.L.; 39 Digest 635, 2308. F
- (10) *Fox v. Nott* (1861), 6 H. & N. 630; 30 L.J.Ex. 259; 7 Jur.N.S. 663; 158 E.R. 260; 41 Digest 398, 2429.
- (11) *Smurthwaite v. Wilkins* (1862), 11 C.B.N.S. 842; 31 L.J.C.P. 214; 5 L.T. 842; 7 L.T. 65; 10 W.R. 386; 1 Mar.L.C. 198; 142 E.R. 1026; 41 Digest 394, 2363.
- (12) *The Figlia Maggiore* (1868), L.R. 2 A. & E. 106; 37 L.J.Adm. 52; 18 L.T. 532; 3 Mar.L.C. 97; 41 Digest 468, 2990. G
- (13) *The Freedom* (1870), 22 L.T. 175; on appeal (1871), L.R. 3 P.C. 594; 8 Moo.P.C.C.N.S. 29; 24 L.T. 452; 1 Asp.M.L.C. 28; 17 E.R. 224, P.C.; 41 Digest 416, 2600.
- (14) *Short v. Simpson* (1866), L.R. 1 C.P. 248; Har. & Ruth. 181; 35 L.J.C.P. 147; 13 L.T. 674; 12 Jur.N.S. 258; 14 W.R. 307; 2 Mar.L.C. 307; 41 Digest 398, 2439. H
- (15) *Jesson v. Solly* (1811), 4 Taunt. 52; 128 E.R. 247; 41 Digest 398, 2442.
- (16) *Stindt v. Roberts* (1849), 5 Dow. & L. 460; 2 Saund. & C. 212; 17 L.J.Q.B. 166; 12 Jur. 518; 41 Digest 399, 2443.
- (17) *Wegener v. Smith* (1854), 15 C.B. 285; 3 C.L.R. 47; 24 L.J.C.P. 25; 24 L.T.O.S. 76; 139 E.R. 432; 41 Digest 559, 3843. I
- (18) *Chappel v. Comfort* (1861), 10 C.B.N.S. 802; 31 L.J.C.P. 58; 8 Jur.N.S. 177; 9 W.R. 694; 142 E.R. 669; sub nom. *Capel v. Comfort*, 4 L.T. 448; 1 Mar.L.C. 78; 41 Digest 396, 2404.
- (19) *Thompson v. Dominy* (1845), 14 M. & W. 403; 14 L.J.Ex. 320; 5 L.T.O.S. 268; 41 Digest 400, 2462.
- (20) *Newsom v. Thornton* (1805), 6 East, 17; 2 Smith, K.B. 207; 102 E.R. 1189; 41 Digest 386, 2306.

- A (21) *The St. Cloud* (1863), Brown. & Lush. 4; 1 New Rep. 244; 8 L.T. 54; 1 Mar.L.C. 307; 167 E.R. 269; 41 Digest 402, 2490.
- (22) *The Nepoter* (1869), L.R. 2 A. & E. 375; 38 L.J.Adm. 63; 22 L.T. 177; 18 W.R. 49; 3 Mar.L.C. 355; 41 Digest 425, 2670.
- (23) *Howes v. Ball* (1827), 7 B. & C. 481; 1 Man. & Ry.K.B. 288; 6 L.J.O.S.K.B. 106; 108 E.R. 802; 39 Digest 642, 2383.
- B (24) *Flory v. Denny* (1852), 7 Exch. 581; 21 L.J.Ex. 223; 19 L.T.O.S. 158; 155 E.R. 1080; 7 Digest (Repl.) 5, 9.
- (25) *Gibson v. Hunter* (1793), 6 Bro. Parl. Cas. 235; 2 Hy. Bl. 187; 2 E.R. 1050; subsequent proceedings (1794), 6 Bro. Parl. Cas. 255; 2 Hy. Bl. 288, H.L.; 6 Digest (Repl.) 28, 203.
- (26) *Gibson v. Minet* (1791), 2 Bro. Parl. Cas. 48; 1 Hy. Bl. 569; 1 E.R. 784, H.L.; 6 Digest (Repl.) 28, 202.
- C (27) *Cocksedge v. Fanshaw* (1779), 1 Doug.K.B. 119; 99 E.R. 80; affirmed sub nom. *Fanshaw v. Cocksedge* (1783), 3 Bro. Parl. Cas. 690, H.L.; 1 Digest (Repl.) 512, 1471.
- (28) *Wright v. Campbell* (1767), 4 Burr. 2046; 1 Wm. Bl. 628; 98 E.R. 66; 41 Digest 386, 2305.
- D (29) *Gledstanes v. Allen* (1852), 12 C.B. 202; 6 L.T. 790; 138 E.R. 879; 41 Digest 589, 4119.

Also referred to in argument:

- Gibson v. Carruthers* (1841), 8 M. & W. 321; 11 L.J.Ex. 138; 151 E.R. 1061; 39 Digest 638, 2349.
- E *Halliday v. Holgate* (1868), L.R. 3 Exch. 299; 37 L.J.Ex. 174; 18 L.T. 656; 17 W.R. 13, Ex. Ch.; 37 Digest 3, 4.
- Coxe v. Harden* (1803), 4 East, 211; 1 Smith, K.B. 20; 102 E.R. 811; 39 Digest 629, 2268.
- Pease v. Gloahec, The Marie Joseph* (1866), L.R. 1 P.C. 219; Brown. & Lush. 449; 3 Moo.P.C.C.N.S. 556; 35 L.J.P.C. 66; 15 L.T. 6; 12 Jur.N.S. 677; 15 W.R. 201; 2 Mar.L.C. 394, P.C.; 39 Digest 684, 2307.
- F *Turner v. Liverpool Docks Trustees* (1851), 6 Exch. 543; 20 L.J.Ex. 393; 17 L.T.O.S. 212; 155 E.R. 659, Ex. Ch.; 39 Digest 514, 1316.
- Franklin v. Neate* (1844), 13 M. & W. 481; 14 L.J.Ex. 59; 4 L.T.O.S. 214; 153 E.R. 200; 39 Digest 361, 23.
- Donald v. Suckling* (1866), L.R. 1 Q.B. 585; 7 B. & S. 783; 35 L.J.Q.B. 232; 14 L.T. 772; 30 J.P. 565; 12 Jur.N.S. 795; 15 W.R. 13; 37 Digest 9, 43.
- G *Lloyd v. Guibert* (1865), L.R. 1 Q.B. 115; 6 B. & S. 100; 35 L.J.Q.B. 74; 13 L.T. 602; 2 Mar.L.C. 283; 122 E.R. 1134, Ex. Ch.; 41 Digest 506, 3346.

Appeal from a decision of the Court of Appeal (SIR BALIOL BRETT, M.R., and BAGGALLAY, L.J., BOWEN, L.J., dissenting), reported 13 Q.B.D. 159, reversing a decision of FIELD, J. (reported 10 Q.B.D. 363), upon further consideration of an action brought by the respondent, James Burdick, on behalf of himself and others, the owners of the steamship *Zoe*, against the appellants, Sewell & Nephew, bankers, endorsees for value of a bill of lading, to recover the sum of £174 8s. 9d., with interest, for freight, primage, and disbursements on sixty cases of spinning machinery shipped in the *Zoe* in 1880 by one Necessiantz, and carried from London to Poti, a port in the Black Sea.

I The action was tried by FIELD, J., and a special jury in April, 1882. In the course of the trial the jury were, by consent of both parties, discharged, and the learned judge adjourned the case for further consideration. The case was argued on further consideration in November, 1882, and in February, 1883, the learned judge delivered judgment in favour of the defendants, the present appellants. It appeared that in the bill of lading Henry Head & Co., as agents, were named as the shippers, and the goods were made deliverable at Poti

“unto Mr. D. S. Necessiantz, Kutais, or to his or their assigns, freight, primage, and disbursements of the said goods to be paid at destination, as per

margin, or in default of such payment the owners or agents to have an absolute lien on the goods, discharging them in their name and holding them till all costs, freight, primage, interest, and insurance should be paid in full, and to have liberty to sell the goods by auction and retain the freight and primage and all charges."

The *Zoe* reached Poti with the goods in the month of September, 1880, and, as no one appeared to clear the goods, they were on Oct. 14, 1880, landed and warehoused at the Russian Custom House, with the usual stop for freight. On Oct. 26, Nercessiantz, who had previously had business transactions with the defendants, applied to them for a temporary loan of £300 to enable him to complete the payment in this country for the goods, and as security for the advance he deposited with the defendants the bill of lading of the goods. By the Russian law goods landed and not cleared within twelve months were liable to be sold for duty and charges, and, as Nercessiantz did not appear to claim the goods in question, they were sold by the Russian Customs officials, but the proceeds were insufficient to do more than to satisfy their claim. The present action for the freight of the goods was brought by the plaintiff against the defendants as the owners of the goods of which they held the bill of lading. FIELD, J., found as a fact that Nercessiantz, in depositing the bill of lading, and the defendants in making the advance, did not intend anything more than a pledge, or that the property in the goods should pass so as to make the defendants liable for the freight as the real owners of the goods, but that it was intended to leave the general property with Nercessiantz, contemplating that he would deliver the goods to the parties for whom he had bought them, and that the possession of the bill of lading would enable the defendants to stop their advance out of the proceeds by making them a necessary party to the delivery, or, at the lowest, to put it in their power to compel the borrower to redeem the pledge and thus obtain the only document by which he could obtain delivery of the goods and perform his contract. This decision was reversed by the Court of Appeal, and the defendants appealed to the House of Lords.

Sir Farrer Herschell, Q.C., and *Danckwerts* for the appellants.

C. Hall, Q.C., and *Edwyn Jones* for the respondent.

Their Lordships took time for consideration.

Dec. 5, 1884. The following opinions were read.

THE EARL OF SELBORNE, L.C.—This appeal raises the question whether, under the Bills of Lading Act, 1855, every holder of a bill of lading, endorsed in blank, who has taken it by way of security for an advance of money (and has not afterwards parted with it), is liable, by reason of such endorsement only, to an action for freight by the shipowner, although he may not have obtained delivery of the goods, or derived any other benefit from his security.

The difference between the learned judges in the court below mainly, if not altogether, turned upon the question whether, according to the authorities, from *Lickbarrow v. Mason* (1) downwards, the effect of an endorsement and deposit of a bill of lading, while the goods are in transitu, by way of security for a loan, is to pass the whole legal title to the goods, or only to pledge them, passing at law a "special property" and leaving the "general property" in the shipper. That question was much debated in *Glyn, Mills & Co. v. East and West India Docks Co.* (2), where BRETT, L.J., expressed the same opinion on which he acted in the present case, BRAMWELL, L.J., taking the opposite view. LORD BLACKBURN, in his opinion on that case when it reached this House, adverted to the point, but thought it unnecessary to express any opinion upon it.

In the present case the true question is whether the property in the goods passed to the endorsee upon or by reason of the endorsement within the meaning of these words as used in s. 1 of the Bills of Lading Act, 1855. It was considered by SIR BALIOL BRETT, M.R., and BAGGALLAY, L.J., that, if the object of the endorsement and deposit was (as they thought) to pass the whole legal title to the goods to the

A appellants as endorsees, leaving an equitable interest only in the shipper, it was a necessary consequence that the property passed to them within the meaning of the statute, and that the respondent, the shipowner, was entitled to recover under the statute in this action. They clearly used the words "legal" and "equitable" in that technical sense which they have acquired in English law. I am not myself satisfied that this consequence is necessary; but I admit that there are difficulties

B in the way of the contrary view, as there are also difficulties (arising from the strong and unqualified language used by judges of great authority, from the time when *Lickbarrow v. Mason* (1) was decided downwards) in the way of the opinion that an endorsement and deposit of a bill of lading, in a case like the present, operates by way of pledge and not as an assignment of the whole legal title to the goods. The facts here are simply an endorsement in blank, and deposit of the

C bills of lading, so endorsed, by way of security for money advanced. There are no special circumstances, except that the endorsee never did obtain, and that it was never possible for him (in fact) to obtain, delivery of the goods.

I should not feel greatly embarrassed, if there were no other authority, by the mere terms in which the custom of merchants was found in *Lickbarrow v. Mason* (1) (5 Term Rep. 683), viz., that

D "bills of lading are, after the shipment and before the voyage performed, negotiable and transferable by the shipper's endorsement and delivery... and that, by such endorsement and delivery, the property in such goods is transferred."

This, it may be said, is the language of the Bills of Lading Act. But I do not

E understand it as necessarily meaning more than that "the property" which it might be the intent of the transaction to transfer, whether special or general, passes by such an endorsement, according to the custom of merchants. The finding must be reasonably understood. It cannot, for instance, mean that the property will be transferred when there is no consideration. But, although the custom as found seems to me to be consistent with the view taken by FIELD, J., and BOWEN, L.J.,

F in the present case, I have more difficulty in saying that the language of BULLER, J., in the earlier stages of *Lickbarrow v. Mason* (1) (2 Term Rep. 63) is so.

In some later cases other great judges have not only followed, but have even gone beyond, that language. The Court of Queen's Bench, in *Re Westzinthus* (3), held that a right of stoppage in transitu might be exercised against the interest remaining in the shipper, subject to the security created by the endorsement and

G deposit of the bill of lading; but they did so on the ground, not that the shipper retained any legal title or interest, but that he had an equity of redemption, of which the form in which the question then arose enabled the court to take notice. And, although it is true that in *Harris v. Birch* (4) the Court of Exchequer, then composed of PARKE, ALDERSON, GURNEY, and ROLFE, BB., decided a question of stamp duty upon the ground that an endorsement and deposit of a bill of lading

H by way of security operated as a pledge, and COLERIDGE, J., in *Jenkyns v. Brown* (5) considered it to pass a special property only to the endorsee, leaving the general property in the shipper, and in *Meyerstein v. Barber* (6) all the judges of the Common Pleas and in the Exchequer Chamber concurred in that view, yet, on the other hand, when *Meyerstein v. Barber* (6) came to the House of Lords, where the judgments of those courts were affirmed, LORD HATHERLEY, L.C., and LORD

I WESTBURY used strong language of an opposite kind.

LORD HATHERLEY, L.C., said (L.R. 4 H.L. at pp. 325, 326):

"If anything could be supposed to be settled in mercantile law, I apprehend it would be this, that, when goods are at sea, the parting with the bill of lading... is parting with the ownership of the goods.... I apprehend that it would shake the course of proceeding between merchants, as sanctioned by decided cases.... if we were to hold that the assignment of the bill of lading, the goods being at the time at sea, does not pass the whole and complete ownership of the goods, so that any person taking a subsequent bill of lading, be it

the second or be it the third, must be content to submit to the loss which would arise from that state of facts." A

These words are hardly, if at all, qualified by the context, although, in a later sentence, as to which see the remarks of LORD BLACKBURN in *Glyn, Mills & Co. v. East and West India Dock Co.* (2) (post page 680), the proposition is less absolute (L.R. 4 H.L. at p. 326):

"When the vessel is at sea, and the cargo has not yet arrived, the parting with the bill of lading is parting with that which is the symbol of property, and which, for the purpose of conveying a right and interest in the property, is the property itself." B

LORD WESTBURY's language is similar, perhaps stronger. He said (*ibid.* at pp. 335, 336, 337):

"No doubt the transfer of it [the bill of lading] for value passes the absolute property in the goods." C

He quoted some words of ERLE, C.J., to which I shall afterwards refer, as having the same sense; he spoke of the first holder for value of the bill of lading as having "the legal ownership of the goods," "the legal right in the property,"

"both the right of property and the right of possession, passing by a symbol, the bill of lading, which is at once both the symbol of the property and the evidence of the right of possession." D

To reconcile these expressions with those used in the same case by the judges of the Common Pleas and in the Exchequer Chamber is scarcely possible, and yet no dissent from the views of those learned judges was expressed in this House; on the contrary, their reasoning, and especially that of WILLES, J., was referred to with apparent approval, particularly by LORD HATHERLEY, L.C., and LORD CHELMSFORD. E

In such a conflict, not of decisions, but of judicial phraseology, if not of doctrine, it becomes important to remember that it is often dangerous to infer, even from very strong words when used diverso intuitu, conclusions on other subjects which, if they had been present to the minds of the speakers, might perhaps have led to their being more guarded or qualified. None of the cases to which I have referred arose upon the statute with which your Lordships have now to deal; they related, some to the right of stoppage in transitu, some to competing claims between holders for value of different parts of the same set of bills of lading. It may well be that, as against all such claims, and against parties setting up interests adverse to the title of the endorsee for value, such words as "the legal ownership," "the legal right," "the right of property in the goods," might be used, and the property which passed to the endorsee might be described as "absolute," in a sense substantially true, even though such property might, as between the endorsee receiving and the shipper depositing the bill of lading by way of security, be special only and not general, and though the most apt term for a scientific definition of the transaction, as between the borrower and the lender, may be, not assignment or transfer, but pledge. F G H

In such a state of authority it is important to see how the matter stands in principle. In principle, the custom of merchants, as found in *Lickbarrow v. Mason* (1), seems to be as much applicable and available to pass a special property at law by the endorsement, when that is the intent of the transaction, as to pass the general property, when the transaction is, e.g., one of sale. In principle, also, there seems to be nothing in the nature of a contract to give security by the delivery of a bill of lading endorsed in blank, which requires more, in order to give it full effect, than a pledge, accompanied by a power to obtain delivery of the goods when they arrive, and, if necessary, to realise them for the purpose of the security. Whether the endorsee, when he takes delivery to himself, may not be entitled to assume, and may not be held to assume towards the shipowner, the position of full proprietor is a different question. But, so long at all events as the goods are in I

A transitu, there seems to be no reason why the shipper's title should be displaced, any further than the nature and intent of the transaction require.

This is not inconsistent with what was said by ERLE, C.J., in *Meyerstein v. Barber* (6) (L.R. 2 C.P. at p. 45), that

B "the endorsement and delivery of the bill of lading, while the ship is at sea, operate exactly the same as the delivery of the goods themselves to the assignee after the ship's arrival would do."

That learned judge cannot have meant that possession of the symbol is, for every purpose, the same thing as actual possession of the goods; what he did mean was, that the endorsement and delivery of the bill of lading, by way of pledge, which he considered to be the effect of the transaction in that case, was equivalent, and

C not more than equivalent, to a delivery by way of pledge of the goods themselves. LORD HARDWICKE, in *Snee v. Prescott* (7), thought that there was a difference between an endorsement of a bill of lading in blank and a personal endorsement, and for some purposes I think there is much reason for that opinion. If, from a personal endorsement, the inference might properly be drawn that a title by assignment, as distinguished from pledge, was meant to pass to the endorsee, it would

D not, in my opinion, follow that the same inference ought to be drawn from an endorsement in blank.

Part of the custom of merchants, found in *Lickbarrow v. Mason* (1) (5 Term Rep. at p. 686), was, that

E "endorsements of bills of lading in blank . . . may be filled up by the person . . . to whom they are delivered or transmitted, with words ordering the delivery of the goods . . . to be made to such person; and, according to the practice of merchants, the same, when filled up, have the same operation and effect as if it had been . . . done by the shipper."

Whether it is or is not usual in practice to fill up the blank with any name before taking delivery, it is certainly not to be implied from the custom, as thus found, that the operation of the endorsement, while it remains in blank, is necessarily to

F all intents and purposes exactly the same as if it were filled up with the holder's name. So long as it remains in blank it may pass from hand to hand by mere delivery, or it may be redelivered to the shipper without any new transfer or endorsement, which would not be the case if there were a personal endorsement.

It would be strange if the Bills of Lading Act has made a person whose name has never been upon the bill of lading, and who, as between himself and the shipowner, has never acted upon it, liable to an action by the shipowner upon a contract to which he was not a party. I am not, however, sure, that, for the decision of the present appeal, it is really necessary to rely, either upon any difference between a personal endorsement and one in blank, or upon the distinction between such a form of security as in English law might be held to pass the whole legal

H title and a simple pledge. The statute with which your Lordships have now to deal is introduced by a preamble, the material part of which is that

"by the custom of merchants a bill of lading of goods being transferable by endorsement the property of the goods may thereby pass to the endorsee, but nevertheless all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner, and it is expedient that such rights

I should pass with the property."

Section 1 enacts :

"Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself."

Section 2 provides :

"Nothing herein contained shall prejudice or affect any right of stoppage in transitu, or any right to claim freight against the original shipper or owner, or any liability of the consignee or endorsee by reason or in consequence of his being such consignee or endorsee, or of his receipt of the goods by reason or in consequence of such consignment or endorsement."

There is nothing else material in that Act.

This statute contemplates the passing of "the property in the goods," by the endorsement of the bill of lading, as a thing which may, or may not happen, according to the nature and intent of the contract or dealing for the purpose of which that endorsement is made; and it seems to provide for those cases only in which the property so passes as to make it just and convenient that all rights of suit under the contract contained in the bill of lading should be "transferred to" the endorsee, and should not any longer "continue in the original shipper or owner." One test of the application of the statute may, perhaps, be whether, according to the true intent and operation of the contract between the shipper and the endorsee, the shipper still retains any such proprietary right in the goods as to make it just and reasonable that he should also retain rights of suit—the word is "suit," not "action"—against the shipowner under the contract contained in the bill of lading. If he does, the statute can hardly be intended to take from him those rights and transfer them to the endorsee. If they are not transferred to the endorsee, neither is the endorsee subjected to the shipper's liabilities. It is very difficult to conceive that when the goods are still in transitu, when the substance of the contract is not sale and purchase, but borrowing and lending, and when the endorsement and deposit of the bill of lading is only by way of security for a loan, it can be the intention of either party thereby, without more, to divest the shipper of all proprietary right to the goods, and to take from him and transfer to the endorsee all rights of suit under the contract with the shipowner. That some proprietary right—his original right, subject only to the creditor's security—remains in him is indisputable. If that proposition needed illustration from authority, it would be found in *Re Westzinthus* (3), *Spalding v. Ruding* (8), and *Kemp v. Falk* (9). Can it be that he is by the statute deprived of all remedies, legal and equitable, under the bill of lading as long as it remains in the hands of the secured creditor? The creditor in the ordinary course of things will do nothing until the time for payment or delivery of the goods arrives.

Can it, then, be material whether the proprietary right thus remaining in the shipper while the goods are in transitu is legal or equitable? The statute relates to a subject of general mercantile law in which not Englishmen only, but foreigners also, may be, and often are, concerned. Foreign as well as British endorsements of bills of lading by way of security for advances which may be made abroad, perhaps in countries not governed by English laws, are liable to be affected by it whenever recourse must be had to British courts. It seems to me to be inconceivable that the construction of the words "the property in the goods" in such a statute can have been intended to depend upon any such technical distinction as that made in English law, but by no means in the laws of all other countries in which the customs of merchants prevail, between legal and equitable titles. It is to be observed, further, that the statute contemplates beneficium cum onere, and not onus sine beneficio. It may be reasonable if the endorsee has the benefit, as he would if he were a purchaser out and out, or if under his title as endorsee of the bill of lading he obtained delivery of the goods to himself, that he should take it with its corresponding burden, quoad the shipowner. But it would be the reverse of reasonable to impose on him such a burden when he has neither entered into any contract of which it might be the natural result, nor, having taken a mere security, has obtained any benefit from it.

This observation is fortified by the fact that the statute does not appear to distinguish between endorsements subsequent and those anterior to its enactment.

- A On the other hand, it seems impossible to suppose the legislature to have passed this statute without some reference to the custom proved in *Lickbarrow v. Mason* (1), and to the law, whatever may be the true view of it, established on the same subject by later authorities in the English courts. And if, as I think, it ought to be understood with some reference to that custom and to those authorities, I cannot persuade myself that its operation is altogether restricted to cases of out-and-out sale, or that an endorsee of a bill of lading, by way of security, who converts his symbolical into real possession by obtaining delivery of the goods ought never to derive any benefit from it. The authorities decided upon the statute appear to me to be most easily reconciled with its apparent objects and with each other by a view which, if hardly consistent with expressions to be found in some other cases, nevertheless seems to me to have a real and substantial foundation in reason and good sense—viz., that the endorsee by way of security, though not having “the property” passed to him absolutely and for all purposes by the mere endorsement and delivery of the bill of lading while the goods are at sea, has a title by means of which he is enabled to take the position of full proprietor upon himself with its corresponding burdens, if he thinks fit, and that he actually does so, as between himself and the shipowner, if and when he claims and takes delivery of the goods by virtue of that title.

- The authorities decided upon by the statute are *Fox v. Nott* (10), *Smurthwaite v. Wilkins* (11), *The Figlia Maggiore* (12), and *The Freedom* (13). Another case, *Short v. Simpson* (14) was also cited during the argument at your Lordships’ Bar. In *Fox v. Nott* (10) the only question determined was that the shipowner retained his remedy by action against the shipper after the endorsement of the bill of lading. In *Smurthwaite v. Wilkins* (11) the only question determined was that the shipowner retained his remedy by action against the shipper after the endorsement of the bill of lading. In *The Figlia Maggiore* (12) the only question determined was that the shipowner retained his remedy by action against the shipper after the endorsement of the bill of lading. In *The Freedom* (13) the only question determined was that the shipowner retained his remedy by action against the shipper after the endorsement of the bill of lading. In *Short v. Simpson* (14) the only question determined was that the shipowner retained his remedy by action against the shipper after the endorsement of the bill of lading.
- E a case provided for by s. 2, but some of the learned judges expressed opinions bearing upon the general construction of the statute. POLLOCK, C.B., said (6 H. & N. at p. 686):

“The endorsee of the bill of lading may be sued under this statute, because by taking the goods he also takes the liability to the freight.”

- F MARTIN, B., said (ibid. at p. 687):

“The statute means an actual vesting of the property, as by bargain and sale.”

WILDE, B., said (ibid. at p. 640):

- G “I agree with my brother MARTIN that the Act applies only to an absolute transfer of the goods, and was never intended to deprive a person who made advances on the security of the bill of lading of the benefit of the original contract of the shipper to pay the freight.”

In *Smurthwaite v. Wilkins* (11) the endorsee for value of a bill of lading, who had endorsed it over to a third party, was held not to be liable to the shipowner. ERLE, C.J., said (11 C.B.N.S. at p. 847):

- H “The contention on the part of the plaintiff is that, the property in the goods passing to the defendants by the assignment of the bill of lading, under the Act, they are liable for the freight, although they never received the goods. . . . The contention is, that the consignee or assignee shall always remain liable, like the consignor, although he has parted with all interest and property in the goods by assigning the bill of lading to a third party before the arrival of the goods. The consequences which this would lead to are so monstrous, so manifestly unjust, that I should pause before I consented to adopt this construction of the Act of Parliament. The person who received the goods was always considered liable for the freight; but that was not by virtue of an original liability as a contracting party, but on a contract implied from his acceptance of the goods. Looking at the whole statute, it seems to me that the obvious meaning is that the assignee who receives the cargo shall have all the rights and liabilities of a contracting party; but that, if he passes on the bill of lading by endorsement to another, he passes on all the rights and liabilities which the bill of lading carries with it.”
- I

VAUGHAN WILLIAMS, J., agreed. He said :

"Looking at the preamble and at the general scope and intention of the statute, I can entertain no doubt that the view presented by my Lord is the true one."

He explained the effect of "the general scope" of the Act to be

"that, where the right of property leaves the party, the rights and liabilities under the contract leave him also."

A case like the present, of a security on an endorsed bill of lading, not acted upon, and which, in fact, never could be acted upon by taking delivery of the goods, but at the same time not transferred to any other person, differs in specie from that of a man who has transferred the bill of lading by endorsing it over to another. But I cannot see that it would be more reasonable to make the holder of such a security, which he has never realised, and never can realise, liable under the statute, than if he had parted with the bill of lading to somebody else.

The Figlia Maggiore (12) and *The Freedom* (13) were determined in the Court of Admiralty under another statute, which, as DR. LUSHINGTON, and his successor, in my opinion, rightly held, gave that court jurisdiction when, and only when, there was, independently of that statute, a right of action or suit; and, in those particular cases, it appears to have been held that there was no such right of action or suit, unless it was given by the Bills of Lading Act. In both of them the plaintiffs, endorsees by way of security of bills of lading, had claimed and obtained delivery of the goods, and then had brought actions against the shipowners for damage which they had sustained through breaches of the contracts contained in the bills of lading, and they were held entitled to recover. This was right, if an endorsee, under such circumstances, may rightly be held entitled to the benefit of the statute, as having elected to complete his potential and inchoate title by taking possession of the goods, and as placing himself towards the shipowner in the position of proprietor. May it not be said that "the property in the goods" then, if not before, "passes" to him "by reason of the endorsement?" The principle of the liability which, under some circumstances, was held, even before the statute, to attach to the endorsee taking delivery, was regarded by ERLE, C.J., in *Smurthwaite v. Wilkins* (11), as elucidating the policy and objects of the statute itself; and both he and POLLOCK, C.B., in *Fox v. Nott* (10), spoke of "taking the goods," and "receiving the cargo," as the test of its application. The authorities on that subject, *Jesson v. Solly* (15); *Stindt v. Roberts* (16); *Wegener v. Smith* (17); *Chappel v. Comfort* (18), seem, from this point of view, to deserve consideration.

The decision of the Court of Admiralty in *The Freedom* (13) was affirmed by Her Majesty in Council, upon the advice of the Judicial Committee; and, although it was on a point as to which the Admiralty had only a statutory jurisdiction, concurrent with the courts of common law, and though in all Admiralty cases the appeal now lies to this House, still this, as the decision of a court of final appeal, ought not, in any later case, to be lightly departed from. *Short v. Simpson* (14) did not really require anything to be decided as to the effect of the statute, and nothing was, in fact, so decided. It was there held that, quocunque modo, whether under the statute or independently of the statute, the shipper, to whom a bill of lading, which he had endorsed and delivered to his creditor by way of security, was re-endorsed and re-delivered upon payment of the loan, was remitted to his original rights.

Upon the whole, I cannot dissemble that the present case appears to me to be attended with some considerable difficulties. But those difficulties are mainly technical, arising out of a comparison of the language of the statute with various and not always consistent forms of expression, found in authorities not decided with a view to any such consequences as those which the statute would produce. They deal with questions between unpaid vendors of goods comprised in bills of lading and bona fide endorsees of the same bills of lading for value, or between competing and adverse claimants to priority as bona fide holders for value of the

A bills of lading themselves. The statute, on the other hand, deals with questions between shippers and endorsees of bills of lading claiming under them, and between endorsees and shipowners. The preponderance of principle and reason appears to me to be against the proposition that, as between those parties, it can have been intended by, or can be the effect of, the statute to make the creditor of the shipper liable, in effect, as his surety to the shipowner, with whom he was
 B never brought in contact, by reason only of the deposit with him, by way of security, of a bill of lading endorsed in blank, his right, under that deposit being, whether at law or in equity, special and not general, and the shipper retaining, whether at law or in equity, the real and substantial property in the goods, subject to the security. It had not, until the present case, been directly or indirectly determined, by any authority, that such is the effect of the statute. My conclusion
 C is that the appellants ought to be exonerated, by your Lordships' judgment, from the respondents' action, and that the order of the Court of Appeal ought to be reversed, with costs.

LORD BLACKBURN.—The judgment of FIELD, J., was reversed by the order now under appeal. The case was tried before him without a jury, and I think it
 D is necessary to see what he had to determine. There was no question between vendor and vendee nor of stoppage in transitu raised, for there was neither a vendor nor a stoppage. The law and decisions as to stoppage in transitu might be relevant in construing the Bills of Lading Act, 1855, but did not otherwise affect the rights of the parties. It was not suggested that the defendants were, at the time the goods were shipped, in any way interested in the goods, nor that they
 E were, either as undisclosed principals or otherwise, parties to the contract in the bill of lading until it was delivered to them after the ship had sailed and the goods were in the hands of the shipowners to be carried under the bill of lading, and were not yet delivered, with an endorsement in blank by Necessiantz, the consignee named in the bill of lading. I do not think that, either at the trial or on the argument, it was at all disputed that at common law the remedy of the shipowner under a bill of lading was by enforcing his lien upon the goods, or by bringing
 F an action on the contract against anyone who, at the time when the goods were shipped, was a party to the bill of lading, either as being on the face of it a contracting party or as being an undisclosed principal of such a party. In either of these cases he might be sued as having been from the beginning a party to the contract. Some attempts had been made to say that the contract in a bill
 G of lading might, under some circumstances at least, be transferred to an assignee in a manner analogous to that in which the contract in a bill of exchange was transferred by the endorsement of the bill of exchange; but I think, since the decision in *Thompson v. Dominy* (19) in 1845, it has been undisputed law that under no circumstances could anyone, not a party to the contract from the beginning, sue on it in his own name. Any action on the contract at common law must be
 H brought in the name of an original contractor, and no action could be brought on the contract against one who was not liable to be sued as an original contractor.

But ten years later the Bills of Lading Act, 1855, was passed. The preamble states this as one of the objects which the legislature had in view:

"Whereas by the custom of merchants a bill of lading of goods being transferable by endorsement the property in the goods may thereby pass to the endorsee, but nevertheless all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner, and it is expedient that such rights should pass with the property."

The mode in which the legislature carry out the object thus expressed in the preamble is by s. 1:

"Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or endorsement, shall have transferred

to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself."

The case made on the statement of claim in the present matter was that "the property" had passed upon or by reason of the endorsement to the defendants, not that they were before that a party to the contract in the bill of lading, but that, by virtue of the Act of 1855, when the property passed they became subject to the same liabilities as if the contract contained in the bill of lading had been made with themselves. It is not disputed that the delivery of the bill of lading to the defendants with the endorsement of the consignee on it in blank was an endorsement, nor that whatever interest then passed to them still remained in them. What was in issue was, whether upon or by reason of that endorsement "the property" passed.

The first and most important question to be decided in this case is: What is the true construction of the Bills of Lading Act, 1855? Does the "property" in the goods there mean any legal property in the goods, so as to be satisfied by proof that a legal property passed accompanied by a right of possession, so as to entitle the transferee to maintain trover, though it was intended by the parties, and was as between them, to be by way of security only, the transferor retaining a right of redemption either by way of a common law retention of the general property, though the pledgee had a right to the possession and a property as pledgee, a right exceeding a lien, or the whole property at law having passed by way of mortgage, the transferor retaining an equity of redemption, which in 1855 was an equitable right, enforceable only in a court of equity? I think that all the judges below were of opinion that, if the right reserved was the general right to the property at law, what was transferred being only a pledge (conveying, no doubt, a right of property and an immediate right to the possession, so that the transferee would be entitled to bring an action at law against anyone who wrongfully interfered with his right), though a property, and a property against the endorser, passed "upon and by reason of the endorsement," yet the property did not pass.

I agree with them. I do not at all proceed on the ground that this, being an endorsement in blank, followed by a delivery of the bill of lading so endorsed, had any different effect from what would have been the effect if it had been an endorsement to the appellants by name. *The Freedom* (13) was cited, and I think there are expressions used in the judgment delivered in that case by SIR JOSEPH NAPIER which indicate that the Judicial Committee were not of that opinion. It is said (L.R. 3 P.C. at p. 599):

"The plaintiffs were consignees for sale, but as part of the transaction a bill of exchange was drawn by the consignors for nearly the full value of the goods; the bills of lading were endorsed by them and forwarded to the plaintiffs, by whom the draft of the consignors was accepted and paid in due course."

If that was the transaction (and whether it was so or not, the Judicial Committee proceeded on the assumption that such was the transaction), the plaintiffs in *The Freedom* (13) were in exactly the position of Church in *Newsom v. Thornton* (20), the case to which I shall have to refer afterwards. Church had the bill of lading endorsed to him as a factor or consignee for sale, and had, therefore, a right to hold the goods as against the endorser as a security for all his advances: and he had authority at common law to sell the goods, and before the arrival of the ship to transfer the bill of lading in furtherance of a sale, but he had no authority to pledge either the goods or the bill of lading. It is true that, by the Factors Acts, the plaintiffs in *The Freedom* (13) would have had a power, which Church had not, to pledge the bill of lading, but, as they did not exercise that power, it could make no difference. The judgment then proceeds (L.R. 3 P.C. at p. 599):

"The legal title to the property in the goods specified in the bills of lading was thus transferred to and vested in the plaintiffs. The right of suing upon

A the contract in the bills of lading was transferred to them by force of the statute 18 & 19 Vict., c. 111 [Bills of Lading Act, 1855]."

The judgment then proceeds to show, I think correctly, that the dictum of MARTIN, B. (reported in *Fox v. Nott* (10)), was not necessary for the decision in that case, and goes on:

B "Their Lordships are satisfied that it was intended by this Act that the right of suing upon the contract under a bill of lading should follow the property in the goods therein specified; that is to say, the legal title to the goods as against the endorser."

C It certainly seems to me that their Lordships thought that "the property" passed within the meaning of the Act of 1855 if any legal right to hold as against the endorser passed. The statute which their Lordships had to construe was the Admiralty Court Act, 1861, s. 6 [repealed by Administration of Justice Act, 1920], which is in these terms:

D "The High Court of Admiralty shall have jurisdiction over any claim by the owner or consignee or assignee of any bill of lading of any goods carried into any port in England or Wales in any ship, for damage done to the goods or any part thereof by the negligence or misconduct of or for any breach of duty or breach of contract on the part of the owner, master, or crew of the ship, unless it is shown to the satisfaction of the court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales. . . ."

E It is not necessary to put a construction on that section. I think that there are very good reasons for contending that a person who has possession of an endorsed bill of lading without any right at all to hold it against the endorser without being owner of any interest in the goods is not an "assignee" within the meaning of this enactment, and, consequently, that what I understand to be the actual decision of DR. LUSHINGTON in *The St. Cloud* (21), that such a person could not sue under the Admiralty Court Act, may have been right enough. It is not necessary to decide that. But I agree with what was said in *The Nepoter* (22), that it is contrary to all rules of construction to interpolate any reference to the Bills of Lading Act into the Admiralty Court Act.

G I think, therefore, that the actual point decided in *The Freedom* (13) might be quite right, for the plaintiff in that action had a property, and a very substantial property, in the goods as against the endorsers, and everyone else perhaps, and was in every sense an assignee of the bill of lading. The opinion expressed on the construction of the Bills of Lading Act, that in that Act the property meant a legal title as against the endorser, was perhaps unnecessary, and I think not sound. The words used in the statute are not such as *prima facie* to express such an intention. No one, in ordinary language, would say that when goods are pawned, or money is raised by mortgage on an estate, the property, either in the goods or land, passes to the pledgee or mortgagee, and I cannot think that the object of the enactment was to enact that no security for a loan should be taken on the transfer of bills of lading unless the lender incurred all the liabilities of his borrower on the contract. That would greatly, and I think unnecessarily, hamper the business of advancing money on such securities which the legislature has, by the Factors Acts, shown it thinks ought rather to be encouraged.

I It is not uncommon to reduce into writing the agreement between the banker and his customers as to the terms on which the bills of lading deposited by them as securities are to be held. Such was the case in *Glyn, Mills & Co. v. East and West India Docks Co.* (2), as to which I shall have more to say hereafter. When there is such a writing, it is, in the absence of fraud, conclusive between the parties as to what they intended. And I do not in the least question that such a writing may be so expressed as to show that between the parties the transfer was a mortgage, though of goods, in the manner with which everyone is familiar with regard

to lands. The equity of redemption in such a case was an equitable estate only, and in 1855 enforceable in equity, not at law. Where there is neither a symbolical delivery by a transfer of a bill of lading, nor an actual delivery of the goods themselves, there may be (though there seldom is) a substantial difference in the rights of the lender according as the transaction is of the one kind or the other. In *Howes v. Ball* (23) Ball sold and delivered a coach to John Howes (since deceased) under an agreement in writing, in which there was this clause (7 B. & C. at p. 482):

“And further I, John Howes, do agree that Thomas Ball do have and hold a claim upon the coach until the debt be duly paid.”

John Howes died without having paid the debt. Ball, after his death, seized the coach, for which seizure the action was brought by the executor. Had that agreement amounted to a mortgage by John Howes to Ball, I take it there could have been no doubt that the mortgagee would have had as much right against the executor of John Howes as he would have had against John Howes himself. But it was held that it did not amount to a mortgage, but only to an agreement that Ball should have a right of hypothec, and, there having been no delivery by Howes to Ball, the decision was that, though so long as John Howes lived and held the property in the coach Ball might have justified a seizure as against him, he could not justify a seizure as against his representatives.

In *Flory v. Denny* (24), where the agreement was

“as an additional security for a loan to assign all the debtor's right and interest in a chattel,”

it was held to be a mortgage, and to operate so as to transfer the property, without any delivery, as a bargain and sale out and out of the goods would, though an agreement to create a pledge would, according to *Howes v. Ball* (23) have conveyed no property of any kind in the goods without a delivery. But where the goods are at sea, and there is a transfer of the bill of lading, there is a delivery of possession, symbolical, it is true, but all that can be given. The question whether there was a mortgage or only a common law pledge, or hypothec, it being accompanied by delivery, might affect the question what was the court in which those rights were to be enforced, but does not affect the substance of the rights. The borrower, if ready and willing to pay the money, might in the one case be able to bring an action at law against the lender who refused to allow him to redeem, and in the other have to sue in equity, but as it would equally be a pledge his rights would be the same in substance. I am, therefore, strongly inclined to hold that, even if this was a mortgage, there would not have been a transfer of “the” property within the meaning of the Bills of Lading Act. This is contrary to the opinions not only of SIR BALIOL BRETT, M.R., and BAGGALLAY, L.J., but of FIELD, J., also. BOWEN, L.J., who agreed with FIELD, J., in thinking that this was not a mortgage but only a pledge, did not express any opinion as to what would have been the law if it had been a mortgage. I believe all the noble and learned Lords who heard the argument are agreed with him in thinking that in this case it was only a pledge. I do not, therefore, intend to express a final decision that an assignee of a bill of lading by way of mortgage is not as such liable to be sued under the Act of 1855, but only to guard against its being supposed that, even if SIR BALIOL BRETT, M.R., and BAGGALLAY, L.J., were right in holding this a mortgage, I, as at present advised, should agree in their conclusion that the defendant could be sued.

I now proceed to consider the question on which the Court of Appeal were divided in opinion, but the majority made the order now appealed against. The question is stated by SIR BALIOL BRETT, M.R., to be:

“Does the endorsement of a bill of lading as a security for an advance by a necessary implication which cannot be disproved pass the legal property in the goods named in the bill of lading to the endorsee with an equity in the endorser, the borrower, to redeem the bill of lading by payment or to receive the balance, if any, on a sale?”

- A FIELD, J., had held, and BOWEN, L.J., agreed with him, that it might so operate, if so intended by the parties at the time, but did not so operate if it was intended to be no more than a pledge as distinguished from a mortgage. I do not understand that any one of the judges below disputed that if it was a question of intention depending on the evidence, the finding of FIELD, J., was right; but the majority in the Court of Appeal proceeded on the principles laid down by BRETT, L.J., in
- B *Glyn, Mills & Co. v. East and West India Dock Co.* (2).

In that case the terms on which the bill of lading was delivered to Glyn, Mills & Co. were reduced to writing, and the question, therefore, whether it was intended to deliver it by way of pledge only, or by way of a mortgage, depended on the construction of that writing. Whether BRETT, L.J., thought that on the construction of the written instrument it was intended to be a mortgage, I do not know. I do

C not think he proceeded on that ground. He said it was a mortgage, and that the effect of the Bills of Lading Act was to transfer the right to sue and the liability to be sued to Glyn, Mills & Co. BRAMWELL, L.J., was of an opposite opinion on both points. He thought that Glyn, Mills & Co. had a special property and a right of possession, and no more. In the House of Lords I said (post page 681):

- D “I do not think it necessary to express any opinion on a question much discussed by BRETT, L.J., I mean whether the property which the bankers were to have was the whole legal property in the goods, Cottam & Co.’s interest being equitable only, or whether the bankers were only to have a special property as pawnees, Cottam & Co. having the legal general property. Either way the
- E bankers had a legal property, and at law the right to the possession, subject to the shipowners’ lien, and were entitled to maintain an action against anyone who, without justification or legal excuse, deprived them of that right.”

All the noble and learned Lords agreed in this. I think, therefore, the decision of this House is a strong authority in support of the position which I have before advanced, that the rights of a mortgagee having taken a bill of lading, and the

F rights of a pawnee having taken a bill of lading, are in substance the same. I did not think it necessary to point out that the question which the House in *Glyn, Mills & Co. v. East and West India Dock Co.* (2) had to decide, and did decide, would have been just the same if the Act of 1855 had never been passed, or had been repealed, and consequently that it was unnecessary to express any opinion on the construction of that Act; but it obviously was so.

- G Before proceeding further, I wish to point out what, in my opinion, is a great misapprehension as to the effect of the decision of this House in *Lickbarrow v. Mason* (1), and as to the weight to be given to the opinion of BULLER, J., delivered in this House, and reported in a note to 6 EAST, 20. I have already said that in this case there is no sale, no vendor, and no vendee, and no stoppage in transitu; so that this misapprehension, as I think it is, is not so material as it might be in
- H some other cases. A demurrer on evidence, as is pointed out by EYRE, C.J., in delivering the unanimous opinion of the judges in *Gibson v. Hunter* (25), not *Gibson v. Minet* (26), as is by mistake said in the note in 6 EAST, though not familiar in practice, was a proceeding known to the law. He explains it, and states his very confident expectations (which have been justified by the result) that no demurrer on evidence would again be brought before the House. It may be well
- I to point out the dates. The demurrer on evidence in *Lickbarrow v. Mason* (1) was in 1787. The only case of a demurrer on evidence in what were then recent times was *Cocksedge v. Fanshawe* (27), on which judgment had been given in this House in 1783. Neither in the King’s Bench nor in the Exchequer Chamber was any question raised in *Lickbarrow v. Mason* (1) as to the mode in which the questions discussed were raised. In 1790 the writ of error from the decision of the Exchequer Chamber was brought before the House of Lords. The law peers at that time were LORD THURLOW, LORD LOUGHBOROUGH, and LORD KENYON. When it was argued does not appear, but it was argued, and the same question as had been asked

of the judges in *Cocksedge v. Fanshawe* (27) was asked of the judges. Six judges (including all the survivors of those who had joined in LORD LOUGHBOROUGH's judgment in the Exchequer Chamber) answered in favour of the respondent. The three judges who had given judgment in the King's Bench answered in favour of the appellant. This House delayed giving its opinion till 1793.

In the meantime, in 1791, there was a demurrer to evidence in *Gibson v. Hunter* (25), which was brought before this House. On Feb. 7, 1793, this House gave judgment awarding a venire de novo. One week afterwards, on Feb. 14, 1793, this House delivered judgment in the long-pending case of *Lickbarrow v. Mason* (1), awarding in that case also a venire de novo. LORD LOUGHBOROUGH was himself at that time Lord Chancellor. I should have thought, if anything was clear, it was that this House did not decide anything, except that on that demurrer to the evidence no judgment could be given. Certainly the last conclusion that I should draw is that stated by FIELD, J., that the House in which LORD LOUGHBOROUGH was Lord Chancellor decided, "presumably" on the opinion delivered by BULLER, J., against the judgment of LORD LOUGHBOROUGH, which six judges to three had thought right. Neither can I at all agree in the opinion expressed by FIELD, J., that the opinion of BULLER, J., has always been taken as the law, and been adopted and followed as the law up to the present day. It never was published till 1805, in a note to *Newsom v. Thornton* (20).

I have for many years been of opinion, and still remain of opinion, that much of what BULLER, J., expresses in that opinion as to stoppage in transitu was peculiar to himself, and was never adopted by any other judge, and is not law at the present day. But it is not necessary to pursue this subject further, as I agree with BOWEN, L.J., that neither the statement of the custom of merchants in the special verdict in *Lickbarrow v. Mason* (1), nor the opinion of BULLER, J., justifies the inference that the endorsement of a bill of lading for a valuable consideration must pass the entire legal property, whatever was the intention of the parties. In *Lickbarrow v. Mason* (1) Turing was an unpaid vendor to Freeman. He had endorsed the bill of lading to Freeman, and had not, therefore, any right, except that of stopping the goods while in transitu, if Freeman became insolvent without having paid for the goods, and that right he had, though the endorsed bill of lading had been sent on to the vendee, so long as that bill of lading remained in the vendee's hands. But before any such stoppage Freeman, for valuable consideration, endorsed the bill of lading to Lickbarrow, who, whether as mortgagee or pledgee, had a legal property accompanied by a right of possession.

The point which I understand to have been decided in *Lickbarrow v. Mason* (1) was that, on the transfer of the bill of lading to Lickbarrow, the goods ceased to be in transitu, the shipowner from that time no longer holding them as a middleman to carry the goods from the unpaid vendor, Turing, to Freeman, his vendee, but holding them as agent for Lickbarrow. It was held first in *Re Westzinthus* (3) and then in *Spalding v. Ruding* (8) that where the transitu was thus put an end to by what was in reality only a pledge, the stoppage might be made available in equity so far as the rights of the pledgee did not extend. I thought, and still think, that the reason why the stoppage could not be made available at law was because the shipowner no longer held the goods as a middleman, as the transferee of the bill of lading for valuable consideration and bona fide, so as to give him a security, whether by way of mortgage or by way of pledge, had a legal property in the goods which he could enforce as against the shipowner. Such being my view of the law, whether it was right or wrong, I expressed myself accordingly in *Kemp v. Falk* (9), so as to show that I thought so; but there was nothing in that case to call for a decision on the point now before this House.

In *Newsom v. Thornton* (20) LORD ELLENBOROUGH, C.J., says (6 East. at pp. 40, 41):

"I should be very sorry if anything fell from the court which weakened the authority of *Lickbarrow v. Mason* (1) as to the right of a vendee to pass the

A property of goods in transitu by endorsement of a bill of lading to bona fide holders for a valuable consideration and without notice. For as to *Wright v. Campbell* (28), though that was the case of an endorsement of a factor, it was an outright assignment of the property for value. Scott, the endorsee, was to sell the goods and indemnify himself out of the produce the amount of the debt for which he had made himself answerable. The factor at least purported to

B make a sale of the goods transferred by the bill of lading, and not a pledge. This was a direct pledge of the bill of lading, and not intended by the parties as a sale. A bill of lading, indeed, shall pass the property upon a bona fide endorsement and delivery where it is intended so to operate, in the same manner as a direct delivery of the goods themselves would do if so intended. But it cannot operate further."

C LAWRENCE, J., says (*ibid.* at p. 43), speaking of *Lickbarrow v. Mason* (1):

"All that that case seems to have decided is, that where the property in goods has passed to a vendee, subject only to be divested by the vendor's right to stop them when in transitu, such right must be exercised, if at all, before the vendee has parted with the property to another for a valuable consideration and bona fide, and by endorsement of a bill of lading given him a right to recover them."

D LE BLANC, J., says (*ibid.* at p. 44), that what they then determine

"will not break in at all on the doctrine of *Lickbarrow v. Mason* (1) that the endorsement of a bill of lading upon the sale of goods will pass the property to a bona fide endorsee, the property being intended to pass by such endorsement."

E In *Glyn, Mills & Co. v. East and West India Dock Co.* (2), BRETT, L.J., speaking of an opinion of WILLES, J., says (6 Q.B.D. at p. 480):

"To say that an endorsement of a bill of lading for an advance is only a pledge, seems to me to be inconsistent with what has always been considered to be the result of *Lickbarrow v. Mason* (1), namely, that such an endorsement passes the legal property."

F By this I understand him to mean the whole legal property. But neither in that case nor in the case now at Bar does he refer to any authority to that effect.

Expressions used by judges have been cited which, I think, only show that they did not carefully consider their language, where no question of the kind before

G us was under discussion. And, as far as I know, there is no decision subsequent to *Lickbarrow v. Mason* (1) which proceeds on such a ground, while *Newsom v. Thornton* (20) proceeds expressly on the ground that the endorsement of a bill of lading, when intended to be a pledge only, is not valid if made by one who has no authority to make a pledge. I do not know that I am justified in saying that it is a decision that, if it was made by one who had authority to make a pledge, it would

H be good as such, though I think that appears to have been LORD ELLENBOROUGH's opinion, and I do not think any authority was cited on the argument at the Bar to show that such is not the law. No case was cited at the Bar, nor am I aware of any in which it has been held that a transfer of the bill of lading for value necessarily, whatever might be the intention, passed the whole legal property. SIR BALIOL BRETT, M.R., says:

I "If the general understanding of merchants had not been in accordance with the verdict of the jury in *Lickbarrow v. Mason* (1) accepted in its largest sense, there would, one would think, have been cases in the books raising the question."

With submission to him I think no weight can be given to this absence of authority until it is shown that there have been cases in which it became material to consider whether an endorsement intended to be and operating as a pledge at law had a less effect than an endorsement operating against the intention as a mortgage. I

have already given my reasons for thinking that in substance the right would be the same. Without, therefore, deciding the question whether a mortgage would render the mortgagee liable under the Bills of Lading Act, I decide that mainly for the reasons given by BOWEN, L.J., this transfer did not operate as a mortgage. I, therefore, am clearly of opinion that the order made by the Court of Appeal should be reversed with costs, and the judgment of FIELD, J., restored.

LORD BRAMWELL.—I concur. This action would not have been maintainable at common law. Is it maintainable under the Bills of Lading Act, 1855? That depends upon whether the appellants are endorsees of the bill of lading

“to whom the property in the goods therein mentioned has passed upon or by reason of such endorsement.”

It is found, as a fact, and rightly found, as is admitted, that all that was intended in the transaction was a pledge. This would give the appellants a property, but, as put by BOWEN, L.J., not “the” property. As I understand SIR BALIOL BRETT, M.R., if this could be, then the appellants are right; but he thinks it could not be, that *Lickbarrow v. Mason* (1), or rather BULLER, J.’s judgment shows that, when a bill of lading is endorsed to give any title to the transferee, the entire property is passed, and that in such a case as this nothing but an equitable right to redeem remains in the transferor. It is for those who assert this to prove it. I cannot prove the negative that it is not so, and logically and reasonably I might content myself with saying that it is not proved to me—that I see no reason and no authority in support of it. But I go further. I think that authority and reason are against it.

I will not discuss or examine the cases. They do not, in my opinion, justify the contention. I will not examine them in detail. That has been done by the Lord Chancellor. I understand his conclusion to be that the expressions of the learned judges which have been relied upon should be read and interpreted secundum subjectam materiam. I agree. In no case has the present matter been under consideration. As to the reason and principle which should govern, I ask: Why should the transfer of the bill of lading have a greater effect, contrary to the parties’ intention, than the handing over of the chattels themselves would have? They could be pledged if on shore, but, being at sea, no actual delivery, which is necessary to a common law pledge, can take place. There can, however, be a symbolical delivery by transferring the bill of lading. Why should the effect be different?

Consider the inconvenience of holding that the pledgor has only an equitable right; that he may repay the loan at the day appointed, but thereby acquire no legal title to the possession of the goods; that the pledgee may sell and pass the entire property to one not having notice of the equitable title. Consider what difficulties would be put on those who lend on such securities if this action was maintainable. The banker who lent money on a bill of lading for goods which arrived in specie, but damaged by perils of the seas so as to be worthless, might lose the money lent and the freight. Another consequence would be that the transferee of the bill of lading, though only interested to the amount of the loan on it, would be the person to bring actions on the contract to carry. It is true that, unless he can do so in all cases, he can in none, even where his interest is to the extent of the full value of the goods. Either this was not thought of by the legislature, or, if it was, they thought that no case could be included unless all were, and that it was better to include none than all. It is to be observed that the statute in its preamble says that by endorsement the property “may” pass. It is to be remembered also, as pointed out by my Lord Chancellor, that this law bears upon foreigners out of the kingdom. I am the more surprised at this contention on the part of SIR BALIOL BRETT, M.R., as he has always so ably and powerfully contended that mercantile laws, contracts, and usages should be as free as possible from technicality.

A I am of opinion that the appeal should be allowed. I cannot truly say that I have any doubt on the matter. I take this opportunity of saying that I think there is some inaccuracy of expression in the statute. It recites that,

"by the custom of merchants a bill of lading of goods being transferable by endorsement the property in the goods may thereby pass to the endorsee."

B The truth is that the property does not pass by the endorsement but by the contract in pursuance of which the endorsement is made. If a cargo afloat is sold, the property would pass to the vendee, even though the bill of lading was not endorsed. I do not say that the vendor might not retain a lien, nor that the non-endorsement and non-handing over of the bill of lading would not have certain other consequences. My concern is to show that the property passes by the contract. So if the contract was one of pledge, the property would be bound by the contract, at least, as to all who had notice of it, though the bill of lading was not handed over. There is, I think, another inaccuracy in the statute, which indeed is universal. It speaks of the contract contained in the bill of lading. To my mind, there is no contract in it. It is a receipt for the goods, stating the terms on which they were delivered to and received by the ship, and, therefore, excellent evidence of those terms, but it is not a contract. That has been made before the bill of lading was given. Take, for instance, goods shipped under a charterparty, and a bill of lading differing from the charterparty, as between shipowner and shipper at least the charterparty is binding: *Gledstanes v. Allen* (29). These distinctions are of a verbal character and not perhaps of much consequence, but I am strongly of opinion that precision of expression is very desirable, and had it existed in such cases as the present there would not have been the contradictory opinions which have been given.

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LORD FITZGERALD.—FIELD, J., in the court below came to the conclusion that the transaction under investigation was intended by the parties to operate as a pledge only. There can be no doubt that the inference thus drawn by the learned judge was correct in fact. It seems to follow that the pledgees acquired a special property in the goods with a right to take actual possession should it be necessary to do so, for their protection or for the realisation of their security. They acquired no more, and subject thereto the general property remained in the pledgor. I am of opinion that the delivery of the endorsed bill of lading to the defendants as a security for their advance did not by necessary implication transfer the property in the goods to the defendants. They were not, therefore, endorsees of a bill of lading to whom the property in the goods passed by reason of the endorsement, so as to make them, without more,

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"subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with"

H them. The opinions which have been just delivered are so very full, and so able and satisfactory, that it would be mere affectation on my part to attempt to do more than express my concurrence.

Appeal allowed.

Solicitors: *Hare & Co.*, for *H. J. Leach*, Manchester; *Lowless & Co.*

[Reported by C. E. MALDEN, Esq., Barrister-at-Law.]

SMITH v. CHADWICK AND OTHERS

[House of Lords (the Earl of Selborne, L.C., Lord Blackburn, Lord Watson and Lord Bramwell), November 15, 16, 21, 22, 23, 1883, February 18, 1884]

[Reported 9 App. Cas. 187; 53 L.J.Ch. 873; 50 L.T. 697;
48 J.P. 644; 32 W.R. 687]

Deceit—Evidence—Need to prove actual fraud which was inducing cause to contract, and damage—Need to call plaintiff as witness—Relevance of motive of defendant.

To succeed in an action for deceit by which the plaintiff was induced to enter into a contract the plaintiff must establish (i) actual fraud, which is to be judged of by the nature and character of the representations made, considered with reference to the object with which they were made, the knowledge or means of knowledge of the person making them, and the intention which the law justly imputes to every man to produce those consequences which are the natural result of his acts; (ii) that this fraud was an inducing cause to the contract, for which purpose it must be material, and it must have produced in his mind an erroneous belief, influencing his conduct; and (iii) damage.

Per LORD BLACKBURN: As to what is sufficient proof of damage, I do not think it is necessary that the plaintiff always should be called as a witness to swear that he acted on the inducement. If it is proved that the defendants, with a view to induce the plaintiff to enter into a contract, made a statement to the plaintiff of such a nature as would be likely to induce a person to enter into a contract, and it is proved that the plaintiff did enter into the contract, it is a fair inference of fact that he was induced to do so by the statement. The weight of this evidence must greatly depend on the degree to which the action of the plaintiff was likely, and on the absence of all other ground on which the plaintiff might act. If the plaintiff is not called, or, being called, does not swear that he was induced, it adds much weight to the doubts whether the inference was a true one. . . . As a matter of law the motive of the person saying that which he knows not to be true to another, with the intention to lead him to act on the faith of the statement is immaterial.

Notes. Applied: *Bellairs v. Tucker* (1884), 13 Q.B.D. 562. Considered: *Hughes v. Twisden* (1886), 55 L.J.Ch. 481; *Smith v. Reed* (1886), 2 T.L.R. 442. Applied: *Moore v. Explosives Co.* (1887), 56 L.J.Q.B. 235. Considered: *Re London and Leeds Bank, Ex parte Carling, Carling v. London and Leeds Bank* (1887), 56 L.J.Ch. 321. Applied: *Derry v. Peek* [1886-90] All E.R.Rep. 1. Considered: *Arnison v. Smith* (1889), 41 Ch.D. 348; *McKeown v. Boudard-Peveril Gear Co.* (1896), 65 L.J.Ch. 735; *Andrews v. Mockford* (1896), 73 L.T. 726; *Nash v. Calthorpe*, [1904-7] All E.R.Rep. 968; *MacLeay v. Tait*, [1906] A.C. 24; *Bissett v. Wilkinson*, [1926] All E.R.Rep. 343. Referred to: *Edgington v. Fitzmaurice* (1885), 29 Ch.D. 459; *Capel v. Sim's Ships Compositions Co.* (1888), 57 L.J.Ch. 713; *Glasier v. Rolls* (1889), 42 Ch.D. 436; *Angus v. Clifford*, [1891] 2 Ch. 449; *Re Metropolitan Coal Consumers' Association, Karberg's Case* (1892), 66 L.T. 700; *Knox v. Hayman* (1892), 67 L.T. 137; *Greenwood v. Leather Shod Wheel Co.*, [1900] 1 Ch. 421; *Cackett v. Keswick*, [1902] 2 Ch. 456; *Broome v. Speak*, [1903] 1 Ch. 586; *Shepherd v. Bray*, [1906] 2 Ch. 235; *Pearson v. Dublin Corpn.*, [1904-7] All E.R.Rep. 255; *Tackey v. McBain*, [1911-13] All E.R.Rep. 616; *Bradford Third Equitable Benefit Building Society v. Borders*, [1941] 2 All E.R. 205.

As to actions for deceit, see 26 HALSBURY'S LAWS (3rd Edn.) 862 et seq.; and for cases see 35 DIGEST (Repl.) 17 et seq.

Cases referred to:

(1) *Arkwright v. Newbold* (1881), 17 Ch.D. 301, 313; 50 L.J.Ch. 372; 44 L.T. 393; 29 W.R. 455, C.A.; 35 Digest (Repl.) 20, 115.

- A (2) *Chandelor v. Lopus* (1603), Cro. Jac. 4; 79 E.R. 3; sub nom. *Lopus v. Chandler*, 1 Dyer, 75, n., Ex. Ch.; 35 Digest (Repl.) 29, 203.
- (3) *Pasley v. Freeman* (1789), 3 Term Rep. 51; 100 E.R. 450; 35 Digest (Repl.) 25, 165.
- (4) *Redgrave v. Hurd* (1881), ante p. 77; 20 Ch.D. 1; 51 L.J.Ch. 113; 45 L.T. 485; 30 W.R. 251, C.A.; 35 Digest (Repl.) 48, 423.

B **Appeal** by the plaintiff in the action from a decision of the Court of Appeal (SIR GEORGE JESSEL, M.R., COTTON and LINDLEY, L.JJ.), reported 20 Ch.D. 27, reversing a decision of FRY, J., in an action brought by William Smith, a steel manufacturer, against D. Chadwick, J. O. Chadwick, E. Adamson, and E. Collier, accountants, for damages alleged to have been sustained by him by his having been induced to take and pay for shares in the Blochairn Iron Co., Ltd., by the fraudulent misrepresentations of the defendants.

C The company was formed in the early part of 1873 for the purpose of purchasing from Messrs. Hannay & Son the Blochairn Iron Works, near Glasgow, and also the Nether Johnstone Colliery, which Messrs. Hannay were under contract to purchase. The alleged misrepresentations were contained in a prospectus dated May 27, 1873, signed by the defendants, and in a circular letter from them, bearing the same date, which accompanied it. The prospectus contained the name of Mr. James J. Grieve, M.P. for Greenock, as a director, and stated that the value of the property amounted to £301,000; that that of the stocks and working capital might be estimated to be £200,000; that there had been no addition for goodwill; that the company's works were capable of producing 75,000 tons per annum; that the "present value of the turnover or output" of the works was over £1,000,000 per annum; and that the land on which the works stood was about seventeen acres, and was held in perpetuity, subject to a reasonable ground-rent. In the circular letter which accompanied this prospectus the defendants said:

"We have much confidence in recommending this investment to our friends, and request to be favoured with your early application."

F On June 4, 1873, the plaintiff sent in an application for one hundred £50 shares in the company, on the faith, as he alleged, of the statements in the prospectus, and he eventually paid £5,000 in respect of them. On July 25, 1874, the company being unsuccessful, a resolution was passed for winding it up voluntarily. On May 5, 1876, the plaintiff brought the present action against Messrs. Chadwick, claiming £5,750 as damages sustained by him by having been induced to take shares in the company by their fraudulent misrepresentations, the alleged misrepresentations being that Mr. Grieve was untruly stated to be a director of the company, that the prospectus did not mention that interest was to be paid on the instalments of the purchase-money, that the plaintiff was led to believe that the goodwill was valuable whereas it was valueless, that the production and output or turnover were falsely stated, and that the valuation of the land related to twenty acres, whereas the company only obtained seventeen acres. It appeared that Mr. Grieve had originally consented to become a director, and that he had been requested to sign the memorandum and articles of association, but had telegraphed in reply:

"Your movements are too rapid for me. Cannot conclude finally till I hear from Mr. Morton tomorrow regarding necessary inquiries."

I The defendants, however, expecting that the answer of Mr. Morton, who was himself a director, would be satisfactory, issued the prospectus without striking out Mr. Grieve's name. The plaintiff admitted that he had never heard of Mr. Grieve before, and when asked whether the name had any effect in inducing him to join the company, shook his head. It was proved that the money received by the company in the year 1872 was only £365,000, and that in 1873 it was less than half that amount, while the output was nothing like the amount stated. FRY, J., came to the conclusion, on these facts, that the prospectus contained such misrepresentations as entitled the plaintiff to recover. The Court of Appeal, however,

reversed his decision, the learned judges expressing their belief that the defendants were honest men, and had not been guilty of fraud, but merely of carelessness in some matters, and that the plaintiff, not having been induced to take the shares by reason of Mr. Grieve being stated to be a director, was not entitled to base his claim upon that erroneous statement. From that decision the plaintiff appealed. A

Romer, Q.C., Cozens-Hardy, Q.C., and Chadwyck-Healey for the appellant.

Sir Hardinge Giffard, Q.C., H. Davey, Q.C., and Russell Roberts for the respondents, Chadwick and Collier. B

R. T. Reid, Q.C., for the respondent Adamson.

Their Lordships took time for consideration.

Feb. 18, 1884. The following opinions were read. C

THE EARL OF SELBORNE, L.C.—I conceive that in an action of deceit like the present, it is the duty of the plaintiff to establish two things—first, actual fraud, which is to be judged of by the nature and character of the representations made, considered with reference to the object with which they were made, the knowledge or means of knowledge of the person making them, and the intention which the law justly imputes to every man to produce those consequences which are the natural result of his acts; and, secondly, he must establish that this fraud was an inducing cause to the contract, for which purpose it must be material, and it must have produced in his mind an erroneous belief, influencing his conduct. D

All your Lordships are, I believe, agreed in thinking that, of the several representations in this prospectus, by which the appellant alleges himself to have been deceived, only one is material, viz., that as to "the present value of the turnover or output of the entire works" (stated as being over "£1,000,000 sterling per annum"). Of the materiality of that representation there can be no doubt; and if the appellant was justified in understanding, and did understand it, in the sense insisted upon by his counsel at the Bar, it was untrue as well as material. If, in the context in which it stands, it could not be honestly intended or reasonably understood in any other sense, I should think that the appellant's case was made out, although he has contented himself with swearing, in his answer to the defendant's interrogatories, that he understood the meaning of the words to be "that which they obviously convey," and has professed to be "unable to express in other words, what he understood to be the meaning thereof." If, for instance, the material statement had been that Mr. Grieve was a director, I should have thought such an answer quite sufficient. But it is otherwise, in my opinion, if the words in the context in which they stand may have been honestly intended to bear another sense (in which they would be true), and might probably and reasonably have been so understood by an intelligent man of business, aware of the current prices at that time of bar and plate iron, and if, at the time when that answer was given, the appellant had notice that the respondents, who made the representation, did in fact allege such other sense to be the true one, and the sense which they themselves intended. E F G H

The sentence is, beyond question, unhappily expressed, and I think its more natural *prima facie* meaning is that which takes the verb "is" literally, as affirming a present fact, and the words "the present value of the turnover or output" as equivalent to "the present value of the present turnover or output." I cannot, however, consider the words in the context in which they stand to be clear or unambiguous. In any point of view I do not think that they sufficiently explain themselves. Some reference, at least, I to current prices, as a basis of valuation, must be implied in them. Even on the appellant's construction, "the turnover or output" is a term requiring some further definition. Does it mean the rate of production then actually going on, if extended over a whole year, or the total production of the past twelve months, estimated at the then present prices, or the actual yearly production on a series or an average of years? If the demonstrative article "this" had preceded the words "turnover or output" (instead of the definite article "the"), the sense would clearly be that which the respondents say they intended.

- A After repeatedly considering the words in connection with their context and with the evidence, I think the soundest conclusion is that this sentence was honestly intended to be understood as a statement of the value, at the then current prices, of that "turnover or output" of which the works were in the immediately preceding context stated to be "capable," and that, to an intelligent man of business, who knew what those current prices actually were, and who took the trouble of comparing them with the figures given, they would really convey that meaning. The appellant was an intelligent man of business, and it does not appear to me to be a hypothesis inconsistent with anything to which he has sworn, that he may have had the requisite knowledge, and may have made use of it, and may have himself understood the representation in this sense, and have intended (in that sense) to challenge its truth. He did expressly challenge the truth of part of the representation, in the antecedent context, as to the capacity of the works. That the respondents would offer that explanation of it, he had (to my mind) clear notice, by their answers to his interrogatories, sworn or filed on June 12, 1877.

- D Having such notice, and afterwards answering the respondents' interrogatories in the way that he did, and not attempting in any other way to prove that he was deceived by the representation, I cannot think that he has satisfied the burden of proof, which, under these circumstances, was incumbent upon him. The Court of Appeal have so decided; I cannot say that they were wrong. It ought not to be forgotten that the appellant has sworn in precisely the same way as to all the representations which in his pleadings he alleges to be false, as to some of which your Lordships do not accept his construction, and as to others of which it is certain that he was not deceived by, and did not rely on, them. I do not think it necessary to add more, because I agree generally with that view of this case, which I know will be explained to your Lordships in greater detail by LORD BLACKBURN. My conclusion is that the appeal ought to be dismissed with costs.

- F LORD BLACKBURN.—In this case FRY, J., who tried the action, gave judgment for the plaintiff, and ordered and adjudged that the plaintiff should recover £5,000 by way of damages, and that the defendants, David Chadwick, John Oldfield Chadwick, Ebenezer Adamson, and Edwin Collier, should pay the same. The defendants David and J. O. Chadwick and Edwin Collier appealed, and the defendant Adamson separately appealed. In each case the Court of Appeal, consisting of SIR GEORGE JESSEL, M.R., and COTTON and LINDLEY, L.JJ., made an order reversing the judgment and dismissing the action with costs. The appeal to your Lordships is against those two orders. It is not contended that there is any room for a distinction between the cases. If the order reversing the judgment against one set of defendants is right, the order to reverse the judgment against the other is also right.

- The action is brought in the Chancery Division, the endorsement on the writ being that

- H "the plaintiff's claim is for damages sustained by him by his having been induced to take and pay for shares in the Blochairn Iron Co., Ltd., by the fraudulent misrepresentations of the defendants."

- The statement of claim does not depart at all from this, though stating it at more length. I agree in what is said by COTTON, L.J., in *Arkwright v. Newbold* (1) I (17 Ch.D. at p. 320):

"An action of deceit is a common law action, and must be decided on the same principles, whether it be brought in the Chancery Division, or any of the Common Law Divisions, there being, in my opinion, no such thing as an equitable action for deceit."

But though this is, I think, quite accurate, the different mode in which cases are tried makes, I think, a difference in the province of a Court of Appeal which I wish to notice, for, in the view I take of this case, it is important. Had this action

been brought on the old system, before a judge and a jury, and the same evidence given as has been given here, the judge would have had to direct the jury, pointing out to them what it was necessary for the plaintiff to prove in order to support his case, and what evidence there was from which an inference of fact, sufficient to support the plaintiff's case, might be drawn, leaving it to the jury, with proper comment, to draw, or refuse to draw, that inference. And if the jury had found for the plaintiff, on a proper application on behalf of the defendant, a Court of Appeal could have inquired whether the proper direction was given, and, if it was, whether the verdict drawing the inference was so unsatisfactory that a new trial should be granted and the opinion of another jury taken. But the Court of Appeal, however strongly convinced that the jury drew the wrong inference, could not find the verdict for the defendant. A B

When the case is, as it was here, tried before a judge both of law and of fact, he draws the inference of fact. If he finds in favour of the defendant, it may be because he thinks the evidence such that, as a matter of law, no inference of what was necessary to support the plaintiff's case could properly be drawn from the evidence before him, or it may be because, though he thinks such an inference might be drawn, he does not, as a matter of fact, draw it. The result would be the same. If he finds in favour of the plaintiff, it must be because he not only thinks that an inference might be drawn from the evidence, but that he does draw it. The Court of Appeal ought to give great weight, but not undue weight, to the opinion of the judge who tried the cause and saw the witnesses and their demeanour. That gives him considerable advantages over those who only draw their information from perusing the notes. But still, though the Court of Appeal ought not lightly to find against the opinion of the judge who tried the cause, I think that the Court of Appeal, if convinced that the inference in favour of the plaintiff ought not to have been drawn from the evidence, should find the verdict the other way. C D E

In the present case, I think there were four statements by the defendants, alleged to be fraudulent, and to have induced the plaintiff to buy the shares, on which the finding of the judge below, in favour of the plaintiff, was based. Two were disposed of in the course of the argument; two remain. One, that which stated that Mr. Grieve was a director, was, I think, proved to be untrue to the knowledge of the defendants when they made it, and anyone who took shares, induced by the belief that Mr. Grieve would not lend his name to a company without ascertaining that it was a solid one, would, I think, be entitled to maintain an action of deceit. I can very well believe that there might be persons in Greenock or elsewhere who would be influenced by his name to that extent. But the plaintiff, in his evidence on cross-examination, says that he had never heard of Mr. Grieve before, and on the counsel saying: "Then, I suppose, seeing Mr. Grieve's name on the prospectus had not much effect on you," he said nothing, but we are informed that he shook his head, and it is plain that the cross-examining counsel was satisfied with this mute answer, and on re-examination nothing is said more about Mr. Grieve. F G

I think it proved that the plaintiff was not induced to take the shares by this deceit. And I believe all your Lordships agree so far. But there is a much more difficult question depending upon the confused statement as to the turnover and output, which I will examine more in detail afterwards. I have come to the conclusion that, whatever be the meaning of that statement, the plaintiff has not sufficiently proved that it did influence him. I do not say that there is no evidence on which a verdict for the plaintiff might be found. I certainly think that, if trying this cause with a jury, I should not be justified in withdrawing it from the jury. I do not even say that a verdict for the plaintiff, if found by a jury, would be so unsatisfactory that there should be a new trial. But I should have accompanied my direction to the jury with the same observations which I shall hereafter submit to your Lordships as justifying the conclusion to which the Court of Appeal have come and to which I myself come, and to which I ask your Lordships to come, and I think that the jury would, on hearing them, have probably found for the defendants. H I

- A Before going further, I wish to make some observations, for, though I very nearly agree in what is said by SIR GEORGE JESSEL, M.R., he does not quite state what I conceive to be the law. I do not mean to go through the numerous decisions on the subject of an action of deceit. All those which were decided before the date of the last edition of SMITH'S LEADING CASES [8th Edn., 1879] are to be found collected in the notes there to *Chandelor v. Lopus* (2) and *Pasley v. Freeman* (3).
- B In *Pasley v. Freeman* (3) BULLER, J., says (3 Term Rep. at p. 56):

"The foundation of this action is fraud and deceit in the defendant and damage to the plaintiffs. And the question is whether an action thus founded can be sustained in a court of law. Fraud without damage, or damage without fraud, gives no cause of action, but where these two concur an action lies per CROKE, J., 3 BULSTRODE'S REPORTS, p. 95."

- C Whatever difficulties there may be as to defining what is fraud and deceit, I think no one will venture to dispute that the plaintiff cannot recover unless he proves damage. In an ordinary action of deceit the plaintiff alleges that false and fraudulent representations were made by the defendant to the plaintiff in order to induce him, the plaintiff, to act upon them. I think that if he did act upon these representations, he shows damage; if he did not, he shows none. And I think the plaintiff
- D in such a case must not only allege but prove this damage.

It is as to what is sufficient proof of this damage that I wish to make my remarks. I do not think it is necessary, in order to prove this, that the plaintiff always should be called as a witness to swear that he acted upon the inducement. At the time when *Pasley v. Freeman* (3) was decided, and for many years afterwards, he could not be so called. I think that if it is proved that the defendants, with a view to induce the plaintiff to enter into a contract, made a statement to the plaintiff of such a nature as would be likely to induce a person to enter into a contract, and it is proved that the plaintiff did enter into the contract, it is a fair inference of fact that he was induced to do so by the statement. In *Redgrave v. Hurd* (4), SIR GEORGE JESSEL, M.R., is reported to have said it was an inference of law. If he really meant this, he retracts it in his observations in the present case. I think it not possible to maintain that it is an inference of law. Its weight as evidence must greatly depend upon the degree to which the action of the plaintiff was likely, and on the absence of all other grounds on which the plaintiff might act. I quite agree that, being a fair inference of fact, it forms evidence proper to be left to a jury as proof that he was so induced. But I do not think that it would be a proper direction to tell a jury that, if convinced that there was such a material representation, they ought to find that the plaintiff was induced by it, unless one of the things which SIR GEORGE JESSEL, M.R., specified (ante p. 79) was proved*, nor do I think he meant to say so. I think there are a great many other things which might make it a fair question for the jury whether the evidence on which they might draw the inference was of such weight that they would draw the inference. And, whenever that is a matter of doubt, I think the tribunal which

H has to decide the fact should remember that now, and for some years past, the plaintiff can be called as a witness on his own behalf; and that, if he is not so called, or, being so called, does not swear that he was induced, it adds much weight to the doubts whether the inference was a true one. I do not say it is conclusive.

The principal facts in the present case are not now much in controversy. The defendants were employed by Messrs. Hannay & Co. to assist in getting up a limited company to take over their works, and they were to receive a commission (amounting to some thousands of pounds) if they succeeded in floating such a limited company. They prepared a prospectus, and on May 27, 1873, circulated that prospectus with a lithographed letter. On May 31, 1873, the defendants circulated a second letter with what is called an abridged prospectus. Pausing here,

I

* I.e., (i) that the plaintiff knew the facts before he entered into the contract, and, therefore, could not rely on the mis-statements or (ii) that he avowedly did not rely on them, whether he knew the facts or not.

I may say that I do not think it can admit of dispute that the defendants intended A
by those letters and prospectus to induce those to whom they sent them to apply
for shares in the projected limited company. Among others, they sent them to the
plaintiff. He was not a customer or client of the defendants (I do not know
that it would have made any difference if he had been), but he was a man of
business, who had himself turned his own business into a limited company, and
had taken shares in other companies and was quite competent to form an opinion B
for himself. He was, however, in my opinion, entitled to consider the letters
and prospectus as amounting to a representation to him that all stated in that
prospectus was true. He did, a day or two after receiving the second letter and
the abridged prospectus, apply for 100 shares, expecting, as he says, that he might
get 20, but the whole 100 were allotted to him. He paid the calls, amounting
to £5,000 and, the limited company having completely failed, he lost the whole; C
and if he is entitled to recover on the ground that he was by fraudulent representa-
tions induced to take the shares, he is entitled to recover £5,000 as damages.
Nothing that happened after he applied for the shares could have had a part in
inducing him to apply for them, and, therefore, I think that the circular subse-
quently issued by the defendants can have no bearing on this part of the case,
whatever bearing it may have on other questions.

I now proceed to state why I think that the finding that the plaintiff was induced D
to buy the shares by that passage relating to the turnover and output cannot be
supported. The passage is short:

"The iron works are the largest and most important in Scotland and have
been equipped in a substantial, complete, and permanent manner. They can
now produce at the rate of 1,500 tons of finished bars and plates per week, E
or about 75,000 tons per annum. The rolling mills with some slight alterations,
will be capable of turning out 90,000 tons of manufactured iron per annum.
The present value of the turnover or output of the entire works is over one
million sterling per annum."

As early as June 12, 1877, the defendants, in answer to an interrogatory, showed, F
in my opinion, what they at that time said was the meaning of this very obscure
passage. They swore as follows:

"The then value of the annual turnover or output of the works is a necessary
arithmetical result from the amount of the weekly productiveness, of which the
particulars are given by the last preceding paragraph, taken in connection with
the then existing average prices, after allowing reasonable deductions for short
working, defects, and casualties. The current price in Glasgow of bars and
rails in May, 1873, was £13 10s. per ton, of nail rods £15 10s. per ton, of hoops G
£17 per ton, and of sheets £20 per ton. Taking a mean of only £15 per ton
on 1,500 tons per week, and allowing only 50 weeks in the year, the value of
the year's turnover or output would be £1,125,000."

The defendants interrogated the plaintiff, requiring him H

"as to each and every of the allegations of misrepresentations contained in the
statement of claim,"

to separately and categorically state, firstly, what he understood to be the meaning
of the particular representation; thirdly, "in what respect or respects he now
alleges that every or any of the said representations were untrue."

On Jan. 23, 1878, seven months and more after the defendant's answer, which I I
have read, the plaintiff answers thus:

"Firstly, I understood the meaning of such misrepresentations respectively to
be that which the words composing them obviously convey, and I am unable
to express in any other words what I understood to be the meaning thereof. . .
Thirdly, I allege that such misrepresentations are untrue in the manner and
respects appearing in the said statement of claim, and I have nothing to add
to, or detract from, the said statement of claim."

- A It is said that the plaintiff could not say more than that he understood the words in their natural sense. I think that his legal advisers had notice ever since June 12, 1877, if not before, that the defendants contended that the meaning of this obscure phrase was that, at the then present prices of bars and plates, 75,000 tons would be worth more than a million. So understood, the representation was true. This meaning is one at least so plausible that COTTON, L.J., thought it the right meaning.
- B If the statement as to prices at the date of the prospectus had been inserted in it so as to make it read thus: "The current price of bars is now £13 10s. per ton, of plates £15 to £20 per ton, according to their quality; so that, assuming the proportion of bars to plates not to be unreasonably large, the mean price of bars and plates is more than £13 6s. 8d. The present value of the turnover," etc., I think that a reasonable man would have probably thought that the meaning was
- C that put upon it in the defendants' answer to the interrogatories, or, at least, would not have acted, without some further inquiry, on the belief that it meant something else. It is quite true that those prices are not stated on the face of the prospectus, and though the plaintiff, being himself engaged in a branch of the iron trade, was not unlikely to know what those prices were, I do not find it anywhere asserted that he knew them; but it is nowhere, that I can find, asserted that he did not
- D know them.

- I cannot myself see what difficulty there could have been in saying, in answer to the defendants' interrogatory: "I understand the meaning of the representation as to turnover to be that Messrs. Hannays' works had actually during the past year turned out produce that at present prices would be worth more than a million; and that was untrue, for they never produced half as much." When I say this,
- E I mean of course if the plaintiff could truly swear to that effect. If he did not so understand it, there was of course a very good reason for not so swearing. It is true that the answers to interrogatories are prepared by the legal advisers, and the plaintiff, if at the trial he had sworn: "I did so understand it," had been asked, "Then, if so, why did you not say so in January, 1878?" might have had an excuse by saying, "I swore what was true, and if I should have sworn more, that was my
- F lawyer's fault, not mine." But he never at any time, from first to last, swears anything of the sort, and I think it is impossible now to listen to the suggestion that the counsel for the plaintiff, at the trial in November, 1881, were taken by surprise at finding that the defendant's counsel still put on this passage the interpretation which had been put upon it in the answer to the interrogatories so long ago as June, 1877. If they were surprised, they had no right to be so. But I
- G think the fair conclusion is that they feared to ask the question in examining the plaintiff in chief lest he should answer that he did not understand the prospectus as meaning that there had been an actual output during the last year, or at least that he would not swear that he was influenced by his belief in that statement. Counsel for the defendants did not choose, on cross-examination, to risk bringing out of a hostile witness evidence which his own counsel had not brought out in
- H chief. If I am right in the opinion which I have already expressed, that the burden lay on the plaintiff to prove that he was induced, I think they acted wisely. If the plaintiff had made a *prima facie* case which required affirmative proof of an answer from the defendants, I think it would be otherwise.

- It will be observed that this opinion is quite irrespective of what the true construction of the prospectus is. I should think that a reasonable man would give much
- I more weight to a statement of fact that the actual produce of the works had been so much than to a statement that their productive power was estimated at so much, and, therefore, that the statement, if understood as FRY, J., and LINDLEY, L.J., and I believe some of your Lordships think, was material. I should think that a reasonable man reading this prospectus would hardly act on the faith of such an obscure statement without further inquiry. But he might so act. My reason for supporting the judgment of the Court of Appeal is that I do not think it proved that he did so act. In the case of the mis-statement as to Mr. Grieve being a director, I think it positively proved that he did not.

I may say, though it is not necessary for the decision of the case, that I think, A
as a matter of law, the motive of the person saying that which he knows not to be
true to another, with the intention to lead him to act on the faith of the statement,
is immaterial. The defendants might honestly believe that the shares were a capital
investment, and that they were doing the plaintiff a kindness by tricking him into
buying them. I do not say this is proved, but if it were—if they did trick him
into doing so—they are civilly responsible as for a deceit. And if, with intent to B
lead the plaintiff to act upon it, they put forth a statement which they know may
bear two meanings—one of which is false to their knowledge—and thereby the
plaintiff, putting that meaning on it, is misled, I do not think they can escape
by saying he ought to have put the other. If they palter with him in a double
sense, it may be that they lie like truth; but I think they lie, and it is a fraud.
Indeed, as a question of casuistry, I am inclined to think the fraud is aggravated C
by a shabby attempt to get the benefit of a fraud without incurring the responsibility.
But I do not think there is any case made out against the defendants of that sort.

There is a third possible case, that a man may make a statement which he
intended to mean one thing only, but which negligently and stupidly he sends out
in such a shape as to bear another meaning, and the plaintiff acts upon that mean-
ing. On that I need only say that the defendant, in such a case, would have
great difficulty in establishing that it was only honest blundering; but if he did,
as for instance, by showing that his manuscript sent to the printer contained the
word "not," which by some printer's error was omitted in the published prospectus,
or that 10,000 was, by a printer's error, printed 100,000, which escaped notice in
revising the proofs, I should say it was not a fraud, though perhaps gross negli-
gence. But the question whether in such a case there would be any, and if any D
what, remedy for the party misled, may, I think, safely be left for decision when
it arises. It never has arisen, and I think it not likely ever to arise. It certainly
does not arise now. E

LORD WATSON concurred.

LORD BRAMWELL.—I am content that your Lordships' judgment should be F
as indicated by the noble and learned Lords who have spoken; but I am not content
with the reasons they have given. It seems to me that the prospectus is capable
of but one meaning. I know, as a matter of fact, that a most able and acute
mind has said that it was capable of a different meaning from that which I think
it is alone capable of, but what I mean is that, according to my understanding, this
part of the prospectus—the main matter—that which alone is of any consequence, G
is capable of but one meaning, namely, that the actual output was a million a
year, or I think over a million a year. I quite agree with the LORD CHANCELLOR,
who has said that it may mean one or other of two things; it may mean that the
actual output was at that rate, or that it had come to over that figure in a year.
But that either it was at the rate of over one million a year, or was in fact over one
million a year, seems to me the only meaning that can be attached to that state- H
ment in the prospectus.

If that was the meaning of it, that statement was untrue, because there neither
was an output at that rate, nor was there an output actually of over a million
a year. Further, I think the plaintiff said that he so understood it. It was
unfortunate that he was not more examined or more cross-examined, but I declare
the man gave the only answer I could have given if I had been in his situation: I
"I understood it according to its natural meaning." I do not see what more he
could do, and it seems to me impossible to suppose that he was saying: "I understood
it to mean that fifteen times £75,000 came to over one million," because that he
knew perfectly well, and everybody else knew; and if his answer is understood as
meaning that, his answer is understood as meaning: "I make no complaint of
untruth in it, because it simply comes to this, that £75,000 multiplied by fifteen
is over one million." It seems to me, therefore, that the statement was untrue:
that it was understood in the sense in which it was untrue, and consequently that

- A the plaintiff proved all that he could prove, the only other possible question being one of inference to a certain extent, namely, was it fraudulent? I confess that upon that matter I have entertained the very greatest doubt, and do entertain the greatest doubt. Assuming that the statement means that the actual turnout was over one million a year, or at the rate of over one million a year, and assuming
- B that was a fraudulent statement on the part of the defendants. I am not satisfied that it was, and I will shortly state my reasons for not being satisfied that it was. I cannot but think that the defence which has been made for the defendants is one they would not have made for themselves if they had been let alone. I think it is their counsel's defence. I cannot see that it is their defence, because the defendants state that they were told by Hannays, who were respectable—people
- C to be trusted—that the actual rate of production was such that it was over one million a year. They have sworn that they were told so and that they believed it, and, in addition to that, one of them has given the convincing proof of his sincerity that he staked £5,000 upon it, which he has lost. I am not satisfied that that man was telling an untruth; I cannot be satisfied of it. I cannot but think it was a most reckless prospectus, and certainly, with regard to the statement about Mr.
- D Grieve being a director, when they issued it they knew that was untrue, which throws a great suspicion on the case. But I am not satisfied, and I cannot be satisfied, that these men were wilfully making a statement which they knew to be untrue. They have sworn that they had the information from Hannays, and that they believed it.

- Under these circumstances I am not dissatisfied that your Lordships should
- E affirm the judgment that has been given in their favour. If the question here had been whether they should be in any way punished for a most improvident and rash number of statements (more than one) in the prospectus, I should have been very much inclined to say "yes"; but I am not sure that I should have gone beyond the £5,000 which they have been fined. But that is not the question. The question is whether we are satisfied that it was a fraudulent as well as what it
- F was, to my mind, an untrue, statement. I am not satisfied of that. I confess I should very much have liked, if it had been a possible thing, to have tried this case over again. I hope I shall not be misunderstood as suggesting that I could have tried it better than anybody else, but I should like to have been present at the trial and to have had an opportunity of putting some questions to the witnesses, both the plaintiff's and the defendants' which it seems to me might very properly
- G and usefully have been put. But that is an impossibility. We must either, as I understand it, affirm the judgment or reverse it, and I am not so satisfied, as I have said, that a fraud has been made out against these defendants that I am content to reverse it.

Appeal dismissed.

- H Solicitors: Darley & Cumberland for Newstead & Wilson, Leeds; Ashurst, Morris, Crisp & Co.; H. T. Chambers.

[Reported by C. E. MALDEN, ESQ., Barrister-at-Law.]

EARL DE LA WARR *v.* MILES AND ANOTHER

[COURT OF APPEAL (James, Brett and Cotton, L.JJ.), February 5, 7, March 14, 15, 18, 19, 21, April 4, 1881]

[Reported 17 Ch.D. 535; 50 L.J.Ch. 754; 44 L.T. 487;
29 W.R. 809]

Commons—Common—Right of—Acquirement by prescription—Evidence—Acts done as right in respect of tenement owned by claimant—Continuous exercise.

Section 1 of the Prescription Act, 1832, provides that on a claim to any right of common, made by custom, prescription, or grant, when such right, profit, or benefit shall have been taken and enjoyed without interruption by the person claiming the right for the full period of sixty years, the right shall be deemed absolute and indefeasible unless it was enjoyed by consent.

To bring himself within the section the person claiming the right must show that the acts which he claims a right to do are such as could be supported as lawful by custom or prescription, or could have been lawfully granted to him, and that the acts which he has done in purported exercise of the right were done as of right, i.e., not secretly, not as acts of violence, and not under permission from time to time given by the person on whose soil the acts were done. It must also be shown that the acts were done in respect of some tenement owned either by the claimant or by him and his predecessors in title; that the period of prescription relied on began at a certain time; and that the right claimed, if it is capable of being so exercised, has been exercised from year to year from that time to the beginning of the action. The fact that other persons in the same circumstances as the claimant to the right make the same claim will not derogate from his special right.

By a decree of the Duchy Court of Lancaster in 1693, in a friendly suit for the establishment of the respective rights of the lord and the commoners in a former royal forest, the commoners were declared entitled, in respect of their tenements, to the sole common pasturage and herbage in 6,400 acres of the forest thereby set apart to meet the requirements of the commoners.

Held: the decree gave to the commoners the ordinary right of common of pasturage or herbage only, and, the decree being unambiguous in its terms, evidence that for upwards of sixty years past the commoners had exercised the supposed right of cutting and carrying away for use on their tenements brakes, fern, heather, and other litter, was not admissible to show that such a right was intended to be recognised by the decree.

Notes. Distinguished: *Lyell v. Hothfield*, [1914] 3 K.B. 911. Referred to: *Lemaitre v. Davies* (1881), 19 Ch.D. 281; *Hollins v. Verney* (1884), 13 Q.B.D. 304; *Glazier v. Rolls* (1889), 59 L.J.Ch. 63; *Brocklebank v. Thompson*, [1903] 2 Ch. 344.

As to rights of pasture by prescription, see 5 HALSBURY'S LAWS (3rd Edn.) 312-314; and for cases see 11 DIGEST (Repl.) 5 et seq., 29 et seq. As to the creation of an easement under the Prescription Act, 1832, see 12 HALSBURY'S LAWS (3rd Edn.) 555-560; and for cases see 19 DIGEST (Repl.) 57 et seq. For the Prescription Act, 1832, see 6 HALSBURY'S STATUTES (2nd Edn.) 669.

Cases referred to:

- (1) *Chilton v. London Corpn.* (1878), 7 Ch.D. 735; 47 L.J.Ch. 433; 38 L.T. 498; 26 W.R. 474; 11 Digest (Repl.) 23, 272.
- (2) *Blewett v. Tregonning* (1835), 3 Ad. & El. 554; 1 Har. & W. 431, 432. n.; 5 Nev. & M.K.B. 234, 308; 4 L.J.K.B. 223, 234; 111 E.R. 524; 11 Digest (Repl.) 21, 246.
- (3) *Hamerton v. Honey* (1876), 24 W.R. 603; 17 Digest (Repl.) 4, 9.

A Also referred to in argument :

Suckerman and Coates v. Warner (1613), 2 Buls. 248.

Smith v. Earl of Brounlow (1870), L.R. 9 Eq. 241; 21 L.T. 739; 34 J.P. 293; 18 W.R. 271; 11 Digest (Repl.) 36, 505.

Warrick v. Queen's College, Oxford (1870), L.R. 10 Eq. 105; 39 L.J.Ch. 636; 23 L.T. 63; 18 W.R. 719; affirmed, 6 Ch. App. 716; 40 L.J.Ch. 780; 25 L.T. 254; 19 W.R. 1098, L.C.; 11 Digest (Repl.) 16, 179.

Sewers Comrs. of London v. Glasse (1872), 7 Ch. App. 456; 41 L.J.Ch. 409; 26 L.T. 647; 20 W.R. 515, L.J.J.; 11 Digest (Repl.) 22, 269.

Sewers Comrs. v. Glasse (1874), L.R. 19 Eq. 134; 44 L.J.Ch. 129; 31 L.T. 495; 23 W.R. 102; 11 Digest (Repl.) 12, 115.

Potter v. North (1669), 1 Lev. 268; 2 Keb. 513, 517; 1 Saund. 346; 1 Vent. 383; 83 E.R. 400; 11 Digest (Repl.) 14, 146.

Greenslade v. Darby (1868), L.R. 3 Q.B. 421; 9 B. & S. 428; 37 L.J.Q.B. 137; 18 L.T. 463; 32 J.P. 437; 17 Digest (Repl.) 10, 83.

Stammers v. Dixon (1806), 7 East, 200; 3 Smith, K.B. 261; 103 E.R. 77.

Johnson v. Barnes (1872), L.R. 7 C.P. 592; 41 L.J.C.P. 250; 27 L.T. 152; affirmed (1873), L.R. 8 C.P. 527; 42 L.J.C.P. 259; 29 L.T. 65, Ex. Ch.; 11 Digest (Repl.) 14, 148.

Duke of Beaufort v. Swansea Corp'n. (1849), 3 Exch. 413; 12 L.T.O.S. 453; 154 E.R. 905; 17 Digest (Repl.) 50, 582.

Calmady v. Rowe (1844), 6 C.B. 861; 4 L.T.O.S. 96; 136 E.R. 1487; 11 Digest (Repl.) 655, 791.

Bean v. Bloom (1773), 2 Wm. Bl. 926; 96 E.R. 547; sub nom. *Beau v. Bloom*, 3 Wils. 456; 11 Digest (Repl.) 17, 190.

Grimstead v. Marlowe (1792), 4 Term Rep. 717; 100 E.R. 1263; 11 Digest (Repl.) 25, 303.

Rogers v. Allen (1808), 1 Camp. 309; 19 Digest (Repl.) 221, 1626.

Tewkesbury (Bailiffs, etc.) v. Bricknell (1808), 1 Taunt. 142.

Lord Rivers v. Adams (1878), 3 Ex.D. 361; 48 L.J.Q.B. 47; 39 L.T. 39; 42 J.P. 728; 27 W.R. 381; 11 Digest (Repl.) 17, 191.

A.-G. v. Mathias (1858), 4 K. & J. 579; 27 L.J.Ch. 761; 31 L.T.O.S. 367; 4 Jur.N.S. 628; 6 W.R. 780; 70 E.R. 241; 11 Digest (Repl.) 31, 388.

Hoskins v. Robins (1671), 2 Keb. 842; Poll. 13; 2 Saund. 319; 1 Vent. 123, 163; 84 E.R. 533; sub nom. *Roberts v. Hoskins*, 2 Keb. 757; sub nom. *Hopkins v. Robinson*, 2 Lev. 2; 1 Mod. Rep. 74; 11 Digest (Repl.) 14, 140.

Welcome v. Upton (1840), 6 M. & W. 536; 9 L.J.Ex. 154; 151 E.R. 524; 11 Digest (Repl.) 13, 139.

Higham v. Ridgway (1808), 10 East, 109; 103 E.R. 717; 22 Digest (Repl.) 93, 709.

Davies v. Humphreys (1840), 6 M. & W. 153; 9 L.J.Ex. 263; 4 Jur. 250; 151 E.R. 361; 22 Digest (Repl.) 104, 837.

Marks v. Lahée (1837), 3 Bing.N.C. 408; 4 Scott, 137; 6 L.J.C.P. 69; 132 E.R. 467; 22 Digest (Repl.) 106, 870.

Doe d. Kingslake v. Beviss (1849), 7 C.B. 456; 18 L.J.C.P. 128; 12 L.T.O.S. 452; 137 E.R. 181; 22 Digest (Repl.) 46, 292.

Duke of Portland v. Hill (1866), L.R. 2 Eq. 765; 35 L.J.Ch. 439; 15 W.R. 38; 11 Digest (Repl.) 21, 250.

Campbell v. Wilson (1803), 3 East, 294; 102 E.R. 610; 19 Digest (Repl.) 70, 388.

Angus v. Dalton (1878), 4 Q.B.D. 162; 48 L.J.Q.B. 225; 40 L.T. 605; 43 J.P. 412; 27 W.R. 623, C.A.; affirmed sub nom. *Public Works Comrs. v. Angus & Co., Dalton v. Angus & Co.* (1881), ante p. 1; 6 App. Cas. 740; 50 L.J.Q.B. 689; 44 L.T. 844; 46 J.P. 132; 30 W.R. 191, H.L.; 19 Digest (Repl.) 6, 4.

Codling v. Johnson (1829), 9 B. & C. 933; 4 Man. & Ry.K.B. 671; 8 L.J.O.S.K.B. 68; 109 E.R. 347; 19 Digest (Repl.) 112, 686.

Gateward's Case (1607), 6 Co. Rep. 596; 77 E.R. 344; sub nom. *Smith v. Gatewood, Cro. Jac.* 152; 11 Digest (Repl.) 32, 410.

- Sowerby v. Coleman* (1867), L.R. 2 Exch. 96; 36 L.J.Ex. 57; 15 L.T. 667; 31 A
J.P. 263; 15 W.R. 451; 17 Digest (Repl.) 13, 128.
- Selby v. Robinson* (1788), 2 Term Rep. 758; 100 E.R. 409; 17 Digest (Repl.) 16,
173.
- Clayton v. Corby* (1842), 2 Q.B. 818; 2 Gal. & Dav. 174; 11 L.J.Q.B. 239; 114
E.R. 816; subsequent proceedings (1843), 5 Q.B. 415; Dav. & Mer. 449; 14
L.J.Q.B. 364; 8 Jur. 212; 114 E.R. 1306; sub nom. *Doe d. Clayton v. Corby*, B
2 L.T.O.S. 207; 19 Digest (Repl.) 220, 1621.
- Baylis v. Tyssen-Amhurst* (1877), 6 Ch.D. 500; 46 L.J.Ch. 718; 37 L.T. 493; 11
Digest (Repl.) 8, 49.
- Blundell v. Catterall* (1821), 5 B. & Ald. 268; 106 E.R. 1190; 25 Digest (Repl.)
8, 48.
- Hanmer v. Chance* (1865), 4 De G.J. & Sm. 626; 6 New Rep. 4; 34 L.J.Ch. 413; C
12 L.T. 163; 29 J.P. 324; 11 Jur.N.S. 397; 13 W.R. 556; 46 E.R. 1061,
L.C.; 19 Digest (Repl.) 70, 387.
- Carr v. Foster* (1842), 3 Q.B. 581; 2 Gal. & Dav. 753; 11 L.J.Q.B. 284; 6 Jur.
837; 114 E.R. 629; 19 Digest (Repl.) 81, 471.
- Parker v. Mitchell* (1840), 11 Ad. & El. 788; 3 Per. & Dav. 655; 9 L.J.Q.B. 194;
4 Jur. 915; 113 E.R. 613; 19 Digest (Repl.) 79, 449. D
- Lowe v. Carpenter* (1851), 6 Exch. 825; 20 L.J.Ex. 374; 17 L.T.O.S. 203; 15
Jur. 883; 155 E.R. 779; 19 Digest (Repl.) 79, 450.
- Bailey v. Appleyard* (1838), 8 Ad. & El. 161; 3 Nev. & P.K.B. 257; 7 L.J.Q.B.
145; 112 E.R. 798; sub nom. *Bayley v. Appleyard*, 2 Jur. 872; sub nom.
Appleyard v. Bayley, 1 Will. Woll. & H. 208; 11 Digest (Repl.) 5, 1.
- Staffordshire and Worcestershire Canal Navigation Proprietors v. Birmingham* E
Canal Navigations Proprietors (1866), L.R. 1 H.L. 254; 35 L.J.Ch. 757; 38
Digest (Repl.) 447, 973.

Appeal by the defendants from a decision of BACON, V.-C., in an action brought by Earl De la Warr, as lord of the manor of Duddleswell and tenant for life of Ashdown forest in Sussex, against the defendant John Miles in respect of an alleged trespass committed by him under the instructions of his employer the defendant Bernard Hale, in cutting and carrying away heather and litter from part of the waste lands of the forest.

The forest, containing 13,991 acres, was anciently a royal forest belonging to the Crown in right of the Duchy of Lancaster, which in 1661 King Charles II disafforested, and in 1677 granted to the plaintiff's predecessors in title. The defendant Hale in his statement of defence, after stating that the tenants of the manors of Maresfield and Duddleswell, both freehold and copyhold, were with reference to their common rights over the forest called "free tenants," the tenants of other manors near "foreign tenants," and persons holding both descriptions of land "inter-tenants," justified the trespass, stating (i) in para. 10 of his statement of defence, that "the said free tenants, foreign tenants, and inter-tenants, had and exercised as of right and without interruption previously to the year 1693, from time whereof the memory of man runneth not to the contrary, the several and respective rights of common in and over the said 13,991 acres which they enjoyed, or to which they were entitled as aforesaid"; (ii) in para. 2, that, under a decree in the Duchy Court in 1693, it was decided that the complainants (the predecessor in title of Lord De la Warr), their heirs and assigns, owners and proprietors of the soil of the said forest, should for ever hold and enjoy certain lands amounting to about 7,591 acres of the forest to be inclosed or improved by them, and that the defendants (through one of whom, John Day, the present defendant Bernard Hale derived title) should be for ever excluded from having or claiming any common pasturage, pannage, or herbage within the 7,591 acres so allotted to the complainants), and that the defendants, their heirs, tenants, and assigns, and all other persons having right of common in the said forest according to their respective interests therein, should from time to time have and take the sole

- A common pasturage and herbage of the remaining 6,400 acres of the forest, and that the complainants, their heirs and assigns, tenants and farmers, should be for ever excluded from having or claiming any common of pasture or herbage upon or in the said 6,400 acres so left for common as aforesaid; (iii) in para. 13, that, since the year 1693, the said John Day, and the other commoners, and their heirs, successors, and assigns, had taken and enjoyed, by themselves or their
- B tenants, in, over, and from the aforesaid 6,400 acres, the sole common pasturage and herbage, including the brakes, fern, heather, and litter growing in and upon the said 6,400 acres, and their rights had been recognised by all owners of the forest until the present Lord De la Warr disputed them; (iv) in para. 15, that the defendant Hale and Charlotte Cecilia his wife and their predecessors in title, owners of the tenement called Suntings, otherwise Fordland, otherwise Alfrey,
- C and the several occupiers of the same tenement, from time to time had actually taken and enjoyed as of right, in respect of the said tenement, without interruption, for the full periods of thirty years and sixty years respectively next preceding the commencement of this action, the right, profit, or benefit of cutting and carrying away brakes, fern, heather, and litter in and from the said 6,400 acres sufficient for the manurage, improvement, maintenance, sustaining, repairing, and amending the said tenement. BACON, V.-C., who in his judgment held that the decree of 1793 gave to the commoners the ordinary right of common of pasturage, or herbage, and that, the decree being unambiguous, evidence of acts committed subsequent to the decree was not admissible to explain its meaning, and also that the right claimed was a profit a prendre in alieno solo, and could not be claimed by prescription, granted an injunction against the defendants. The defendants appealed.
- E *Joshua Williams, Q.C., R. E. Webster, Q.C., and P. H. Lawrence* for the defendants.
Elton, Q.C., Cope and Costelloe for the plaintiff.

JAMES, L.J.—We are of opinion that, upon the only point on which we have heard the plaintiff, which was whether Mr. Hale had made out the defence in

F para. 15 of his defence, Mr. Hale has so made out his defence. Therefore, he will be entitled to the costs of the suit. The suit fails, because he has not done anything wrong, but has justified what he has done.

- The defendant, Hale, has proved *de facto*—he has given evidence which has not been cross-examined on—that for a period of upwards of sixty years, he has claimed to take and has taken, not by way of permission, not by way of concession on the
- G part of the lord, but as being his own right and as of right, that is to say, as a thing which he was entitled to do upon some right or other which he claimed, the litter from the forest to the farm for the use of that farm for the agricultural purposes to which litter would be put. Is that within the Prescription Act? It appears to me that, if we were to hold it was not, it would be repealing the Act. What the Act was intended to legalise and to allow was a thing done, as of right,
- H for a sufficient period, that is to say, for sixty years. It has been contended on behalf of the plaintiff that not only must it be shown to have been done as of right, but it must be shown to have been done under a claim of right, which claim would itself be capable of being supported as a valid prescription, or valid grant, or valid custom, and that if you could show that the thing was done under some claim which was not a claim to a valid legal right, it must fail.

- I In my opinion, that is not so in point of law, and is not so in point of fact, in this case. It does not signify, as it seems to me, what the exact language of the claim, if there were such, was, provided we know that the thing actually done was a thing which could have been legally granted to the man who was doing it, and which, therefore, could have had a legal origin. The thing which was actually done, according to the evidence, is exactly that which is legal, the exercise of a right to go on the forest to cut litter—not for the purpose of sale, not for any other purpose, but for the purpose of being used on the farm to which that litter was carried. That would be a good subject of prescription. If the thing has been

done; if the same man has been doing it for sixty years for the purpose of sale, that may be good. I do not know what the limit would be, the case being confined to one particular matter growing upon the common, that is, the litter. The user here is confined to the taking of the litter to the farm-yard, there to be used as litter. Then it is said: "Yes, but you are doing this as one of a great body of persons."

There might have been something in the objection to be considered, if what was done was done by every inhabitant and everybody, and you could never distinguish between what one inhabitant or person was doing from what the other was doing; that there was nothing by which you could infer the acts of the one which did not apply to the others. I may give an example of that. It is not because the owner of a particular house in London shows that he and all the people who have lived in that house have gone every year to Hampstead Heath, and have run about the heath, that he could establish a particular right, as annexed to that house, to go upon Hampstead Heath, when it was quite clear that he was only going there like every other person who was coming from London who chose to go and recreate himself there. But here it is manifest from the evidence that there was a distinct right, a distinct right of a legal character, claimed by a particular class of persons who could in law have taken that right; that is to say, not *qua* class, not a corporation or quasi corporation, but persons constituting a class, that is, owners of particular tenements, every one of whom might have had a valid legal grant in exactly the same words to the same extent as this defendant would have had a legal grant. It is not a grant to a class, but they are a class because every one of them has got the same right.

Therefore, it is not a claim by custom, it is not a claim by a body of persons incapable of receiving such a grant, but a claim by each and every of a particular defined class of persons, each of those persons being recognised and being marked in respect of a particular tenement as appurtenant to which he was claiming the right. In that there was nothing illegal. There was nothing, in point of law, to prevent a grant of this kind, which might have been made if the lord had chosen to do it: "Whereas certain persons have already got the right of sole common of pasture upon the land, now I do grant to every one of those same persons that, in addition to that right of common, each and every of them shall have the right of cutting litter for the improvement of his farm." That would have been a perfectly valid grant, even if granted by one general deed to each person. Therefore, there is nothing in the fact that this defendant was doing that which every other person in the same circumstances as himself was doing, and nothing, therefore, to derogate from his own special right, that other persons in the same condition with himself were doing exactly the same thing. It cannot be brought up to this, that he and all of them were in fact constituting members of that class of trespassers which he and the other gentlemen, with the lord, were endeavouring to the best of their powers to put down because they were trespassers and because they had no rights. Therefore it appears to me that that objection as to the nature of the claim made by the defendant fails.

Then it is said, with respect to that same objection, that it is not proved that the defendant did not buy from a wrong-doer—that, instead of cutting the fern himself, he was not buying from some of the persons there during some of the years. To my mind, it is so improbable as to be absolutely incredible, that a man, believing he had the right which this defendant must have supposed he had (a right acknowledged by the lord, as it was believed, and to exist by everybody in the forest), must be regarded as a trespasser, and not as a man taking that which was his right; and that, instead of cutting the fern himself, or employing a man to cut it, he was paying the man for that which that man must have been stealing from him and the other commoners and the lord. I would as soon believe that he was paying a man who had stolen his mangel-wurzels or swedes instead of taking the mangel-wurzels and swedes himself from his field. I am satisfied upon that. Therefore, there was no foundation for the long criticism

A we had on the supposed nature of the user which Mr. Hale had; and, without going further into it, speaking as a judge of fact, I am satisfied that Mr. Hale has proved, not that he bought the fern from anyone, but that he did, by himself and his workmen, for the whole period of sixty years that was required by the statute, go upon this forest and cut the fern and take it to be enjoyed on his farm.

B There was another point, which, as we are only dealing with Mr. Hale, may not be so important, and which we did not call upon the plaintiff's counsel to deal with, that is to say, as to what was the construction of that decree of the Duchy Court, and what was the effect of that decree. It is impossible, as it seems to me, to give to that decree the meaning which has been attempted to be assigned to it by the defendant's counsel. When one sees what the object of the suit was, and the nature of the suit, the decree seems to me to be plain beyond
C all reasonable doubt. The lord, having a very large waste, and a waste that evidently was a great deal more than was wanted for the commonable cattle of the persons who had rights of common, commenced a suit in the Duchy Court of Lancaster, which had jurisdiction over this matter. It is said to have been an amicable suit, and apparently it was an amicable suit for the purpose of seeing how much of the waste he could take without injuring the commoners, and how much ought to be left to the commoners for the exercise of their rights of common.
D It was an approvement under the Statute of Merton through the medium of the court, to ascertain how much the lord could properly and justifiably approve under the statute as against the common of pasture. That appears to me to be the only thing that was determined, and the only thing that was intended to be determined,
E except some question about particular estovers which are comparatively of little amount, as to the right of estovers of birch, willow, and alder.

All that was done afterwards was this: It was said,

F "Whereas the commoners and the lord have now the right of enjoying the whole pasture by the mouths of their cattle in common, you, the commoners, shall now, on a particular part of that common, have the sole common pasturage and herbage. You shall have it there, and the lord shall take the rest for himself, and shall not have any more common of pasture or herbage upon that part which has been assigned to the commoners."

G It appears to me that the meaning of that was perfectly plain, that they were to have not any new common—no new right in the herbage or pasturage—but the enjoyment as under the old right of common of pasture and herbage in this spot exclusive of the lord, sole as against the lord, but in common as between themselves, and that the lord was to be excluded from having any further right of common with them in that which was the commonable right, the common, ordinary, well-known common of pasture or herbage which was known to the law at that time as it is now known.

H I am of opinion, therefore, upon that, that we cannot enlarge it. We can only say that they did take that common of pasture and common of herbage to themselves, exclusive of the lord, which they had before—that was common of pasture in the ordinary sense of the word—the taking of the grass by the mouths of their commonable cattle. Therefore, it appeared to me, and to the other members of the court, that the decree was perfectly clear upon this point, and that we could
I not attend to the great body of evidence that was used for the purpose, as it was said, of construing an ambiguous term (which I do not find in that decree) by the evidence of user. The user would not have explained it, and it was not admissible for the purpose of explaining it. Upon that part of the case the defendant fails in establishing, by user anterior to the decree, that any such right existed anterior to the decree when the matter was before the Duchy Court. I am of opinion, upon the whole, that the defendant has failed in everything but the right set up in para. 15 of his defence, and that he is entitled to the judgment of the court upon that paragraph, and, therefore, to have the action dismissed.

BRETT, L.J.—This action was brought claiming relief in respect of certain alleged acts which were said to be trespasses, and in respect of a manifest intention to continue those acts, unless the so-called trespassers were stopped. The action was brought by the owner of the land. Those acts of which complaint was made were necessarily, *prima facie* trespasses, and the defendants were called upon to defend those which were *prima facie* wrongful acts done by them or by their servants. The defendants, by their statement of defence, set up several distinct defences. Their first defence was founded upon an allegation that the acts now complained of had been in suit before between the predecessors of the plaintiff and the predecessors of the defendants, and that those acts had been determined by a decree, which was pleaded, to be lawful acts on the part of the predecessors of the defendants. Their first defence, therefore, raised a question as to what was the true construction of that decree. They next assumed to defend on the ground of a common law prescription, that is to say, an immemorial prescription on the part of the predecessors of the defendants and others, to do the acts complained of. They then, as I apprehend, set up another defence, which was that a grant by the predecessors of the plaintiff had been made to the predecessors of the defendants and others, to do these acts, which grant was lost. They then, as an absolutely distinct defence, set up the user, of that which is complained of by the predecessors of the defendants for sixty years under the Prescription Act.

With regard to the defence under the decree. The words of the decree were relied upon, and we had very learned and abstruse readings given to us from old books, and from dictionaries, in order to lead us to the conclusion that in the words "the sole common pasturage and herbage" was included the right to cut and carry away the brake, fern, heather, and litter, for the use of the farms of the persons such as the defendants. I declined, upon reading the whole of the proceedings in the suit in which that decree was made, to construe that decree by old books, or by dictionaries. It seems to me that the words, taking the whole of the decree and the pleadings in that suit, are not ambiguous, but are perfectly plain, quite irrespective of the use of each of the words. It seems to me apparent from the pleadings in that case that those who were defendants in it were claiming nothing but a well-known right, namely, the right of common of pasturage and herbage, that is to say, a right in respect of their tenements, and in respect of certain cattle, to feed upon this waste by the mouths of their cattle; not merely the grass, but whatever the cattle would eat, which I take to be included under the word "herbage" in that decree. It is clear from the pleadings that that was all they claimed as being part of the value of the whole waste to them, which was to be taken into consideration in proportioning that which was the real subject-matter of that suit, namely, how much the lord should be entitled to inclose, and how much should be left open for the commoners. If that was the state of the pleadings, then the meaning of the decree seems to me to be perfectly clear. It only dealt with that which was claimed. It empowered the lord to inclose a certain portion of the waste, and it left the other portion to be used by the commoners in the same way as they had claimed, but shut out the lord from that which would otherwise be a right of his, namely, to share in that mode of dealing with the waste. It shut him off from so dealing with the waste, on his part, in that part of the waste or forest which was not inclosed.

Therefore, the real meaning of the decree was, that, as to these 6,400 acres which were left open, the commoners were to have the right of taking estovers, which is what they had claimed, in certain woods, and in certain woods only, and were to have the right, with regard to the cattle on their farms, to common of pasture and herbage in the sense I have stated, that is, feeding by the mouths of their cattle, and the lord was to give up his right to put his own cattle on that part of the forest and any right of taking that wood which they would have to take as estovers; but it left the lord in the possession, with regard to that uninclosed part, of every other right which he had possessed before. It did not, therefore, give the commoners, who were then setting up their rights, the right

A which they now claim, namely, to cut brake, fern, heather, and litter growing upon that open waste for the use of their farms. That is what they had not claimed, and that was not given to them. Indeed, that subject-matter did not enter into the contemplation of any of the parties to that suit at all. Therefore, upon the interpretation of the decree, I think that the contention of the defendants here has been wrong from the beginning, and that the plaintiff was right in his contention. It was attempted to make us come to a contrary conclusion by a mass of evidence of alleged user since the time of that decree until now, for the purpose of construing that decree. It is obvious that you may always give evidence of the state of things existing at the time that a decree is made or a deed is executed. It is very rarely indeed that you are allowed, for the purpose of construing a document, to bring in evidence of what has been done since; but, at all events, it seems to me to be clear that that evidence was not admissible for that purpose, because upon the true construction of the decree, taking it in company with the pleadings in the suit which ended in that decree, there was no ambiguity in the words or phrases at all, and such evidence was, to my mind, inadmissible, and certainly cannot control the construction of the document.

D It was alleged by way of defence, that we ought to find a common law prescription or an immemorial prescription; and it was said that from the modern user we have a right to infer such a prescription. It seems to me that no such claim was made in the suit in the Duchy Court at that time, and that no such practice existed; because, if there had been any such claim, it would have been most material for the defendants to put it forth in order to see how much of the forest should be left to them. It seems to me to be clear that no such practice existed before that decree, as is now alleged, and that no such right was claimed, and, therefore, any claim from a more modern usage to an immemorial prescription is put an end to. It is shown by that fact alone that the user must have commenced as a claim of right after that decree, and, therefore, within a known and given time.

E The other allegation was that we ought to presume a lost grant. The doctrine with regard to presumption of lost grants, and what it is necessary to prove, and what ought to be in the mind of the court, is at the present moment a very much controverted matter. For my part I have always been of opinion, and, until corrected, I must hold to that opinion, that, if you are asked to find the fact of a grant and say that it has been lost, you must have some belief that it was so. I decline to find it. It seems to me that there is no evidence upon which one ought to find that there had been a grant, since the time of that decree, by the owner of this property, and that such a grant has been lost.

G Therefore, the case comes to be whether the defendant has made out his defence under the Prescription Act; that is the only defence which is left for him to maintain. The first point with regard to that raises the question: What is the true construction of the Prescription Act? It seems to me that, in order to maintain a defence under the Prescription Act, those who set it up must first show, if they set up a prescription for sixty years, that they have exercised—that is, that they have taken or enjoyed as a fact for sixty years—a certain right, or profit, or benefit. Right, in that sense, means a right to do something; that is, a right which can be taken or enjoyed. In the present case, therefore, what the defendant has to show is that he and his predecessors have, for sixty years, taken or enjoyed the right of cutting, by themselves or their servants, the brake, fern, heather, and litter upon these uninclosed acres for the use of this particular farm. The next fact, according to the true construction of the Act, which anyone who relies upon it has to prove is that that right, profit, or benefit, which he has so taken or enjoyed for sixty years, he has exercised as of right. The true interpretation of those words "as of right" seems to me to be that he has done so upon a claim to do it, as having a right to do it without the lord's repeated permission, and that he has so done it without that permission. That is the whole meaning of doing it "as of right." If he shows that he has claimed to do it, not as a thing permitted to him year by year by the lord, but as a thing that he had a right to do, whether

the lord said: "You may do it" or not, that is all that is necessary for him to A
prove.

Having proved those two things, the remainder of that which is necessary in
order to make the statute applicable is a pure question of law, and not of fact.
It is a pure question of law whether those acts which have been so done could
have been the subject-matter of a custom, or prescription, or grant, and not B
whether they were claimed as a matter of prescription, or custom, or grant. So
that, in any tribunal where the adjudication of the facts is separated from the
adjudication of the law, as in the case of a trial by judge and jury, it would be
for the jury to say what were the acts done, whether they had been done for
sixty years, and whether for sixty years they had been claimed to be done without
regard to the permission of the lord; and if they found that certain acts were done,
then, as a pure question of law, the judge would have to decide whether such acts C
so done could have been the subject-matter of a custom, prescription, or grant.

Then comes the question what are the facts which the defendant has proved?
I am bound to say that it seems to me that, where the statute is set up, by the
defendant to a suit, what is done by other people or in other cases is no evidence
with regard to the issue raised between the plaintiff and the defendant; the only D
evidence which is admissible is the evidence of what has been done by the
defendant or his predecessor, and whether he had done so on the claim of doing it
without the consent of the lord, or contrary to his consent. Here it seems to me
that the evidence must be treated, not according to a minute criticism of the
words which may be elicited from a witness during cross-examination, but as any
tribunal which has to adjudicate upon evidence ought to do, trying to find out
and understand, and then acting upon that which the witness really means to say. E
[His LORDSHIP referred to the evidence.] It seems to me that the defendant did
prove that for sixty years previous to the commencement of this suit his pre-
decessors and himself in this farm had exercised the right by themselves and
their servants to cut the brakes, fern, heather, and litter, to be used upon the
farm, during certain months of the year. It seems to me that that was all that
he proved. He did not prove a right to mow the grass upon this waste, where there F
was no heather, if that is now asserted or pretended. It seems to me he did not
show that they had exercised the right of cutting down anything which could be
fairly and reasonably called fir trees, even of young growth. If, in cutting the
heather, he cut that which some people may call young fir trees, that is, the
shoots of a year's growth, or things which are really not noticeable, which nobody
could distinguish from the heather, or if he cut grass which was growing among the G
heather, it would be idle to suppose he is prevented from cutting the heather
because he may cut a blade of grass or this very young growth. But, if it is
asserted that, in cutting the heather, he has a right to cut anything like a real
growth of fir trees, I say that that has not been proved, and that he would exceed
his right if he did so.

Then it was said that, even if this right had been exercised at the commence- H
ment of the sixty years, it was not shown that it had been exercised during the
whole of them. I think it is necessary to come to the conclusion that he had
exercised the right year by year, and that, if he failed to give satisfactory evidence
that he had done these things during some part of the intermediate period, he
would not prove that which lies upon him under the statute. If, therefore, it
had been shown that, instead of cutting this litter, as I will call it now, by his I
own servants, he had submitted to that which was alleged, namely, to the fact of
tramps or gipsies, or people who were undoubtedly trespassers, cutting the fern,
appropriating it to themselves as litter belonging to them, which they sold, although
they would have no right to sell it—if he or his predecessors had submitted to
that, and, instead of cutting his litter by his own servants, had bought it from
those people, as buying from them that which they had a right to sell, if it could
have been shown that he had done that for a year or two years, without cutting
any litter during that year or two years by his own servants at all—I should

A have thought that a gap had been made in the user for sixty years, and that he could not have succeeded under this plea. If he had bought from such people in each year, but also during each year had cut a part by himself and his servants under the claim of right, the mere fact of wrongful buying from these people would not, in my opinion, have destroyed the continuity of his actual user. As my Lord observed during the case, however, no person was called on behalf of the plaintiff to show that anybody ever had sold such things to the defendants. The oral evidence is conclusive that what the defendant did had been done from year to year.

Then it was said that, although the defendant has taken this litter by himself and his servants (only such litter as he used on his farm), yet he fails because he claimed to do it in respect of a claim which could not be supported in law by way of prescription, or custom, or grant. It was said that, although he had taken this litter by his servants and for the use of his farm, yet he asserted he did so because all the inhabitants of the district had a right to do so. I do not think he did make the claim in that form; but it seems clear to me, upon the construction which I put upon the statute, that, if he had, it would have made no difference—that the claiming to exercise the right—which he did in fact exercise in respect of some claim, or, if you please, a right in that sense, which could not be supported—is wholly immaterial, because, as I have said, the only question is, when he has once proved the facts, whether the court is of opinion that such facts could be supported by a prescription or a custom or a grant, if such had been proved. That objection, therefore, fails. If it had been shown that the defendant and his predecessors had not only taken the litter which was to be used on their farms, but had taken litter for the purpose of selling it—if their actual user, therefore, had not been merely the taking the fern for the use of the farm, but the taking of the fern generally although part of it was used on the farm—then I think we should have had to consider the ruling of SIR GEORGE JESSEL, M.R., in *Chilton v. London Corpn.* (1). I should be inclined to think that, if that had been the user proved, that would have destroyed the claim to take it in respect of the farm. But if all that was taken was taken for the use of the farm, then the assuming to take that under an erroneous view, or in respect of an erroneous claim, seems to me immaterial.

It was then said that litter was taken because the defendant and his predecessors had been of opinion that they had a right to do so under the words of the decree, and that that view was erroneous. For the same reason it seems to me to be immaterial, because that is not one of the points which can prevent the right.

Therefore, I think that the user has been established, and I think it is clear that the defendant and his predecessors, from whatever view they did so, assumed to do it at all events upon a right to do it, whether the lord permitted them or not. Then comes the question: Could such a right be the subject-matter of a grant? In my opinion, it clearly could, as a matter of law. Therefore, the defence on that part was made out. There was one other point, which was as to the frame of mind with which one should come to the contemplation of a claim made under the Prescription Act; and there seems to be considerable authority—dicta at all events by learned judges sitting in the Court of Chancery—that, where the facts of user are proved, the court ought to be astute to discover some legal mode in which the claim might be maintained. That is to say, that the court ought to lean, and lean heavily always, in favour of this defence of a prescription under the statute. If by that is meant that the court ought to look at the evidence with anything like an extremely indulgent view, I beg leave to say that I cannot accede to that view. It seems to me that there is nothing so dangerous as to lay down, as if it were matter of law, a machine rule for dealing with evidence of matters of fact, where the Prescription Act is vouched in order to maintain that which one believes to have been a true right, although the evidence of it may be wanting. I should be inclined, and I should certainly advise a jury, always to look at the evidence with considerable indulgence. But if one was of opinion that

the statute was vouched in order to create a right which one believes did not really exist, I should myself act upon this view, and I should advise a jury to act upon the same—to look, under those circumstances, at the evidence with considerable strictness. In the present case, looking at it in what way you will, it seems to me that the evidence fairly considered is conclusive as to the user, that user may be the subject of a valid right, such as is described in the statute, and the defendants' defence in para. 15 of the defence is, therefore, made out. It seems to me that every other part of the statement of defence has failed; that, therefore, this appeal must be allowed; and that the decree of the Vice-Chancellor ought to have been founded on the view that the defendants had made out the defence under para. 15 and under that paragraph alone.

COTTON, L.J.—This is an action of trespass, and the alleged acts of trespass complained of are cutting heather and fern for the purpose of carrying it away to be used as litter on a farm called Suntings. The question is whether the defendant, by any of the defences he has raised, has justified that, so that the plaintiff cannot succeed in his action of trespass. In my opinion, the only defence upon which the defendant has succeeded is that raised by para. 15 of his statement of defence, in which he alleges that these acts of alleged trespass have been done by him and his predecessors in title in respect of that farm of Suntings for upwards of sixty years.

The first question to be decided is whether that is such a defence as in this case was capable of being raised. The Vice-Chancellor's view was that it was not capable of being raised. To a great extent, the matter was decided when the Master of the Rolls—and there was no appeal from his order—declined to strike out para. 15 as an alternative defence. I think he was right in not striking it out, because, although there are other defences raised, which, if the evidence had gone to support them, might have made this a defence which could not have been raised, yet, in my opinion, the defendant was justified in putting this on the record as an alternative defence. Of course, it would be a question whether, having regard to the statute, by the evidence which he has adduced he has made out his defence, and for that purpose I will refer very shortly to the statute.

It was said that in order to bring a case within the statute it must be shown that the same right which the statute will support has been vouched in support of the acts which have been done, that is to say, that the acts which have been done must have been done under a title, the same as is supported by the statute; and it is said here that these acts, if they are made out in fact to have been done for sixty years, were done, not under what the court thinks would give a good defence, but as under a custom which the court holds incapable of proof and not proved. I quite agree with what **BRETT, L.J.**, has said, and I shall be very short, therefore, in my observations upon the statute.

What the statute requires is that you must see whether the acts which the defendant claims a right to do in the suit are such as could be supported as lawful by custom, prescription, or grant; and then you must see whether the acts have been done as of right, that is to say, not secretly, not as acts of violence, not under permission from time to time given by the person on whose soil the acts were done. I say "from time to time given," not that it should necessarily be yearly, but from time to time during the period the exercise during which is said to establish the right; because, if there has been permission before the sixty years, that is not sufficient to prevent the defendant from establishing his claim unless it has been by consent or by agreement in writing. That is expressly provided by s. 1 of the statute. But, in my opinion, if there is permission from time to time given and accepted during the period relied upon, that does prevent what is essential, that the acts should be done as of right; and I may also say, because it bears upon the present case, that it must be shown that the acts were done in respect of some tenement owned by the defendant and his predecessors in title. What one has

A first to consider is whether the acts of the defendant have, in fact, been done by him and his predecessors in title for the period of sixty years.

Upon that point, I must say that, until I heard the evidence read again I entertained some doubt, and I did so for this reason. We must have evidence of the beginning of the period, and we must have evidence to satisfy us that, successively from year to year, where the right claimed is so capable of being exercised, and
B probably, if it were a right, would be exercised, from year to year, the acts have been done not only in the first year, but in successive years down to the commencement of the suit. The only evidence which could be relied on, as regards the doing of these acts at the beginning of the sixty years, was the evidence of Robert Edwards. I agree with BRETT, L.J., that we ought to come to the conclusion on his evidence that he has established that, in respect of this farm of Suntings, the
C cutting and carrying away of litter has been done by the predecessors in title of the defendant at the beginning of the period of sixty years—that is that the right now claimed has been exercised for at least sixty years. But it was said that it had not been done by the defendant or his predecessors in title. Of course, that would be material, because if persons had, without any directions from him, cut the fern and litter, and then, treating it as their own, had come and sold it to
D him, that would not have been an exercise by him in respect of this farm of the right of cutting and carrying away the litter. But, in my opinion, it is immaterial whether the act done on his behalf was done by his regular servants, that is to say, by persons permanently employed by him, or by persons whom he made, for the time being, his servants, by directing them to go and cut; and the question must be whether that is what he did, for certainly he did not always cut the fern
E by his own servants, or whether he bought it from persons who, not as his agents, had cut it. On the evidence I think we must come to the conclusion, not only that this act was done by the predecessor in title of the defendant at the beginning of the sixty years, but that there was continuous exercise of that right to cut by him from time to time down to the commencement of the suit.

There is another matter, which is perhaps of a more serious nature. It is said
F that a number of persons were cutting this fern, not in respect of their own particular farms, but under a general supposition that the decree gave them a right to do so, or that there was some custom which justified it. In my opinion, it is not necessary under the statute that the acts done should at the time have been attempted to have been justified in a way in which we think they can legally be justified, if the person doing them was claiming to do them as of right.
G What particular right they have alleged, unless there was permission from time to time given by the lord, in my opinion is not material under the statute. But no doubt it must be shown that the acts of the defendant are acts of user in connection with his particular tenement; and here, I think, we have that, because what has been proved in respect of this defendant and his predecessors in title is that they cut the heather and fern (I will call it litter for shortness) in respect
H of and for the use of that farm only, and, that being so, he did exercise this as a right in respect of that tenement, and connects it with the tenement and the possession and occupation of the tenement and ownership of the tenement. That, in my opinion, distinguishes this case from *Blewett v. Tregonning* (2) and *Hammerton v. Honey* (3). We must not look at the evidence and the finding of the jury upon the evidence to guide us here; but we must look at the law laid down by the judges
I who decided *Blewett v. Tregonning* (2) upon an application for a new trial. All that was laid down is contained in the judgment of PATTESON, J., the judgment of WILLIAMS, J., being to the same, or nearly to the same, effect. PATTESON, J., says:

"It must be pointed out to the jury that they must be satisfied that the occupiers of the farm enjoyed the privilege, because they were occupiers, and that the right was attached to the farm."

However much other persons who have no right claim to cut litter, and although there was a general supposition that this right was given by the decree, or possibly

that nobody would or could be interfered with who cut it, or that there was a custom in the district, yet when we do find that Mr. Hale and his predecessors in title cut it for the purpose of carrying it off to Suntings, and there used it, and only cut what they required for the purposes of that farm, in my opinion, that does connect the acts done with the farm, and enables them to be given in evidence in support of the claim to prescription under the Prescription Act. A

Hammerton v. Honey (3) at first sight seemed more in favour of the plaintiff, but in that case what was attempted to be asserted was a claim of all the inhabitants of a village to use a green for the purpose of recreation. The evidence given was that all people, whether of the village or elsewhere, had used it; and, therefore, that would not support a claim of right in respect of the inhabitants of that village. Some of the persons who used it happened to be inhabitants of the village, but there was no distinction at all as between their user and that of all the rest of her Majesty's subjects, and, therefore, the user by all her Majesty's subjects as such, the villagers not using it as villagers, but as her Majesty's subjects, did not afford any evidence in support of the claim that was there sought to be established. There was no distinction between those who were not inhabitants of the village in their user and those who were. That case, in my opinion, does not support the contention of the plaintiff. B C D

The defence under para. 15 of the defence, in my opinion, the defendant has succeeded in proving; but, although that disposes of the case, I think one ought not to leave altogether untouched that which occupied a great deal of the argument for the defendants, and a great deal of the evidence and pleading—the claim under the decree of 1693. I quite agree with the view of the Vice-Chancellor and of the other lords justices on that point. The decree of 1693 does not in terms give the defendant the right which he claims here, and those who are in a similar position as commoners claim. In my opinion, looking at the decree, it is decidedly against such a construction—so decidedly as not to leave the words of the decree in any way ambiguous. The decree is founded upon the report of the commission. I will not go into the circumstances under which and the object for which that was issued. What was recommended was that the commoners should have these 6,400 acres for common of pasture and herbage, and that the lord should not be allowed to turn out any cattle there. What the lord is excluded from shows what the commoners were to have. Then we come to the words in the latter part of the decree, which were relied upon and alone give foundation for the argument, that “sole common pasturage and herbage” was something different from common of pasture. We must construe those words fairly by looking at the whole of the decree; and when we find how the commissioners' report, as regards the lord, the owner of the soil, is construed and the language used, we find that “common of pasture” is used for just the same purpose as common pasturage. In the one case common is used (possibly improperly) as a substantive, and in the other (possibly properly) as an adjective, for the lord is excluded by the decree from claiming any common of pasture or herbage upon the land. In my opinion, all that is given by the decree over these 6,400 acres to the commoners is common of pasture in the ordinary sense of those words, and we cannot, in my opinion, properly construe those words of the decree by any reference to usage subsequently to the date of the decree. E F G H

There is only one other matter, namely, the user alleged to be proved before the date of that decree. Without going through the documents, I may express my opinion that the Vice-Chancellor was quite right in the conclusion at which he arrived upon the careful examination which he had of all the documents, and that there was not any evidence to satisfy the court, from which the court ought to have drawn the conclusion that the commoners, as they are called, the owners of these tenements, had previously to that decree the right of cutting the litter and fern as in manner claimed by the defence. I must say one word as regards another matter. The defendant has claimed a right entirely to exclude the lord from any interest, not only in the litter and herbage, but also in young seedlings. It I

A does not appear that what has been done by the defendant has included the cutting of seedlings; but, in my opinion, all that he is justified in doing is cutting the litter, but that he will not be answerable for anything which he unavoidably does in cutting the litter. He has no right to destroy trees as trees, or to destroy seedlings, if in cutting the litter, which, in my opinion, he has a right to do, he can avoid cutting and destroying those seedlings and trees.

B Solicitors: *Horne, Hunter & Birkett*, for *Raper & Ellman*, Battle; *Cope & Co.*

[Reported by FRANK EVANS, ESQ., Barrister-at-Law.]

C

ROBINSON v. OMMANNEY

[COURT OF APPEAL (Sir George Jessel, M.R., Cotton and Bowen, L.JJ.), March 17, 1883]

D

[Reported 23 Ch.D. 285; 52 L.J.Ch. 440; 49 L.T. 19; 31 W.R. 525]

Power of Appointment—Appointment by will—Exercise of power under covenants in mortgage deed—Appointment to mortgagee—Covenant not to revoke will—Bankruptcy of covenantor—Effect on covenant—Subsequent will made revoking former will and appointing to another appointee—Validity of second appointment.

E

Contract—Illegality—Public policy—Restraint of marriage.

L.M.B., a spinster, having an absolute power of appointment by will over the capital of a trust fund, made a will and appointed it to the mortgagee pursuant to a covenant in the mortgage deed which also contained a covenant not to revoke the will. Subsequently she was adjudicated a bankrupt, and, after obtaining her discharge, she made another will revoking her former will and appointing the capital to her executors.

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Held: (i) the covenant not to revoke the will was divisible, and, although the marriage of the covenantor would revoke the will, it was not void as necessarily being a covenant in restraint of marriage; (ii) the covenant was not discharged by the bankruptcy as it was ancillary to the mortgage and not to the debt, and, the breach having been committed after the bankruptcy, an action for damages for breach of covenant was maintainable.

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Notes. Considered: *Morgan v. Hardy* (1886), 17 Q.B.D. 770. Referred to: *Re Lawley, Zaiser v. Lawley*, [1902] 2 Ch. 799; *In the Estate of Heys, Walker v. Gaskill*, [1914] P. 192; *Re Lind, Industrials Finance Syndicate, Ltd. v. Lind*, [1914–15] All E.R.Rep. 527; *Re Marsland, Lloyds Bank, Ltd. v. Marsland*, [1939] 3 All E.R. 148.

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As to contracts in restraint of marriage, see 8 HALSBURY'S LAWS (3rd Edn.) 135; and for cases see 12 DIGEST (Repl.) 278 et seq. As to covenants to exercise powers in a particular way, see 30 HALSBURY'S LAWS (3rd Edn.) 241; and for cases see 37 DIGEST 508 et seq. As to restriction of freedom of testamentary disposition, see 39 HALSBURY'S LAWS (3rd Edn.) 851 et seq.; and for cases see 44 DIGEST 178 et seq.

I

Cases referred to in argument:

Price v. Green (1847), 16 M. & W. 346; 16 L.J.Ex. 108; 153 E.R. 1222; sub nom. *Green v. Price*, 9 L.T.O.S. 296, Ex. Ch.; 43 Digest 47, 486.

Collyer v. Isaacs (1881), post; 19 Ch.D. 342; 51 L.J.Ch. 14; 45 L.T. 567; 30 W.R. 70, C.A.; 4 Digest (Repl.) 339, 3080.

Thompson v. Cohen (1872), L.R. 7 Q.B. 527; 41 L.J.Q.B. 221; 26 L.T. 693; 36 J.P. 822; 4 Digest (Repl.) 186, 1692.

Appeal by the defendant from a decision of KAY, J., overruling the defendant's demurrer in an action by the plaintiffs, the executors of the mortgagee, against the defendant, an executor of the mortgagor, to recover £710 8s. 9d. (the amount due for principal and interest) as damages for breach of covenant, in the mortgage deed, not to revoke the will dated Feb. 7, 1859. A

Under the will of John Bohn £1,202 15s. 7d. Bank Annuities stood limited in trust for Lydia Marina Bohn during her life, and after her decease upon trust for such person or persons as she should by will appoint, and in default of such appointment for her next-of-kin. By a mortgage deed dated Feb. 5, 1859, L. M. Bohn, being a spinster, assigned the dividends on the £1,202 15s. 7d. Bank Annuities during her life, together with a policy of assurance on her life, to Henry Robinson, to secure the repayment of money advanced by him, with interest at 10 per cent. per annum. The deed contained a covenant by L. M. Bohn that she would forthwith duly make her last will pursuant to and in exercise of the power given to her by the will of John Bohn; and would, by her will, appoint unto H. Robinson, his executors, administrators, and assigns, the principal sum of £1,202 15s. 7d. upon trust, after payment of the premiums and expenses therein mentioned, to retain for himself or themselves the principal money and interest for the time being due under the mortgage, and all interest on account, and to pay the residue or surplus thereof to such person or persons as L. M. Bohn should, by her will, appoint; and that she should not do or commit any act, deed, matter, or thing whatsoever whereby, or by reason or means whereof, the will to be made and executed by her should or might be revoked, annulled, cancelled, obliterated, impeached, or affected in any manner whatsoever; and that she would, within one week, deliver to and deposit with H. Robinson, his executors, administrators, and assigns, the will, and would permit it to remain in the custody of H. Robinson, his executors, administrators or assigns, so long as any money should remain owing to him or them on the money advanced. L. M. Bohn duly made a will dated Feb. 7, 1859, and delivered it to H. Robinson, in accordance with the covenants of the deed. On April 10, 1862, L. M. Bohn, being still a spinster, and not being a trader, was adjudicated a bankrupt, and on June 4, 1862, she obtained her discharge. H. Robinson died in 1870, leaving the plaintiff in the present action and others (since deceased) his executors. On Aug. 28, 1876, L. M. Bohn made another will, and after appointing the defendant, F. Ommanney, and others to be her executors, gave them all her estate and effects and in exercise of the power given her by the will of John Bohn, appointed and bequeathed the £1,202 15s. 7d. to her executors upon certain trusts, and revoked all previous wills made by her. On April 3, 1880, L. M. Bohn died, and her last will was proved by the defendant Ommanney alone. B
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Cookson, Q.C., and *J. G. Wood* for the defendant.

Cozens-Hardy, Q.C., and *G. B. Finch* for the plaintiffs.

SIR GEORGE JESSEL, M.R.—There is nothing in this appeal. With regard to the first point the covenant is, as was pointed out by KAY, J., divisible. So far as it was in restraint of marriage it was bad; you could not bring an action for breach of covenant by the marriage of the covenantor, but that does not destroy the covenant. As to the second point, this is a covenant in a mortgage. L. M. Bohn mortgages her life interest in the dividends, and then appoints the capital to the mortgagee by her will. That is a very good mortgage if the will is not revoked, and then she covenants not to revoke the will. It would have been just as good a covenant if there had been no debt from the covenantor; as, for instance, if there had been a suretyship. The covenant was ancillary not to the debt, but to the mortgage. It is clear that, there being no breach of covenant before her bankruptcy, the covenantee could not have proved in the bankruptcy. He could not prove for the possibility of a breach. Then why should not the executor of the bankrupt be now liable? I see no reason why the bankruptcy should destroy her liability under the covenant. I think that KAY, J., was quite right, and that this appeal must be dismissed with costs. H
I

A COTTON, L.J.—I am of the same opinion. The covenant was in a mortgage deed, there had been no breach of it before the bankruptcy, and it could not be estimated so as to make it provable in the bankruptcy. That being so, and there being a breach after the bankruptcy, why should not this action be brought? It is said that the covenant was ancillary to the debt, and that the debt being discharged the covenant is gone too. But it was not ancillary to the debt in any sense except **B** in the sense that it is a covenant not to destroy the mortgage, and is ancillary to the mortgage by which the debt is secured. In my opinion the breach having been committed after the bankruptcy, this action is maintainable, and the appeal must be dismissed.

BOWEN, L.J.—I am of the same opinion.

Appeal dismissed.

C Solicitors: *G. B. Wheeler* for *G. M. Robinson*, Settle; *Sutton & Ommanney*.

[*Reported by W. C. Biss, Esq., Barrister-at-Law.*]

D

Re FLAVELL. MURRAY v. FLAVELL

E [COURT OF APPEAL (Cotton and Lindley, L.JJ.), November 14, 1883]

[*Reported 25 Ch.D. 89; 53 L.J.Ch. 185; 49 L.T. 690; 32 W.R. 102*]

Annuity—Partnership—Annuity payable to executors of deceased partner for benefit of widow—Trust money—Freedom from claims of creditors of estate.

F By articles of partnership between two solicitors the executors of a deceased partner were entitled to receive an annuity out of the net profits of the partnership to be applied in such manner as the deceased partner should by deed or will direct for the benefit of his widow and children and in default of such direction for the benefit of the widow. A partner died. By his will he appointed his widow sole executrix and gave her all his real and personal estate subject to the payment of his debts, funeral and testamentary expenses, but **G** he did not either by deed or will direct how the annuity payable under the partnership articles should be applied. The estate proved insolvent, an administration action was brought by a creditor, and a receiver was appointed.

The question arose whether the annuity payable formed part of the deceased partner's assets or whether the widow was beneficially entitled to it.

H **Held:** the annuity did not form part of the deceased partner's assets, but under the articles was trust money for the benefit of the widow, and so it was free from the claims of creditors of the estate.

Notes. Referred to: *Re Davies, Davies v. Davies*, [1891-4] All E.R.Rep. 498; *Ehrmann v. Ehrmann* (1894), 72 L.T. 17; *Parker v. Judkin*, [1931] 1 Ch. 475; *Re Kay's Settlement, Broadbent v. Macnab*, [1939] Ch. 329; *Re Greene, Greene v. Greene*, [1949] 1 All E.R. 167.

I As to division of profits and incidence of losses in partnership, see 28 HALSBURY'S LAWS (3rd Edn.) 536 et seq.; and for cases see 36 DIGEST (Repl.) 554 et seq. As to partnership between solicitors, see 36 HALSBURY'S LAWS (3rd Edn.) 209 et seq.; and for cases see 42 DIGEST 370 et seq.

Cases referred to in argument:

Page v. Cox (1852), 10 Hare, 163; 68 E.R. 882; 36 Digest (Repl.) 535, 971.

Re Empress Engineering Co. (1880), 16 Ch.D. 125; 43 L.T. 742; 29 W.R. 342, C.A.; 12 Digest (Repl.) 48, 266.

Appeal by the plaintiff from a decision of NORTH, J., holding, on a summons by the defendant, that the receiver should pay an annuity, under cl. 35 in partnership articles, to the defendant for her own use and benefit for so long as it should remain payable or until further order. A

T. W. Flavell was a solicitor, and carried on business in partnership with J. F. Bowman, under the provisions of articles of partnership dated July 6, 1875. The partnership was to be for the term of ten years from May 1, 1875, if both partners should so long live. Clause 3 provided for the determination of the partnership by notice. Clause 35 provided that from the determination of the partnership the retiring partner, his executors or administrators, or the executors or administrators of the deceased partner, should be entitled to receive out of the net profits of the partnership business during so much (if any) of the term of five years from May 1, 1880, as should remain after the determination of the partnership, if the retiring or deceased partner should be Flavell, the yearly sum of £350, and during so much (if any) of the term of five years from May 1, 1885, as either the retiring partner or a widow of the retiring or deceased partner should be living, if such partner should be Flavell, the yearly sum of £250, B C

"any yearly sum which may under this present article for the time being become payable to the executors or administrators of a deceased partner to be applied in such manner as such partner shall by deed or will direct for the benefit of his widow and children or child (if any) or any of them, and in default of such direction to be paid to such widow, if living, for her own benefit, or if not living, then to the guardian or guardians for the time being of such children or child for the benefit of such children or child." D

By cl. 36 the E

"yearly sum payable under the last preceding article shall, so far as legally may be, be constituted a charge upon the net profits of the partnership business."

By his will, dated Sept. 26, 1845, T. W. Flavell devised and bequeathed all his real and personal estate to his wife, her heirs, executors, administrators and assigns for ever, subject to the payment of his debts and funeral and testamentary expenses. He did not by deed or will direct how the money payable to his executors or administrators under the provisions of the partnership articles was to be applied, unless the will was to be construed as giving such a direction. He died without issue on Jan. 7, 1883, and the defendant A. Flavell was his widow and sole executrix. F

An administration action was brought by the plaintiff, a creditor, against A. Flavell, the testator's widow, and on May 24, 1883, judgment was pronounced and a receiver appointed of the rents and profits of the testator's real and leasehold estate and to get in his outstanding personal estate. The question arose whether the annuity payable under the provisions of the partnership articles to the executrix formed part of the testator's assets, or whether the widow was beneficially entitled to it, and the present summons was taken out by the defendant. G H

NORTH, J., decided in her favour, and the plaintiff appealed.

Warmington, Q.C., and *J. R. Brooke* for the plaintiff.

Cozens-Hardy, Q.C., and *E. W. Byrne* for the defendant.

COTTON, L.J.—This appeal seeks to have an order made that the annuity covenanted to be paid by the testator's partner shall be paid to the receiver appointed to collect the assets of the testator, instead of to his widow, as directed by the order of NORTH, J. Of course that order, if made, would assume that the annuity, when it came to the hands of his executrix, was part of the testator's estate, and not part of his trust property, because, if it was part of his trust property, it would not go to his creditors. The annuity arises under cl. 35 of the articles of partnership, which provides for two events, one of which is the retirement of a partner from the partnership during his life, and the other the determination of the partnership by his death. These events are provided for in I

A different ways, though in one clause of the articles. The event which has happened is the death of a partner; and in that event, by the article I have mentioned, an annuity for some years is to be paid to the executors of the deceased partner. The executors were to apply the annuity in such a manner as the deceased partner directed for the benefit of his widow and children, and in default to his widow for her own benefit. The testator's death is the only event we have to consider, and the question is simply whether the money which is now payable is to be treated as part of the testator's assets, or as trust funds.

B A good deal of the argument was based on this being part of the testator's property, and if it was, the executrix takes it subject to his liabilities. We have to inquire then what are the grounds for saying that it was his property. It was said first of all that this was part of the testator's property because he could have released his partner, at any time before his death, from the covenant to pay it. But he did not release it, and the covenant remains to pay money to the testator's executors to be held upon certain trusts. But then it is said that, because the covenant could be released, there was only a contract to make a trust, and that the court would not enforce such a contract in favour of a mere volunteer. But I asked counsel for the plaintiff whether the testator could have altered the trusts applying to the money after it came to the hands of his executors so as to deprive his widow of the benefit of it, and he could not, to my mind, deal satisfactorily with my question. He said the testator could do so, and that was all. The money was already impressed with a trust when it reached the hands of the executrix. It was money which, under a contract for value, in its inception and creation existed only as being held on these trusts for the benefit of the testator's widow. It is said that the widow is only a volunteer, but that does not prevent her from insisting on the trusts being performed. The question is not between the widow and the surviving partner, but between her and the executrix of the testator. What is the position of the testator's legal personal representative as to this fund, which *ex hypothesi* is paid over to her? It never came to her as part of the testator's estate, but as a fund impressed with a trust in favour of his widow. I by no means favour the idea that, if this had been a declaration of trust of the testator's own property, the deed could have been impeached; but I put my decision on the ground that the annuity came to the executrix not as assets, but as trust property.

E **LINDLEY, L.J.**—I am of the same opinion. What kind of a document are we dealing with? It is not a voluntary or fraudulent deed, but a bargain between two partners that if one dies the survivor is to carry on the business, and pay an annuity to be applied for the benefit of the widow. What is the matter with it? It is not fraudulent; it is not a legacy; it is not revocable. It is said to be a voluntary settlement; but if it is, that does not matter if it cannot be impeached. I do not, however, think that it was a voluntary settlement; it was a contract for value. Then it is said that the annuity formed part of the testator's assets, and cannot be diverted from his creditors. The answer is, that it is no part of his assets at all. Unless this contract can be impeached on the ground of fraud, I cannot see why it should not be supported.

Appeal dismissed.

Solicitors: *Wray & Phillips; R. A. Kelley.*

[*Reported by FRANK EVANS, Esq., Barrister-at-Law.*]

LUDGATER v. LOVE

[COURT OF APPEAL (Lord Selborne, L.C., Baggallay and Brett, L.J.J.), November 25, 30, 1880, January 15, 1881]

[Reported 44 L.T. 694; 45 J.P. 600]

Agent—Principal—Liability for act of agent—Misrepresentation by agent—Sale of goods with defect—Defect known to principal, but fraudulently concealed from agent.

The principal's son, acting for and with the authority of his father, represented that certain sheep which he sold to a buyer were sound. The father had fraudulently concealed from his son that the sheep had the rot and gave his son authority to sell them for the best price, intending that his son should represent that they were sound.

Held: where a principal employed an agent ignorant of the truth in order that the agent might innocently make a false statement believing it to be true and might so deceive the party with whom he was dealing the representation by the agent became the misrepresentation by the principal so as to vitiate the contract, and the principal was liable in an action for damages for misrepresentation.

Notes. Considered: *Armstrong v. Strain* [1952] 1 All E.R. 139. Referred to: *London County Freehold and Leasehold Properties, Ltd. v. Berkeley Property and Investment Co.*, [1936] 2 All E.R. 1039.

As to misrepresentation by an agent, see 1 HALSBURY'S LAWS (3rd Edn.) 221; and as to standard of proof and questions of law and fact in determining whether representation was fraudulent, see 26 HALSBURY'S LAWS (3rd Edn.) 845; and for cases see 1 DIGEST (Repl.) 681 et seq.

Cases referred to:

- (1) *Cornfoot v. Fowke* (1840), 6 M. & W. 358; 9 L.J.Ex. 297; 4 Jur. 919; 151 E.R. 450; 1 Digest (Repl.) 683, 2435.
- (2) *National Exchange Co. v. Drew* (1855), 2 Macq. 108; 25 L.T.O.S. 223, H.L.; 1 Digest (Repl.) 684, 2438.

Also referred to in argument:

Coleman v. Riches (1855), 16 C.B. 104; 24 L.J.C.P. 125; 1 Jur.N.S. 596; 3 W.R. 453; 3 C.L.R. 795; 139 E.R. 695; 1 Digest (Repl.) 685, 2441.

Udell v. Atherton (1861), 7 H. & N. 172; 30 L.J.Ex. 337; 4 L.T. 797; 7 Jur.N.S. 777; 1 Digest (Repl.) 683, 2433.

Mackay v. Commercial Bank of New Brunswick (1874), L.R. 5 P.C. 394; 43 L.J.P.C. 31; 30 L.T. 180; 38 J.P. 296; 22 W.R. 473, P.C.; 1 Digest (Repl.) 682, 2428.

Houldsworth v. City of Glasgow Bank (1880), 5 App. Cas. 317; 42 L.T. 194; 28 W.R. 677, H.L.; 9 Digest (Repl.) 256, 1631.

Barwick v. English Joint Stock Bank (1867), L.R. 2 Exch. 259; 36 L.J.Ex. 147; 16 L.T. 461; 15 W.R. 877, Ex. Ch.; 1 Digest (Repl.) 681, 2425.

Brady v. Todd (Tod) (1861), 9 C.B.N.S. 592; 30 L.J.C.P. 223; 4 L.T. 212; 25 J.P. 598; 7 Jur.N.S. 827; 9 W.R. 483; 142 E.R. 233; 1 Digest (Repl.) 324, 108.

Pasley v. Freeman (1789), 3 Term Rep. 51; 2 Smith, L.C., 12th Edn., 71; 100 E.R. 450; 1 Digest (Repl.) 27, 205.

Howard (Howarth) v. Sheward (1866), L.R. 2 C.P. 148; 36 L.J.C.P. 42; 15 L.T. 183; 12 Jur.N.S. 1015; 15 W.R. 45; 1 Digest (Repl.) 438, 911.

Polhill v. Walter (1832), 3 B. & Ad. 114; 1 L.J.K.B. 92; 110 E.R. 43; 1 Digest (Repl.) 760, 2967.

Foster v. Charles (1830), 7 Bing. 105; 4 Moo. & P. 741; 9 L.J.O.S.C.P. 32; 131 E.R. 40; 35 Digest (Repl.) 37, 294.

A Appeal by the defendant in an action for damages for fraudulent misrepresentation from a decision of the Common Pleas Division (GROVE and LINDLEY, JJ.), discharging a rule nisi for a new trial.

The plaintiff claimed damages for fraudulent misrepresentation made to the plaintiff by the defendant's son, acting for and on behalf of the defendant, to the effect that certain sheep, which the plaintiff purchased from the defendant's son, **B** were sound, whereas they had the rot. The action was first tried in July, 1879, at Maidstone, before BAGGALLAY, L.J., and resulted in a verdict for the plaintiff. A new trial was subsequently granted by the Court of Appeal, on the ground that there was no sufficient evidence of authority from the father to the son to make the representation complained of. The second trial took place before DENMAN, J., when the jury found that the son had authority from his father to make the representation; that the defendant fraudulently withheld from his son the knowledge **C** that the sheep had the rot, but negatived fraud in the son. Upon these findings a verdict was entered for the plaintiff, and judgment given accordingly. The defendant obtained a rule nisi for a new trial, which was discharged by the Common Pleas Division and the defendant now appealed.

D Douglas Kingsford for the defendant.

Morgan Howard, Q.C., and F. J. Smith for the plaintiff.

Cur. adv. vult.

Jan. 15, 1881. **BRETT, L.J.**, read the following judgment in which **BAGGALLAY, L.J.**, concurred. This was an action brought to recover damages alleged to be the result of a fraudulent misrepresentation made on the sale of sheep. The statement of claim averred, among other allegations, that upon the sale to the plaintiff the defendant's son, acting for the defendant, and with the defendant's authority, represented that the sheep were all right; that the sheep were not all right, but were diseased and affected with rot; that the statement was fraudulent on the part of the defendant, and that the defendant had purposely concealed and withheld from his son the fact that the sheep had the rot, with intent that the son might sell them in ignorance of the fact, and make, if necessary, such statement as he did make respecting the condition of the sheep, etc. The allegation of fraud by the defendant was denied in the statement of defence.

F At the trial, before DENMAN, J., and a jury, several questions were left to and answered by the jury, which were as follows:

G (i) "Did the defendant's son in fact represent that the sheep were all right?" Answer: "Yes." (ii) "If so, had he the defendant's authority for so representing?" Answer: "Yes." (iii) "Did the son fraudulently represent that the sheep were all right, knowing that they had the rot?" Answer: "We believe he knew it, but we can't say there is sufficient evidence for us to say that it was fraudulently done." (iv) "Did the defendant fraudulently authorise his son to represent that the sheep were all right, knowing them to have the rot?" **H** Answer: "Yes." (v) "Did the defendant fraudulently conceal from his son that the sheep had the rot, and fraudulently give the son authority to sell them for the best price, intending that the son should represent that they were sound, so as to obtain the best price for them?" Answer: "Yes." (vi) "Was the plaintiff materially influenced towards buying the sheep by a representation **I** that the sheep were all right, or was he wholly induced by other causes?" Answer: "Yes; we think he was also influenced by the statement that they came from Lenny's farm. We don't believe they were Lenny's sheep, and regret he was not called."

Upon these findings, and upon the pleadings and evidence, many questions were disputed in the Divisional Court and before us.

It was urged on behalf of the defendant that there was no evidence of authority from him to his son to make any representation as to the sheep; that he was not bound by any misrepresentation of his son; that there was no evidence of fraud

in the defendant; that there was no evidence in support of the fifth question; that the answer to the sixth question was contrary to the weight of the evidence. It was argued on behalf of the plaintiff that the son was a general agent of the father to sell for him, and that, therefore, the son's representation bound the father; that the father was a commission salesman, and that his son was his agent, and, therefore, the son's representations bound the father; that if the son was only agent on this particular occasion, yet, from the simple fact of his being sent to sell, he had an implied authority to make a representation at least as to the quality and condition of the thing to be sold, if not as to other matters; that such authority was, at all events, to be implied from the direction to sell for the best price; that there was evidence to justify the leaving of the fifth question to the jury, and that it was a proper question to be left; that there was evidence to justify the answer to the sixth question. We were on the hearing clearly of opinion that there was ample evidence to justify a finding of fraudulent intention in the defendant; and that the admitted truthfulness of the plaintiff justified the jury in finding, as we think they did, that the plaintiff was induced to purchase by the representation that the sheep were all right.

We took time to consider the questions which were discussed whether there was such authority from the defendant to his son as was sufficient to bind him by reason of his son's representations to a liability to pay damages in an action for deceit. These questions were to be determined, as it seemed to us, upon the finding of fraud in the father without a finding of fraud in the son. If the son was authorised to make the representations, whether such authority was express or implied, we are of opinion that the defendant was, by reason of his own fraudulent mind, liable, notwithstanding want of fraud in the son. We are of this opinion, notwithstanding the decision in *Cornfoot v. Fowke* (1), if that decision is contrary to this view. Several of the propositions, however, enunciated as to the authority to be implied, seemed to us to raise questions of considerable difficulty; but, upon consideration, we are of opinion that it is not necessary to determine them.

We think that the following facts afforded sufficient evidence to justify the leaving to the jury of the fifth question, and their answer to it. The sheep were affected with rot; the symptoms of that disease are such as would not improbably induce questions from an intending buyer as to the condition of the sheep; the defendant knew that the sheep had the disease; it was eminently probable that he would at least suspect that the inquiry as to the condition of the sheep would be made: his answer on cross-examination to the question, "Why he did not tell his son?" that he "was not such a fool" was an impudent admission; he directed his son to sell for the best price without telling his son the fact, known to himself, that the sheep were affected with rot. These facts seem to us sufficient to justify the jury in drawing the inferences which induced their answer to the fifth question. If that question, therefore, was one which might properly be left to the jury, in order to justify a finding of authority from the defendant to his son to bind him, the defendant, by the misrepresentation in fact made by the son, the findings on the first, fourth, fifth, and sixth questions are sufficient to justify the verdict and judgment in favour of the plaintiff. And it is unnecessary to give an opinion on the other questions as to authority.

But in *Cornfoot v. Fowke* (1) every judge stated that such a question as the fifth in the present case might, upon evidence to justify it, be left to the jury as determining the liability of the principal to an action for damages for false representation, although the agent was innocent of fraud. Thus ROLFE, B., said (6 M. & W. at p. 370):

"Or if the defendant purposely employed an agent ignorant of the truth in order that such agent might innocently make a false statement believing it to be true, and might so deceive the party with whom he was dealing, he would be guilty of a fraud."

ALDERSON, G., said (*ibid.* at p. 372):

A "It is said that this will open a door to fraud by enabling parties in the situation of this principal, themselves conscious of objections to their premises, to appoint agents, who unconsciously may make misrepresentations to the injury of third persons. This does not follow. If the fact could be shown it would be a fraud on the part of the principal with such a motive to appoint such an agent."

B PARKE, B., said (*ibid.* at p. 373):

C "It must also be admitted that if the plaintiff not merely knew of the nuisance, but purposely employed an ignorant agent, suspecting that a question would be asked from him, and at the same time believing or suspecting that it would, by reason of such ignorance, be answered in the negative, the plaintiff would unquestionably be guilty of a fraud . . . ; for then the representation of the agent, which he intended to be made, would be the same as his own; and his own representation, coupled with his knowledge of its falsehood, would doubtless be a fraud."

D We think that these dicta are correct. The fifth question was, if answered in the affirmative, sufficient, in conjunction with answers to some of the other questions which have been indicated, to fix the defendant with liability in this action. That question was not improperly answered. The verdict may, therefore, properly stand without the necessity of deciding the questions which were raised as to what authority may be inferred, or what liability in respect of the agent's misrepresentations may be incurred, from the mere fact of sending a particular agent to sell goods. We are of opinion that the appeal must be dismissed.

E LORD SELBORNE, L.C.—I agree in the judgment just delivered; and I wish also to refer to the following observations of LORD ST. LEONARDS, in *National Exchange Co. v. Drew* (2), with respect to *Cornfoot v. Fowke* (1), and the principles applicable to cases of a like nature. He said (2 Macq. at p. 146):

F "I should say, that if in that case fraud had not been alleged, but it had been put upon misrepresentation, and the fact were, that a man, knowing that there is so serious a nuisance affecting a house as to diminish its value in such a way that no man of respectability could live in it, takes care himself not to make the contract, but leaves it to an agent whom he has no reason to suppose [to be] aware of the fact; and if, in the course of the treaty for the contract, the agent, being asked if such a fact existed, states positively, No, and the contract is executed in silence upon the point, because the purchaser's or the tenant's vigilance has been lulled to sleep upon it, and he believes the representation made to him by the agent; I say in such a case as that I should be very much shocked at the law of England if I could bring myself to believe that it would not reach the case of a person so availing himself of a misrepresentation of his own agent, who might be ignorant of the fact, although the principal himself knew it, and [having] employed the agent in order to avoid making a direct representation to the contrary, I should hope that the law of England would reach a case of that sort. I should feel no hesitation, if I had myself to decide that case, in saying that though the representation was not fraudulent—the agent not knowing that it was false—yet that, as it in fact was false, and false to the knowledge of the principal, although the agent did not know it, it ought to vitiate the contract. When, upon a matter so material to the value of the property, he left it to his agent to make the representation without informing him of so important a fact within his own knowledge, the agent making a false representation of that fact would bind the principal, and thus impeach the validity of the contract."

I It appears to me, from the evidence, that (substituting only sheep for a house) we have here to deal with the identical case which LORD ST. LEONARDS supposed.

Appeal dismissed.

[Reported by A. H. BITTLESTON, Esq., Barrister-at-Law.]

A

Re LESLIE. LESLIE v. FRENCH

[CHANCERY DIVISION (Fry and Pearson, JJ.), March 12, 13, April 20, 1883]

[Reported 23 Ch.D. 552; 52 L.J.Ch. 762; 48 L.T. 564; 31 W.R. 561]

Lien—Life assurance policy—Ways in which lien can be created—Contribution—Policy taken out by wife before marriage—Payment of premiums by husband—Right of husband's executor to lien on policy.

B

The only ways in which a lien upon the moneys secured by a policy of life insurance can be created by payment of premiums are (i) by contract with a beneficial owner of the policy; (ii) by reason of the right of trustees of the policy to an indemnity out of it, as trust property, for moneys expended by them in its preservation; (iii) by subrogation to the rights of the trustees of some person who may have advanced money at their request for the preservation of the property; (iv) by reason of the right vested in mortgagees or other persons having a charge upon the policy to add to that charge any moneys which may have been paid by them to preserve the property. Except in the above circumstances no lien is created by the payment of premiums by a mere stranger or by a part owner. Even if the law of contribution applies, the right to contribution is a personal right and there is no lien for the amount of the moneys in respect of which the right arises. Where one person allows another to expend money upon his property and stands by during such expenditure, a lien is not created unless the person who makes the payment does so under a belief in the validity of his own title.

C

D

E

A wife before her marriage insured her life for £5,000. On her marriage she handed the policy to her husband, and thereafter he paid the premiums, and after his death they were paid by his executors out of his estate. On a claim by the executors that because of the payments which the husband had made his estate was entitled to a lien on the policy,

F

Held: applying the principles stated above, the husband's estate was not entitled to a lien on the insurance policy.

Notes. Explained: *Re Winchelsea's Policy Trusts* (1888), 39 Ch.D. 168. Considered: *Strutt v. Tippet* (1890), 62 L.T. 475; *Re Phillips*, [1914] 2 K.B. 689. Applied: *Re Jones' Settlement*, *Stunt v. Jones*, [1915] 1 Ch. 373. Considered: *Royal Exchange Assurance v. Hope*, [1927] All E.R.Rep. 67. Applied: *Re Smith, Bilham v. Smith*, [1937] 3 All E.R. 472. Considered: *Re Foster, Hudson v. Foster* (No. 2), [1938] 3 All E.R. 610. Referred to: *Leigh v. Dickeson* (1883), 12 Q.B.D. 194; *Falcke v. Scottish Imperial Insurance Co.*, [1886-90] All E.R.Rep. 768; *The Ripon City (otherwise The Silva)*, [1898] P. 78; *Kenrick v. Mountstevens* (1899), 48 W.R. 141; *Re Fitzgerald, Surman v. Fitzgerald* (1904), 90 L.T. 266; *Re Pearce*, [1909] 2 Ch. 492; *Re McKerrell, McKerrell v. Gowans* (1912), 82 L.J.Ch. 22; *Re Stokes, Ex parte Mellish*, [1918-19] All E.R.Rep. 1179; *Smith v. Wood* (1928), 139 L.T. 250; *Re Roberts, Public Trustee v. Roberts*, [1946] Ch. 1.

G

H

As to liens on an insurance policy for premiums paid by other than the sole beneficial owner, see 22 HALSBURY'S LAWS (3rd Edn.) 288; and for cases see 29 DIGEST (Repl.) 415 et seq.

Cases referred to:

I

- (1) *Aylwin v. Witty* (1861), 30 L.J.Ch. 860; 9 W.R. 720; 26 Digest (Repl.) 115, 797.
- (2) *Clack v. Holland* (1854), 19 Beav. 262; 24 L.J.Ch. 13; 24 L.T.O.S. 49; 18 Jur. 1007; 2 W.R. 402; 52 E.R. 350; 29 Digest (Repl.) 416, 3178.
- (3) *Gill v. Downing* (1874), L.R. 17 Eq. 316; 30 L.T. 157; 22 W.R. 360; 32 Digest 261, 453.
- (4) *Todd v. Moorhouse* (1874), L.R. 19 Eq. 69; 32 L.T. 8; 23 W.R. 155; 43 Digest 771, 2126.

- A (5) *Burridge v. Row* (1842), 1 Y. & C.Ch. Cas. 183; 11 L.J.Ch. 369; 6 Jur. 121; 62 E.R. 846; affirmed (1844), 13 L.J.Ch. 178; 3 L.T.O.S. 1; 8 Jur. 299, L.C.; 29 Digest (Repl.) 415, 3112.
- (6) *Pinkett v. Wright* (1842), 2 Hare, 120; 12 L.J.Ch. 119; 6 Jur. 1102; 67 E.R. 50; affirmed sub nom. *Murray v. Pinkett* (1846), 12 Cl. & Fin. 764; 8 E.R. 1612, H.L.; 48 Digest 952, 3919.
- B (7) *West v. Reid* (1843), 2 Hare, 249; 12 L.J.Ch. 245; 7 Jur. 147; 67 E.R. 104; 32 Digest 261, 452.
- (8) *Shearman v. British Empire Mutual Life Assurance Co.* (1872), L.R. 14 Eq. 4; 41 L.J.Ch. 466; 26 L.T. 570; 20 W.R. 620; 29 Digest (Repl.) 416, 3116.
- (9) *Saunders v. Dunman* (1878), 7 Ch.D. 825; 47 L.J.Ch. 338; 38 L.T. 416; 26 W.R. 397; 35 Digest (Repl.) 772, 4498.
- C (10) *Re Tharp* (1852), 2 Sm. & G. 578, n.; 65 E.R. 533, L.C.; 39 Digest 96, 1139.
- (11) *Norris v. Caledonian Insurance Co.* (1869), L.R. 8 Eq. 127; 38 L.J.Ch. 721; 20 L.T. 939; 17 W.R. 954; 29 Digest (Repl.) 417, 3122.
- (12) *Pennell v. Millar* (1857), 23 Beav. 172; 26 L.J.Ch. 699; 29 L.T.O.S. 35; 3 Jur.N.S. 850; 5 W.R. 215; 53 E.R. 68; 25 Digest (Repl.) 298, 1044.
- D (13) *Ex parte Young* (1813), 2 Ves. & B. 242; 2 Rose, 78, n.; 35 E.R. 311, L.C.; 32 Digest 260, 442.
- (14) *Re Nicholson, Ex parte Harrison* (1814), 2 Rose, 76, D.C.; 32 Digest 260, 443.
- (15) *Doddington v. Hallet* (1750), 1 Ves. Sen. 497; 27 E.R. 1165, L.C.; 41 Digest 202, 401.
- E (16) *Kay v. Johnston* (1856), 21 Beav. 536; 52 E.R. 967; 32 Digest 260, 440.
- (17) *Teasdale v. Sanderson* (1864), 33 Beav. 534; 55 E.R. 476; 38 Digest (Repl.) 829, 408.
- (18) *Swan v. Swan* (1820), 8 Price, 516; 146 E.R. 1281; 32 Digest (Repl.) 260, 439.
- (19) *Hamilton v. Denny* (1809), 1 Ball & B. 199; 32 Digest 260, k.
- F Also referred to in argument:
- Rowley v. Unwin* (1855), 2 K. & J. 138; 69 E.R. 726; 32 Digest 263, 463.
- Pitt v. Pitt* (1823), Turn. & R. 180; 37 E.R. 1065; 27 Digest (Repl.) 132, 958.
- Green v. Briggs* (1848), 6 Hare, 395; 17 L.J.Ch. 323; 11 L.T.O.S. 412; 12 Jur. 326; 67 E.R. 1219; 32 Digest 260, 444.
- G *Buxton v. Snee* (1748), 1 Ves. Sen. 154; 27 E.R. 952, L.C.; 41 Digest 940, 8316.
- Dering v. Earl of Winchelsea* (1787), 1 Cox, Eq. Cas. 318; 29 E.R. 1184; sub nom. *Deering v. Earl of Winchelsea*, 2 Bos. & P. 270; 20 Digest (Repl.) 268, 140.

Action brought by the surviving executor of the testator, J. C. Leslie, deceased, against the executors of a deceased son of the testator, Mrs. Leslie (the widow of the testator), and Mr. and Mrs. Trevelyan and their children and the trustees of a settlement under which the Trevelyan family were beneficiaries, seeking a declaration of the right and interests of the plaintiff and defendants in a life insurance policy and the moneys secured by it.

On May 27, 1843, before her marriage with the testator, Mrs. Leslie insured her life for £5,000. At this time she was a widow and was entitled to an annuity of about £8,000 a year under the will of her late husband. On April 26, 1848, a voluntary post-nuptial settlement was executed by Mr. and Mrs. Leslie by which an annual sum of £800, part of Mrs. Leslie's annuity, was made payable to her husband for their joint lives, the balance being settled to her own separate use. On her marriage Mrs. Leslie handed the insurance policy to her husband, and thereafter he paid the premiums and after his death in 1877 they were paid by his executors out of his estate. In September, 1849, Mrs. Leslie had written a letter to her husband in which she expressed her intention at the right time to break the

insurance policy. On Sept. 28, 1863, by a settlement made upon the marriage of Mr. and Mrs. Leslie's daughter Maria with W. R. Trevelyan, Mr. Leslie covenanted with the trustees to pay to them, on his wife's death, a sum of £6,000 to be held by them on certain trusts for the benefit of Mr. and Mrs. Trevelyan and their issue; and he assigned to them, as security, the insurance policy upon his wife's life, and covenanted to pay the premiums thereupon until she should die. On Nov. 28, 1877, Mr. Leslie died, without having ever reduced the insurance policy into possession, and having by his will, made in November, 1863, bequeathed to the trustees of the Trevelyan settlement, on the trusts of that settlement, any surplus that there might be of the policy moneys after payment of the £6,000. He also bequeathed to his wife specifically certain property of little value, but enough to raise against her a case of election between these benefits and the policy.

Cozens-Hardy, Q.C., and Simpson for the plaintiff.

Glasse, Q.C., and Dundas Gardiner for parties claiming under the Trevelyan settlement.

Cookson, Q.C., and Macrae for Mrs. Leslie.

Cur. adv. vult.

April 20, 1883. **PEARSON, J.**, read the following judgment of **FRY, L.J.**, which, by the consent of the parties, he adopted as his own, **FRY, J.**, having been appointed a lord justice of appeal since the conclusion of the argument: As Mrs. Leslie is still alive the question would not require immediate determination were it not for the fact that the testator's will raises against his wife a case of election, and that she is entitled to know between what properties she is called on to elect. The plaintiff contends that the payments made by Mr. Leslie have created a lien or charge upon the money secured by the policy to the extent of the moneys paid. The defendants deny this proposition. The question thus raised has been fully discussed, and it becomes necessary to consider the various arguments which have been adduced and the numerous cases which have been cited upon the point.

In my opinion, a lien may be created upon the moneys secured by a policy of payment of premiums in the following cases: first, by contract with a beneficial owner of the policy; secondly, by reason of the right of the trustees to an indemnity out of the trust property for money expended by them in its preservation; thirdly, by subrogation to the rights of the trustees of some person who may have advanced money at their request for the preservation of the property; fourthly, by reason of the right vested in mortgagees or other persons having a charge upon the policy to add to that charge any moneys which have been paid by them to preserve the policy.

An instance of the first class of cases to which I have referred, viz., the creation of a lien by contract with the beneficial owner is to be found in *Aylwin v. Witty* (1), where **KINDERSLEY, V.-C.**, held that where a mortgagor had contracted with the mortgagee to pay the premiums, and there were sureties for the performance of this contract by the mortgagor, and the sureties had been called upon and had paid the premiums, they were entitled as against the mortgagor to a lien upon the policy moneys. It is obvious that in this case the sureties were, by contract with the principal debtor, entitled to the benefit of all the securities which the mortgagee could have enforced, and among others to a charge for the premiums paid. The second and third classes of cases are well illustrated by *Clack v. Holland* (2), in which it was held that trustees who paid moneys under circumstances which gave them no right to a charge could not create a charge in favour of any third person from whom they borrowed moneys. To the same class may be referred *Gill v. Downing* (3), in which mortgagees whose title as such was good after, and only after, the death of the tenant for life were held entitled to a lien during the subsistence of the tenancy for life. The mortgagees were put by subrogation in the place of the trustees. Again, in *Todd v. Moorhouse* (4), the right of trustees to create a lien by subrogation of their rights was recognised, and it was determined that a person paying at the request of the trustees did not lose the right to the lien

A simply because the trustees might possibly have taken some other course to preserve the property. Such appear to me to be the classes of cases in which a lien is created by payment of premiums. But I am unable to see that the plaintiff has brought the case within any of them. There were no trustees for Mr. Leslie and his wife to whose rights he could be subrogated, and there was no contract between him and her under which the payments were made.

B I am further of opinion that, except under the circumstances to which I have referred, no lien is created by the payment of the premiums by a mere stranger or by a part owner. I will first consider the case of payments by a mere stranger. On principle it is difficult, if not impossible, to see why such payments, which when made without contract or request are a mere impertinence, should create a lien upon the property. It is evident that in themselves they would not even
C create a ground of personal action against the person eased by the payment, for it is certain that moneys paid by A. for B. give no right of action against B. unless they are paid upon his request. In the next place, the law relating to confusion appears to me strongly to show that no such right would exist. If I pour my gold into your heap, or put my silver into your melting-pot, or turn my corn into your granary, I have no right to an account or any relief against you, but on the contrary
D I have actually transferred the property in what was mine to the person with whose property I have mingled it. Again, the authorities appear to me to be clear upon this point. In *Burridge v. Row* (5), KNIGHT BRUCE, V.-C., used the following language (1 Y. & C. Ch. Cas. at p. 191):

E "Nothing that has been stated to me has had the effect of persuading me that, without contract for that purpose, the mere fact of making payments of the premiums, however necessary that might be for the preservation of the property, would give the party making those payments a title to the property."

It may be perfectly true, as was contended before me, that Alderman Winchester was during the period between 1828 and 1832 in the position of a person having no interest in the policy, and that the decree in *Burridge v. Row* (5), by giving him
F a lien for payments made during that period, has gone beyond the principle enunciated by the learned Vice-Chancellor.

The important question is not whether the decree was accurate, but what was the principle of law enunciated by the judge. In *Clack v. Holland* (2), SIR JOHN ROMILLY, M.R., understood *Burridge v. Row* (5) as laying down the principle for which I have cited it. His Lordship said (19 Beav. at p. 277):

G "That case lays down a principle in accordance with my view of this case, and supports *Pinkett v. Wright* (6), and shows that a mere stranger by paying premiums on a policy cannot acquire a lien upon it. He can only acquire a lien by some contract with the persons beneficially interested in it, or with the trustee, where the trustee himself might have obtained a lien."

H It has, however, been contended that a right is created in favour of a stranger making the payments, upon the principle of salvage; and it is said to be contrary to natural equity that one person should gain by another man's loss. What is the state of the authorities upon this point? In the first place, whether there be such a doctrine as that of salvage applicable to cases of this description at all was doubted by KINDERSLEY, V.-C., in *Aylwin v. Witty* (1), to which I have already
I referred. In the next place, with regard to *West v. Reid* (7) and *Shearman v. British Empire Assurance Co.* (8), I will only say that I retain the opinion which I expressed with regard to those cases in *Saunders v. Dunman* (9). *Re Tharp* (10), before LORD ST. LEONARDS, L.C., has been referred to as an authority for the proposition that there is some general doctrine of salvage in cases of this kind. It appears to me, however, that the Lord Chancellor was referring to a practice in the Irish law of conveyancing which probably has its basis in agreement, and that if it is meant to assert, as the language would rather imply, that an ultimate mortgagor making payments for the renewal of a lease is entitled to priority over his

mortgagees, the proposition would seem to be inconsistent with the general law of the land. A

In the next place, with regard to payments made by a part owner, it appears to me that, except by contract, such payments give no title to the person making them against the other part owner or part owners of the policy. That the payments by a mortgagor, who in equity is a part owner with the mortgagee, create no lien as against the mortgagee, was determined by LORD ROMILLY, M.R., in *Norris v. Caledonian Insurance Co.* (11). And, generally speaking, it is clear that money laid out by a tenant for life in improvements on the estate creates no lien against the remainderman. Again, in *Pennell v. Millar* (12), SIR JOHN ROMILLY, M.R., had to deal with a case in which A., the owner of policies, had as part of a transaction voidable for fraud assured them to B., and had covenanted to keep them up; B., claiming under this assignment, had paid premiums. A. instituted an action to set aside the transaction on the ground of fraud, and the Master of the Rolls determined that the assignment was a valid security for the moneys actually advanced, and not for the premiums paid by B., which was a voluntary payment. In this case it is evident that, until the transaction was avoided, A. and B. were both possessed of interests in the policies, and yet the payment by one of the persons so interested was held to create no lien as against the other. C D

An argument was urged from the law of contribution. But, in the first place, the law of contribution arises only between persons joined for a common purpose, or persons who stand in the position of tenants in common, or co-partners. In the next place, it is plain that the right to contribution is a personal right, and the remedy is a personal remedy, and that there is no lien for the amount of the moneys in respect of which the right to contribution arises. This was determined by LORD ELDON, after great consideration, in the case of part owners of a ship, in *Ex parte Young* (13) and *Ex parte Harrison* (14), in which he overruled the previously expressed opinion of LORD HARDWICKE [in *Doddington v. Hallet* (15)] to the contrary; and the same proposition, that there is no lien for the contributed moneys, is supported by *Kay v. Johnston* (16) and *Teasdale v. Sanderson* (17). There are, however, it must be admitted, two cases which look in the opposite direction. The first of those is *Swan v. Swan* (18), where the Court of Exchequer, sitting as a court of equity, refused to grant partition to one co-tenant except upon the terms of the plaintiff allowing a lien for the expenditure of his co-tenant in permanent improvements. But it appears doubtful how far this case has been generally followed, and it does not appear to me to be consistent with the opinion expressed by SIR JOHN ROMILLY, M.R., in *Teasdale v. Sanderson* (17). The second case is *Hamilton v. Denny* (19); there a lease had been made to A. and B. as joint tenants. B. had settled his moiety of the property. A. had made a payment of the renewal fines, and he was held to be entitled to a lien on B.'s settled share. The decision was placed upon two grounds. It was said to be like the case of payments by a mortgagee, and it was said that the payments by A. were entitled to the same benefit as if they had been payments made by a trustee. It is perhaps not perfectly easy to see the strict analogy between these two cases and the case then before the court. In my view, these cases are not sufficient to establish any such general proposition as that the right to contribution creates any lien on the property in respect of which it has been made, and they certainly are insufficient to support the plaintiff's case. For in those authorities the submission to a lien was required from the plaintiff as a term of other relief which he sought, while in the case now before me the plaintiff is affirmatively asserting his right. E F G H I

It has been further urged that the plaintiff is entitled to a lien on the ground of the acquiescence by the other persons interested in the policy in the payments made by Mr. Leslie, and it is said that where one person allows another to expend money upon his property, and stands by during such expenditure, a lien is created in favour of the person making the expenditure. But it is certain that no such lien is created except in the case of a person who makes the payment under a

A belief in the validity of his own title. In the present case there is nothing whatever to show that Mr. Leslie acted under any mistake with regard to his rights in the policy, and it is certain that during a considerable part of the period covered by his payments he was in possession of the opinion of counsel as to his legal rights.

Another argument pressed upon me by the plaintiff was derived from the relation of tenant for life and remainderman. It is well established that, if a tenant for life renews leaseholds, and dies before the expiration of the term, his estate is entitled to a lien on the interests in remainder, proportionate to the unexpired portion of the renewed term. But the equities governing the relation of tenant for life and remainderman are peculiar, and I fail to see any analogy between the case of a tenant for life making such a payment and the case of Mr. Leslie paying premiums on a policy over which he had full control at every moment of his life, which, I repeat, but for his contract on his daughter's marriage, he could have sold or surrendered without consent of his wife.

In my judgment, the arguments of the plaintiff in support of his lien fail, and I conclude that from the time of the marriage down to the year 1863 Mr. Leslie made the payments in question in maintenance of his own right in the policy, and that from 1863 he made the payments in pursuance of his covenant with his daughter's trustees, but that in no case did he make them by reason of any contract between himself and his wife, or by reason of any mistake of his title to the policy, and consequently that his estate is entitled to no lien on the policy moneys as against her. I understand from counsel that the defendant Mrs. Leslie consents to a declaration that the policy shall stand as a security for the £6,000 secured by the Trevelyan settlement, and I believe also some arrangement has been come to as to the premiums paid since Mr. Leslie's death. I will, therefore, make, by consent, a declaration to the effect of the arrangement between the parties, and then declare that, except so far as Mr. Leslie's estate is benefited by the previous declaration, the plaintiff has no right or interest in the policy, but that, subject to the said declaration, the policy has accrued to Mrs. Leslie by survivorship, and I direct the plaintiff to pay the costs of the action.

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*Action dismissed.**Solicitors: Bloxams & Ellison; Dangerfield & Blythe; Maples, Teesdale & Co.**[Reported by H. G. WILLINK, ESQ., Barrister-at-Law.]*

POUNTNEY v. CLAYTON

[COURT OF APPEAL (Sir Baliol Brett, M.R., and Bowen, L.J.), April 18, 19, 20, 1883]

[Reported 11 Q.B.D. 820; 52 L.J.Q.B. 566; 49 L.T. 283;
47 J.P. 788; 31 W.R. 664]

Land—Right to support—Assignee of land from railway company—Right of mine-owner to work mine when surface owned by railway company—Railways Clauses Consolidation Act, 1845 (8 & 9 Vict., c. 20), ss. 77, 78, 79.

Under powers given by the Railways Clauses Consolidation Act, 1845, a railway company compulsorily acquired land excepting mines which were worked beneath the surface by the defendant. Subsequently, the company found that this land was superfluous and sold it to the plaintiff. The plaintiff brought an action against the defendant for working the mines in such a way as to let down the surface belonging to the plaintiff and injuring buildings thereon.

Held: since the defendant could have worked out the mines so as to let down the surface when the surface was owned by the railway company by virtue of ss. 77, 78, and 79 of the Act of 1845, the plaintiff, whose title to the land was derived from the railway company, was in the same position and had no right to support from the defendant's land in respect of the surface.

Notes. Sections 78 and 79 of the Railways Clauses Consolidation Act, 1845, are now incorporated in s. 15 of the Mines (Working Facilities and Support) Act, 1923: 19 HALSBURY'S STATUTES (2nd Edn.) 972.

Considered: *Consett Waterworks Co. v. Ritson* (1889), 22 Q.B.D. 318; *London and North-Western Rail. Co. v. Howley Park Coal and Cannel Co.*, [1911] 2 Ch. 97. Distinguished: *Wath-upon-Deerne U.D.C. v. John Brown & Co., Ltd.*, [1935] All E.R.Rep. 127. Referred to: *Midland Rail. Co. v. Robinson*, [1886-90] All E.R.Rep. 742; *Ruabon Brick and Terra Cotta Co. v. G.W.R. Co.*, [1893] 1 Ch. 427; *Re Arbitration Between Gerard and London and North-Western Rail. Co.*, [1895-9] All E.R.Rep. 1144; *Manchester Corpn. v. New Moss Colliery*, [1906] 2 Ch. 564; *Executors of Hargreaves v. Burnley Corpn.*, [1936] 3 All E.R. 959; *Re Wilson Syndicate Conveyance, Wilson v. Shorrock*, [1938] 3 All E.R. 599.

As to the sale of superfluous lands in general, see 10 HALSBURY'S LAWS (3rd Edn.) 223 et seq.; and for cases see 11 DIGEST (Repl.) 300 et seq. For the Railways Clauses Consolidation Act, 1845, see 19 HALSBURY'S STATUTES (2nd Edn.) 590.

Cases referred to:

- (1) *Great Western Rail. Co. v. Bennett* (1867), L.R. 2 H.L. 27; 36 L.J.Q.B. 133; 16 L.T. 186 15 W.R. 647, H.L.; 11 Digest (Repl.) 164, 375.
- (2) *Rowbotham v. Wilson* (1860), 8 H.L.Cas. 348; 30 L.J.Q.B. 49; 2 L.T. 642; 24 J.P. 579; 6 Jur.N.S. 965; 11 E.R. 463, H.L.; 11 Digest (Repl.) 84, 1031.
- (3) *Smith v. Darby* (1872), L.R. 7 Q.B. 716; 42 L.J.Q.B. 140; 26 L.T. 762; 37 J.P. 4; 20 W.R. 982; 33 Digest (Repl.) 851, 1036.
- (4) *Humphries v. Brogden* (1850), 12 Q.B. 739; 20 L.J.Q.B. 10; 16 L.T.O.S. 457; 116 E.R. 1048; sub nom. *Humfries v. Brogden*, 15 Jur. 124; 33 Digest (Repl.) 732, 94.
- (5) *Great Western Rail. Co. v. Fletcher* (1860), 5 H. & N. 689; 2 L.T. 803; 6 Jur.N.S. 961; 8 W.R. 501; 157 E.R. 1355; sub nom. *Fletcher v. Great Western Rail. Co.*, 29 L.J.Ex. 253; 24 J.P. 516, Ex. Ch.; 11 Digest (Repl.) 164, 373.

Also referred to in argument:

Diron v. Caledonian and Glasgow and South-Western Rail. Cos. (1880), 5 App. Cas. 820; 43 L.T. 513; 45 J.P. 108; 29 W.R. 249, H.L.; 11 Digest (Repl.) 168, 395.

- A** *Caledonian Rail. Co. v. Sprot* (1856), 27 L.T.O.S. 264; 2 Jur.N.S. 623; 4 W.R. 659; 2 Macq. 449, H.L.; 11 Digest (Repl.) 175, 434.
- Errington v. Metropolitan District Rail. Co.* (1882), post p. 528; 19 Ch.D. 559; 51 L.J.Ch. 305; 46 L.T. 443; 30 W.R. 663, C.A.; 11 Digest (Repl.) 107, 40.
- Smith v. Great Western Rail. Co.* (1877), 3 App. Cas. 165; 47 L.J.Ch. 97; 37 L.T. 645; 42 J.P. 404; sub nom. *Great Western Rail. Co. v. Smith*, 26 W.R. 130, H.L.; 11 Digest (Repl.) 168, 397.
- B** *London and North-Western Rail. Co. v. Ackroyd* (1862), 31 L.J.Ch. 588; 6 L.T. 124; 8 Jur.N.S. 911; 10 W.R. 367; 11 Digest (Repl.) 164, 374.

Appeal from an order of the Divisional Court (DENMAN, J., MANISTY, J., dissenting), on a rule for the new trial of an action brought by the plaintiff against the defendant for damages for working his mines in such a way as to withdraw support from the plaintiff's land and five houses thereon.

C At the trial of the action before WATKIN WILLIAMS, J., at Shrewsbury, the jury found for the plaintiff for £465 2s. The defendant obtained a rule nisi for a new trial on the ground of misdirection, but the rule was discharged by the Divisional Court who were divided in opinion. The defendant appealed.

D By s. 77 of the Railways Clauses Consolidation Act, 1845 :

"The company shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them, except only such parts thereof as shall be necessary to be dug or carried away or used in the construction of the works, unless the same shall have been expressly purchased; and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands, unless they shall have been expressly named therein and conveyed thereby."

E By s. 78 of the Railways Clauses Consolidation Act, 1845 [now incorporated in s. 15 of the Mines (Working Facilities and Support) Act, 1923] :

F "If the owner, lessee, or occupier of any mines or minerals lying under the railway, or any of the works connected therewith, or within the prescribed distance, or, where no distance shall be prescribed, forty yards therefrom, be desirous of working the same, such owner, lessee, or occupier shall give to the company notice in writing of his intention so to do, thirty days before the commencement of working; and upon the receipt of such notice it shall be lawful for the company to cause such mines to be inspected by any person appointed by them for the purpose; and if it appear to the company that the working of such mines or minerals is likely to damage the works of the railway, and if the company be willing to make compensation for such mines or any part thereof to such owner, lessee, or occupier thereof, then he shall not work or get the same; and if the company, and such owner, lessee, or occupier, do not agree as to the amount of such compensation, the same shall be settled as in other cases of disputed compensation."

G By s. 79 of the Railways Clauses Consolidation Act, 1845 [now incorporated into s. 15 of the Mines (Working Facilities and Support) Act, 1923] :

H "If before the expiration of such thirty days the company do not state their willingness to treat with such owner, lessee, or occupier for the payment of such compensation, it shall be lawful for him to work the said mines or any part thereof for which the company shall not have agreed to pay compensation, so that the same be done in a manner proper and necessary for the beneficial working thereof, and according to the usual manner of working such mines in the district where the same shall be situate; and if any damage or obstruction be occasioned to the railway or works by improper working of such mines, the same shall be forthwith repaired or removed, as the case may require, and such damage made good, by the owner, lessee, or occupier of such mines or minerals, and at his own expense; and if such repair or removal be not

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forthwith done, or, if the company shall so think fit, without waiting for the same to be done by such owner, lessees, or occupier, it shall be lawful for the company to execute the same, and recover from such owner, lessee, or occupier the expense occasioned thereby, by action in any of the superior courts."

Jelf, Q.C., and Bosanquet, Q.C., for the defendant.

H. Matthews, Q.C., and Poyser for the plaintiff.

SIR BALIOL BRETT, M.R.—In this case the owner of certain land sued the owner of the mines for working his mines in such a way as to let down the surface, and injure the buildings thereon. The plaintiff's title was proved to have arisen in this way. The land and mines originally belonged to one Penson, who granted a lease of the mines to the defendant. I will assume that, on the true construction of the lease, as between the defendant and Penson, the defendant was bound to work the mines so as not to let down the surface. The meaning of the lease is that all the minerals are sold by the owner, and are to be so worked that the surface shall not be let down. As to the rights of the lessee, it is said that he must leave some coal, and so he must, that is, he must leave enough for the support of the surface. The railway company desired to buy the land under their compulsory powers. If it remained under the Lands Clauses Consolidation Act, 1845, alone they would be bound to buy the land and the mines. But by the Railways Clauses Consolidation Act, 1845, the railway company has an option, and may insist on buying the land, and not buying the mines. There is a power of election. It comes to this, that, in popular language, the railway company are entitled to buy the surface, but they may buy all the land except the mines, so that where the mines are excepted out of the conveyance to the railway company, if a person dug under the land in a part which was not mines he would be a trespasser as against the company.

We have to consider the position of a railway company which has exercised this option, and has bought everything except the mines, and we can try it, as the House of Lords did before there was any decision on the question, on the mere construction of the Railways Clauses Consolidation Act, 1845. It depends on the true construction of ss. 77, 78, and 79 of that statute. The question on the construction of those sections is, what are the rights of a railway company which has elected not to purchase the minerals, with regard to the owner of the minerals? It would seem that he and the railway company have two converse rights, which taken together, make up the whole ownership of the land. A question might have been raised if s. 77 stood alone, whether there could be by implication a right reserved to the railway company to the natural support necessary to maintain the railway. If there were a grant to the railway company of all the land except the mines, it may be that inasmuch as the owner would be selling to build a railway, it would be natural when he sold for a particular purpose, and right and reasonable, that he should not sell the land on such terms that he would be entitled to work the mines so as to let down the railway. But that would be because the land would be granted, but on s. 77 there is no grant by the landowner to the railway company: they take the land, and insist that he shall keep the minerals. If that section stood alone I should be inclined to agree with LORD WESTBURY in *Great Western Rail. Co. v. Bennett* (1), that there would be no implied right to support, but it is not necessary to determine this point, for s. 77 is followed by the other sections to which I have referred.

To my mind we have a direct decision of the House of Lords as to the true construction of the statute in *Great Western Rail. Co. v. Bennett* (1). The circumstances of that case were not the same as those here, but in looking to that case for guidance we are bound to see whether it fairly raises the question of construction, and if it does so, we must see what the House of Lords held to be the construction of the statute, and then resume the consideration of the present case, and apply that construction to the facts. It is impossible to say that the question as to the construction of the statute with regard to the rights of the railway com-

A pany and the landowner, when the railway company has bought the lands without taking the mines, did not come before the House of Lords in *Great Western Rail. Co. v. Bennett* (1). The House of Lords decided what is the true construction of the three sections to which I have referred with regard to the rights of the railway company and those of the owner of the mines, and all the Lords who took part in that decision came to the same conclusion, namely, that the legislature, knowing the natural right of the owner of the land to support, and knowing what would be the implication in the case of a grant of all except the minerals, came to the conclusion that the statute was meant to alter the ordinary law, and that inasmuch as railway companies obtained a right of choice whether they would purchase the mines or not, the meaning is that when the railway company exercises a choice and does not take the minerals, then all their rights of support are gone, and the minerals may, as against the railway company, be thoroughly worked out, whether the effect is to injure the railway or not, the only obligation on the landowner being to get out the minerals in the ordinary way.

The boon is partly to one and partly to the other. The necessity of buying all the minerals is postponed, and so the company can keep their money, for the owner may never want to work the minerals that is in favour of the railway company, but it would be unjust to give them that power and not to give some compensation to the mineowner, and, therefore, the House of Lords came to the conclusion that the legislature had guarded him by providing that if the railway company purchased the land without the minerals the owner may work out all the minerals. That again would be too much against the railway company, for the landowner could let down the railway, and, therefore, protection is given to the railway company to countervail this right, for by s. 78 whoever is the owner of or entitled to work the minerals shall not work them until after thirty days' notice. There again an option is given to the company, for they can send their surveyor into the mine to inspect and advise them as to whether it is their interest to prevent the owner from working the mines, and they have a right to purchase the minerals. The Act says that the railway company's rights may be exercised not only within the thirty days, but at any time before the owner has worked the mines.

The House of Lords came to the conclusion that if all the company do is to exercise their option on the first purchase of the land, the minerals may be got to the last inch, whether the effect is to let down the railway or not, and if they do not prevent this in the way pointed out by the statute it is their own fault. LORD CHELMSFORD says (L.R. 2 H.L. at p. 38):

G "This section appears to me to leave the mineowner to work his mine exactly as he would if the surface belonged to him, unless the railway company chooses to prevent him by expressing willingness to make him compensation."

LORD CRANWORTH says (ibid. at p. 40):

H "It was obviously the intention of the legislature, in making these provisions, to create a new code as to the relation between mineowners and railway companies where lands were compulsorily taken for the purpose of making a railway. The object of the statute evidently was to get rid of all the ordinary law on the subject, and compel the owner to sell the surface, and if any mines were so near the surface that they must be taken for the purposes of the railway, to compel him to sell them, but not to compel him to sell anything more. The land was to be dealt with just as if there were no mines to be considered, nothing but the surface. That being so, justice obviously requires that when the mineowner thinks it beneficial to him to work his mines, and proceeds to do so, he should be just in the same position as if he had never sold any part of the surface at all."

I In other words, the mines may be worked as against the railway company just as if they were in the hands of the owner of the surface. I need not read what LORD WESTBURY says, but he takes the same view, and says he is astonished that anyone should think otherwise.

That determines the right of the mineowner, and, necessarily, the converse right of the railway company. Where the railway company buy all except the mines, and do nothing more, what they get is all the land except the mines, subject to this, that the mines may be worked as against them, if they are worked in a particular way, even so as to let down the railway. Then the defect in the plaintiff's case is a defect in the plaintiff's right, and it is immaterial what are the rights of the defendant. It may be that he has done wrong to his lessor, but if he has not invaded the rights of the plaintiff that does not affect the present case. A B

I think the case ought to be decided in favour of the defendant, on the ground that the defendant has not derogated from the plaintiff's right, and I agree with MANISTY, J., rather than with DENMAN, J. The result will be that the plaintiff will have judgment for one-fifth of the amount recovered at the trial, and will have the general costs of the action, diminished by so much of the costs as were caused by his claim in respect of more than one house. The defendant having succeeded in his appeal will have the costs of the appeal. C

BOWEN, L.J.—This is an intricate matter to deal with. The subject-matter of the case is the right to support, which is an obscure right, even where there is a contract. The plaintiff is the ultimate purchaser of superfluous land, and he claims under the railway company, and brings this action for letting down the land. The defendant's answer is, "You have no right, because you claim only under the railway company, and the Railways Clauses Consolidation Act, 1845, liberates me from liability." Is that a good answer? WATKIN WILLIAMS, J., thought not, and the Divisional Court was divided in opinion; so the case comes to us. D

We must keep distinct the different ways in which people get a right to support of the surface of land. *Prima facie*, the owner has all from the sky down to the centre of the earth, and certain rights of support exist where nothing is known of the origin of the rights. Where land is divided so that the part above belongs to one person, and the part below to another, *prima facie* the land above is entitled to support from the land below. That is where you do not know the origin of the rights. Where the origin is known the rights depend on the deed or Act of Parliament which severs the upper land from the lower. This must necessarily be so, for the owner of the whole may do what he likes with it. He may grant the minerals, reserving the right of support, or may grant them so that the grantee is entitled to let down the surface, or he may demise the minerals and reserve the right to support, or he may demise them so as to give the lessee the right to destroy the surface. One must look at the instrument to see how far the demise goes, and how far any right to support is reserved. Where there are mere words of demise, and the right to support is conceded, I should say that the general words of demise would give all the minerals, reserving the right to support of the surface. So looking at the demise from Penson to Clayton, I should think here that the lessee was the occupier of all the coal. E F G

This view seems to me to be consistent with the language used by LORD WENSLEYDALE in *Rowbotham v. Wilson* (2), and which is cited by BLACKBURN, J., in *Smith v. Darby* (3). I call attention to this passage because counsel for the plaintiff's ingenious argument appears to me to ignore it. LORD WENSLEYDALE says (8 H.L.Cas. at p. 360): H

"There is no doubt that *prima facie* the owner of the surface is entitled to the surface itself and all below it *ex jure naturæ*; and those who claim the property in the minerals below, or any interest in them, must do so by some grant from or conveyance by him, or it may be from the Crown, as suggested by LORD CAMPBELL in the case of *Humphries v. Brogden* (4). The right of the grantee to the minerals by whomsoever granted, must depend upon the terms of the deed by which they are conveyed or reserved when the surface is conveyed. *Prima facie*, it must be presumed that the minerals are to be enjoyed, and therefore that a power to get them must also be granted or reserved as a I

A necessary incident. It is one of the cases put by SHEPPARD (TOUCHSTONE, chap. 5, p. 89) in illustration of the maxim, quando aliquid conceditur, conceditur etiam et id sine quo res ipsa non esse potuit, that by grant of mines is granted the power to dig them. A similar proposition prima facie arises that the owner of the mines is not to injure the owner of the soil above by getting them if it can be avoided. But it rarely happens that these mutual rights are not precisely ascertained and settled by the deed by which the right to the mines is acquired; and then the only question would be as to the construction of that deed, which may vary in each case."

C Applying what I have said to the proprietorship of the surface, as the Master of the Rolls has pointed out, one must not fall into the fallacy of thinking that it means the plane surface; I mean all the land except the mines. Then what classes of surface owners are there? First, the surface owner may have both the mines and the surface; or, secondly, you may have a surface owner entitled to the ordinary right of support, not because there is a deed, but because you only know that he is the surface owner; or, thirdly, the surface owner may have a right to support created by a document, where it must depend on the construction of the document; or, fourthly, the surface owner may have no right to support because it has been given away. These being the four classes of owners, a purchaser appears.

E Let us first take a case that is not under the Act of Parliament; what does the purchaser get from the surface owner? First, only what he has to give, and secondly only what he intends to give. Then how are we to know what is intended to be given? We must look at the deed and construe it, or it may be that the deed is silent, and then in each case the law assists. The presumption is that the instrument is intended to be effectual for the purpose for which it was executed; in the words of the maxim cited by LORD WENSLEYDALE in the passage I have just read, quando aliquid conceditur, conceditur etiam et id sine quo res ipsa non esse potuit. Now take each class and see what is passed by implication. First, where the surface owner has all the land, consider what the law implies as passing by a conveyance. If the sale were not to a railway company, it would be what is wanted for the natural enjoyment of the land. In the case of a railway company it might go rather further, and what is wanted for the support of the railway might be held to pass. As to the second class I have referred to, where the owner has only the surface, the right to support passes, but only what he has got, and therefore only the right to the support of the surface. Thirdly, where there is a severance by a document, there if the surface owner can give the right of support he gives what is required. Fourthly, where there is no right to support, there the owner can only give the surface. As to the third case, I wish to point out that a person who has a right to support created by deed as between himself and the lessee of the mine, and transfers the surface to a railway company, transfers the right to support as well, not because the covenant runs as between vendor and purchaser, but because the purchaser is entitled to the benefit of the covenant, if it was the intention of the parties that he should have it.

I I will proceed to see how the Act of Parliament touches the question. The sections must not be treated as applying only as between the railway company and one class of surface owners. It must be remembered that there are the several classes which I have referred to, and also that the sections are intended for the protection both of the railway company, and of the surface owners, because some surface owners cannot give the railway company protection. I think s. 79 is the cardinal section. It is the charter of all mineowners' rights within forty yards of the railway, as against all railways. I had some doubt at first as to its effect outside the limit of forty yards, and still I am not sure whether that question is covered by the decision in *Great Western Rail. Co. v. Bennett* (1), but the question does not arise here, for the mines we have to deal with are within the limit of forty yards. In *Great Western Rail. Co. v. Bennett* (1) the surface owner belonged to the first class which I have referred to, and the question was what

compensation he was entitled to, and on what principle it was to be assessed—whether he was entitled to compensation as for the right to support of the surface, or of the surface and the railway, or of nothing. The House of Lords decided that he ought to be compensated on the basis of having parted with the right of support to nothing. This shows that s. 79 applies in the widest terms to surface owners who also are mineowners. A

Here the owner was not within class number one, but why should not the same principle apply where the right to the minerals is severed from the right to the surface by a document or demise? Is it a distinction which makes any difference in this case? This point seems to have occurred to the Court of Exchequer Chamber in *Great Western Rail. Co. v. Fletcher* (5), where COCKBURN, C.J., says (5 H. & N. at p. 698): B

“If indeed prior to the conveyance there was any separation of the surface soil from the minerals, the right of support would no doubt belong to the company, because if a landowner parts with the surface soil he does so subject to the obligation of dealing with the substratum so as not to disturb the super-incumbent soil. In such case, the landowners, having parted with the surface, and there being attached to the ownership of the soil the right to the support of the stratum below, would not be entitled to any compensation for the loss they may sustain in not working the minerals; but that is not the question which we have now to consider.” C

That is an obiter dictum favourable to the plaintiff rather than to the defendant, but can it be supported? Take the broadest case; a surface owner conveying to a railway company, and a mineowner who is bound to support the surface, not by any deed, but because there is nothing to show the contrary—that is class number two. Apply s. 79, and see if it is possible without altering the words of the section to limit the rights of the mineowners. Section 79 applies to every owner and occupier of a mine within forty yards of the line of railway. D

If what is suggested is true of class number two, it is also true of class number three, and I think on the whole, though not without some difficulty, that we must interpret s. 79 in the broad way adopted by the Master of the Rolls. Several objections have been pressed upon us; first, that the surface may always be injured unless there is danger to the works; but that did not hinder the House of Lords from construing the Act as they did. Then it is said that it would release the hands of a mineowner who was under an implied covenant to leave support for the surface; but that does not follow as to the original lessor, for the privity of contract may remain. The scope of the Act is to give the railway company protection for their works, and that the mineowner, if the railway company do not insist on their protection, should be free to exercise proprietary rights as if he were next to an ordinary owner of land. For these reasons I am of opinion that the answer to the plaintiff's case is that he cannot sue. E

Judgment reversed. F

Solicitors: A. S. Poyser, for H. A. Poyser, Wrexham; Abbott, Jenkins & Co., for Lewis & Son, Wrexham. G

[Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.] H

A

PRIESTMAN v. THOMAS AND ANOTHER

[COURT OF APPEAL (Baggallay, Cotton and Lindley, L.JJ.), June 11, 1884]

[Reported 9 P.D. 210; 53 L.J.P. 109; 51 L.T. 843; 32 W.R. 842]

B

Estoppel—Estoppel by record—Question in issue in former proceedings—Compromise of probate action—Probate of will granted—Will subsequently held to have been forged—Compromise set aside by order of Chancery Division—Further action propounding another will—Defendants estopped from denying forgery.

C

In an action in the Probate Division the plaintiff alleged that a will propounded by the defendants had been obtained by undue influence. This action was eventually compromised by all the parties interested under the will and the will was admitted to probate. In a subsequent action in the Queen's Bench Division it was held that the will was a forgery and that the compromise had been obtained by the fraud of one of the defendants who had been a party or privy to the forgery. In further proceedings a judge of the Chancery Division declared the compromise to be invalid and set it aside. An action was then commenced by the plaintiff propounding a subsequent will revoking the earlier will.

D

Held: in the proceedings in the Chancery Division the forgery was the question in issue and was not a question which arose incidentally, and, therefore, the defendants were estopped by the judgment in those proceedings from denying the forgery.

E

Notes. Considered: *Poulton v. Adjustable Cover and Boiler Block Co.*, [1908] 2 Ch. 430. Referred to: *Re Owtram*, *Marshall v. Edelston* (1884), 50 L.T. 592; *Cole v. Langford*, [1898] 2 Q.B. 36, *Wyatt v. Palmer* (1899), 80 L.T. 639; *Birch v. Birch*, [1902] P. 62; *British and French Trust Corp'n. v. New Brunswick Rail. Co.*, [1937] 4 All E.R. 516; *Marginson v. Blackburn Borough Council*, [1938] 2 All E.R. 539.

F

As to matters in issue in respect of estoppel by record, see 15 HALSBURY'S LAWS (3rd Edn.) 186; and for cases see 21 DIGEST (Repl.) 231 et seq.

Cases referred to:

G

(1) *R. v. Hutchings* (1881), 6 Q.B.D. 300; 50 L.J.M.C. 35; 44 L.T. 364; 45 J.P. 504; 29 W.R. 724, C.A.; 21 Digest (Repl.) 309, 694.

(2) *Duchess of Kingston's Case* (1776), 1 East, P.C. 468; 1 Leach, 146; 20 State Tr. 355; 2 Smith, L.C., 12th Edn., 754; 21 Digest (Repl.) 225, 225.

Also referred to in argument:

Cutto v. Gilbert (1854), 9 Moo.P.C.C. 131; 16 Digest (Repl.) 153, 363.

Pinney v. Hunt (1877), 6 Ch.D. 98; 26 W.R. 69; 23 Digest (Repl.) 88, 889.

Allen v. McPherson (1847), 1 H.L.Cas. 191; 11 Jur. 785; 9 E.R. 727, H.L.; 23 Digest (Repl.) 79, 740.

H

Flitters v. Allfrey (1874), L.R. 10 C.P. 29; 44 L.J.C.P. 73; 31 L.T. 878; 23 W.R. 442; 21 Digest (Repl.) 232, 253.

Meluish v. Milton (1876), 3 Ch.D. 27; 45 L.J.Ch. 836; 35 L.T. 82; 24 W.R. 892, C.A.; 16 Digest (Repl.) 201, 906.

Hunter v. Stewart (1861), 4 De G.F. & J. 168; 31 L.J.Ch. 346; 5 L.T. 471; 8 Jur.N.S. 317; 10 W.R. 176; 45 E.R. 1148, L.C.; 21 Digest (Repl.) 274, 485.

I

Nelson v. Couch (1863), 15 C.B.N.S. 99; 2 New Rep. 395; 33 L.J.C.P. 46; 8 L.T. 577; 10 Jur.N.S. 366; 11 W.R. 964; 1 Mar.L.C. 348; 143 E.R. 721; 21 Digest (Repl.) 274, 486.

Marriot v. Marriot (1725), 1 Stra. 666; Gilb. Ch. 203; 93 E.R. 770; 23 Digest (Repl.) 238, 2884.

Appeal from an order of SIR JAMES HANNEN, P., reported 9 P.D. 70, in an action brought by the plaintiff suing as the executor of an alleged will of James Whalley

deceased, against the defendants Thomas and Gunnell, who claimed to be the only persons interested under an earlier will of the deceased, to revoke the probate of the will obtained by the defendants on the grounds that this will was a forgery. A

The plaintiff applied for an order that points of law raised by the pleadings relating to whether the defendants were estopped by a decision of the Chancery Division from denying that a compromise of earlier proceedings between the parties had been obtained by fraud, or that the will propounded by the defendants was a forgery, should be heard and disposed of before the trial under R.S.C., Ord. 25, r. 3. B
SIR JAMES HANNEN, P., made an order to this effect, and the defendants appealed.

Anderson for the defendants.

C. Russell, Q.C., and *Middleton* for the plaintiff.

BAGGALLAY, L.J., stated the facts and continued: Counsel for the defendants has addressed an able argument to the court, and has referred to numerous authorities; but I am of opinion that the President came to a right conclusion. No doubt the action in the Chancery Division and this action were brought for different purposes; it was not the object of the action in the Chancery Division to set aside the probate which had been granted by the Probate Division, but the court was asked to set aside the compromise, and it could not do that except upon the ground that the will was a forgery. That fact was necessary to be determined before the court could give its decision. I agree with what the President says in his judgment: C D

“The conclusive effect of the verdict and judgment in the action tried before MANISTY, J., is not confined to the bare issue whether the agreement of compromise was obtained by fraud, but extends to that which it was necessary in that action to decide, and which was in fact decided as the basis of the decision.” E

It was argued that an estoppel can only arise as to a matter which can be properly dealt with by the court, and that the question whether the will was valid was not one which could be properly dealt with by the Chancery Division. There may be cases in which that argument might prevail, but it cannot apply to a case like the present, where all the parties interested in the question whether the will was valid were parties to the action in the Chancery Division, and were bound by the judgment in that action. If the parties had been different it might have led to a different conclusion. But that is not the case here. The appeal must be dismissed. F

COTTON, L.J.—The question in this case is whether the defendants are estopped from denying that the will is a forgery. I am of opinion that this case does not come within the rule that parties are not estopped by a decision which is only incidentally involved in the judgment in a previous action. The forgery was the question in issue in the Chancery action. The object for which it was brought was to declare that the will was a forgery, and that Thomas was a party or privy to the forgery, and that with knowledge of that fact he entered into the compromise. G H
The jury found that it was so, and the court gave judgment in accordance with their verdict, and gave consequential relief and set aside the compromise on that very ground. But it is contended that the action in the Chancery Division was brought for a different object to that sought by the present action, and that the purpose for which the present action is brought is not within the jurisdiction of the Chancery Division. That is so, but the action was between the same parties, and when the very point has been decided in one action it would be wrong to allow the same parties to litigate it over again in a different court, when all parties interested in contending that the will was a forgery were present before the court in the former action. Although the Chancery Division has no jurisdiction to revoke the probate of the will, it has full jurisdiction to decide that it was a forgery. I

It is not necessary to go into the authorities on this subject. It is clear to me that the question of forgery was not decided incidentally. *R. v. Hutchins* (1)

A explains the meaning of the term "incidentally arising." In that case it was held that the magistrates had no power to decide whether a certain street was a highway against parties who were not before them, although they could decide it between the overseers and the parties applying. As against absent parties, the point only arose incidentally. That seems to have been the principal reason given in the judgment. LORD SELBORNE, L.C., says (6 P.D. at p. 305):

B "The justices before whom the complaint of the urban authority came on May 7, 1874, had no jurisdiction to adjudicate directly or immediately between those parties (or between any parties whatever) on the question whether Mill Street was or was not a highway repairable by the inhabitants of Bradford at large. That was at the most a matter 'incidentally cognisable' by them. No conclusion which they might form upon it could establish (in the one case) C or disprove (in the other) any such liability as against or in favour of the inhabitants. Their only jurisdiction was to make or refuse the order for payment of a certain sum of money then claimed as the defendant's statutable quota of certain expenses at that time incurred by the urban authority."

But here whether the will was a forgery was the real question which was to be decided as against all parties to the action. It was not, therefore, a question arising D incidentally. I am of opinion that the President was right in holding that the defendants were estopped.

LINDLEY, L.J.—I am of the same opinion. It appears to me that the principle established in the *Duchess of Kingston's Case* (2) is clear enough, but the difficulty lies in applying it to each particular case. Let us look at the facts in this case. E The relief sought in the action in the Chancery Division depended entirely upon the question whether the will was a forgery. That was the real issue in the action; it did not arise merely incidentally, and, when we apply the principle of the *Duchess of Kingston's Case* (2), it seems clear that it is within that authority. Counsel for the defendants contended that, inasmuch as a judge of the Chancery Division could not have decided that the will ought not to be admitted to probate, F the defendants are not estopped in this action. But the action in the Chancery Division had to be decided on the ground that the will was, or that it was not, a forgery. Therefore, that was the issue in the action. That being so, I think the defendants are estopped from now denying that it was a forgery.

Solicitors: *Torr, Janeways, Gribble & Oddie; Bell, Steward & Steward.*

G [Reported by W. C. Biss, Esq., Barrister-at-Law.]

PAGET v. MARSHALL

[CHANCERY DIVISION (Bacon, V.-C.), July 8, 1884]

[Reported 28 Ch.D. 255; 54 L.J.Ch. 575; 51 L.T. 351;
49 J.P. 85; 33 W.R. 608]

Mistake—Mistake of fact—Rectification—Lease executed on terms of a written offer containing mistake by offeror.

The plaintiff, who intended to reserve the first floor of one of three houses which he wished to let for his own use as a shop, by mistake offered in writing to let to the defendant all the floors of all three houses at an annual rent of £500. In earlier negotiations between the parties the plaintiff had made it clear that he was reserving the first floor for himself. The defendant accepted the written offer and a lease was executed in the same terms, including all the floors of each house. In an action by the plaintiff for rectification or annulment of the lease,

Held: it not having been definitely established whether or not there had been a common mistake, the lease should be annulled, but in the circumstances of the case it would be right and just and consistent with authority to give the defendant the alternative of agreeing to the rectification of the lease to exclude from its operation the first floor in question.

Notes. This decision has been criticised (see 26 HALSBURY'S LAWS (3rd Edn.) 91 4note (b)), but in *Solle v. Butcher*, [1949] 2 All E.R. 1122, DENNING, L.J., referred to it as an example which should be followed.

Explained: *May v. Platt*, [1900] 1 Ch. 616. Referred to: *North v. Percival* (1898), 78 L.T. 615; *Solle v. Butcher*, [1949] 2 All E.R. 1107.

As to rescission and rectification in cases of mistake, see 26 HALSBURY'S LAWS (3rd Edn.) 910 et seq; and for cases see 35 DIGEST (Repl.) 130 et seq.

Cases referred to in argument:

Harris v. Pepperell (1867), L.R. 5 Eq. 1; 17 L.T. 191; 32 J.P. 132; 16 W.R. 68; 35 Digest (Repl.) 118, 172.

Sells v. Sells (1860), 1 Drew. & Sm. 42; 29 L.J.Ch. 500; 3 L.T. 229; 8 W.R. 327; 62 E.R. 294; 35 Digest (Repl.) 135, 294.

Earl of Bradford v. Earl of Romney (1862), 30 Beav. 431; 31 L.J.Ch. 497; 6 L.T. 208; 8 Jur.N.S. 403; 10 W.R. 414; 54 E.R. 956; 35 Digest (Repl.) 145, 360.

McKenzie v. Hesketh (1877), 7 Ch.D. 675; 47 L.J.Ch. 231; 38 L.T. 171; 26 W.R. 189; 35 Digest (Repl.) 126, 226.

Webster v. Cecil (1861), 30 Beav. 62; 54 E.R. 812; 35 Digest (Repl.) 115, 140.

Action by the plaintiff Caroline Matilda Paget, against the defendant, Wesley Marshall, claiming a declaration that a lease made on Dec. 21, 1883, between the parties ought not, according to the true intent of the parties, to have comprised the first floor of 48, Aldersgate Street, London, and that the defendant should be ordered to elect between the annulment of the lease and its rectification.

The plaintiff was the lessee of premises numbered 48, 49, and 50, Aldersgate Street, London, where she carried on business with her sons under the name of R. G. Paget & Son. In the latter part of 1883 Richard William Paget, acting as the plaintiff's agent, entered into negotiations with the defendant Wesley Marshall, a wholesale manufacturing furrier, with the view of a lease being granted to him of portions of Nos. 48, 49, and 50, Aldersgate Street. In her statement of claim the plaintiff alleged that it was verbally agreed that the defendant should accept a lease for twenty-one years at £500 a year, of the second, third, and fourth floors of Nos. 48 and the first, second, third and fourth floors of Nos. 49 and 50, Aldersgate Street, and that the agreement should be put into writing. On Nov. 13, 1883, R. W. Paget wrote to the defendant as follows:

- A "Dear Sir—We will let you on lease for seven, fourteen, or twenty-one years the upper part of Nos. 48, 49, 50, Aldersgate Street, consisting of first, second, third, and fourth floors (reserving for our own use one of the closets on the second floor landing, also the right of passage to roof) for the sum of £500 per annum and taxes. We await your acceptance of the above terms.—Yours obediently,
R. G. PAGET & SON."
- B It was alleged that the first floor of No. 48, Aldersgate Street was included by inadvertence, and contrary to the intention of the plaintiff or her agent, and that the defendant knew it to be so. On Nov. 14, 1883, the defendant wrote accepting the offer contained in the letter of the previous day. The indenture of lease of the premises was dated Dec. 21, 1883, and by it the plaintiff demised to the defendant
- C "all those the first, second, third and fourth floors of and in the messuages or warehouses and premises situate on the east side of Aldersgate Street, in the city of London, and having a frontage of 52 ft. 9 in. (more or less), and known as Nos. 48, 49, and 50, Aldersgate Street aforesaid,"
- D from Dec. 25, 1883, for twenty-one years, except and reserved out of the same premises the lavatory between the first and second floors of the said premises, and the sole right of passage to the roof (which said lavatory and right of passage it was thereby declared were for the exclusive use of the plaintiff) at the yearly rent of £500. The first floor of No. 48 was separated from the premises intended to be leased by a closed partition; and the only access thereto was through the premises occupied by the plaintiff on the ground floor of the same building. Moreover, by the terms of the lease under which the plaintiff held, she was precluded from making any openings in the partition. The plaintiff offered to amend the lease or to accept a surrender of the term and indemnify the defendant against loss. On the defendant refusing, the plaintiff instituted the action on Jan. 9, 1884.
- E By his defence the defendant denied the alleged verbal agreement, and stated that he had offered during the negotiations to take a lease either of the first, second, third, and fourth floors of Nos. 48, 49, and 50, or a lease of the second, third, and fourth floors of No. 48, and the first, second, third, and fourth floors of Nos. 49 and 50, together with some other room which he could use as a packing-room, and that he considered the letter of Nov. 13 to contain an offer naturally arising from the previous negotiations. The defendant further submitted that the partition between Nos. 48 and 49, being only lath and plaster, could easily be removed on a licence being obtained from the original lessors without any structural damage;
- F that there was no mistake, but that if there was it was a unilateral mistake and not common to both parties. By his counterclaim he asked for compensation and damages if the lease should be annulled, and reduction of rent if it should be rectified. It was in evidence that the defendant considered a packing-room of great importance, and would not have taken the premises on the terms of the lease without one; that he wished to have a board with his name on it placed all round the first floor of Nos. 48, 49, 50, but that the plaintiff's agent replied that
- H he would not allow it to be put up round the first floor of No. 48. It appeared that when the draft lease was sent to the defendant's solicitors an objection was made to the covenant for the lessee to do external repairs. A note was made by Messrs. Prideaux & Sons, the plaintiff's solicitors, in the margin of the draft, in these words:
- I "The lessee is taking all but the ground floor, and in such cases in our experience it is usual for him to do external repairs."
- Evidence was also adduced as to the value of the premises, exclusive of and including the first floor of No. 48. A model of the building was produced in court, in which the whole of the first, second, third, and fourth floors of the building, exclusive of the first floor of No. 48, were coloured blue, and the first floor of No. 48 was coloured brown.

Hemming, Q.C., and H. J. Hood for the plaintiff.

Marten, Q.C., and J. D. Davenport for the defendant.

BACON, V.-C.—In all these cases on the law of mistake it is very difficult to settle a principle, because you have to rely upon the statements of parties interested, and upon the not very accurate recollections of what took place between them. But the law I take to be as stated by counsel for the plaintiff. If it is a case of common mistake—a common mistake as to one stipulation in many provisions contained in a settlement or any other deed—that, upon proper evidence, may be rectified. The court has the power to do so, and it is very often exercised. The other class of cases is one of what are called unilateral mistakes; and there, if the court is satisfied that the true intention of one of the parties was to do one thing, or omit to do one thing; that will not be enforced against him, but the parties will be restored to their original position, and the agreement will be treated as if it had never been entered into. That I take to be the clear conclusion to be drawn from the authorities. The old law is very much as was stated in that very excellent treatise by MR. KERR ON FRAUD AND MISTAKE, and anybody who has read that book must be well satisfied with the diligence, industry, intelligence, and sagacity with which he has acquitted himself of the task he undertook, but of course I cannot consider it as an authority upon which I can rely, although I listen to it with interest and respect.

The case before me is in a very narrow compass. The plaintiff has taken the lease of a site of property from the Goldsmiths' Co., upon a contract to build upon it a very valuable and commodious structure, and he did so; and his plans are in evidence, and it is quite clear what his intention was. He built two separate tenements, which were let to two separate tenants; he kept a third, intending to occupy it for himself; and the fourth part, that coloured blue on the model, he had to let, when the negotiation commenced with the defendant. So that the subject in dispute is beyond all question. The two shops, Nos. 49 and 50, were separate and distinct things, as separate as if they had been in some other street; and the third, No. 48, was equally separate and distinct, built by the plaintiff for his own occupation, and for carrying on his own business, and constructed so that those objects might be conveniently performed by him. To that end he built on the ground floor of No. 48 a staircase communicating with the first floor of No. 48, and he partitioned off the first floor of No. 48, so that it became in its turn just as distinct a building, just as distinct a tenement, as Nos. 49 and 50, and the purpose was equally distinct. Then the part coloured blue being still available, and the plaintiff being willing to let it, he constructed a staircase which led from the street, past the first floor of No. 48, and landed upon the blue part, as I will call it, for that is a sufficient description: no communication whatever in fact being made, or, according to the evidence, ever intended to be made, between the part coloured brown and the part coloured blue.

That was the state of things when these parties met to negotiate. The partition which effectually severed the lower part of No. 48 from the upper part of No. 48, coloured blue, had been completely settled and arranged. The defendant upon his first visit looked over all that was then to let, ascertained what the plaintiff meant to let, saw the first floor over No. 48, and said that it would make a very handsome ware-room, but knew at the same time that it was not to be let, because, to use his own expression in his own evidence, the plaintiff told him: "We mean to use that for ourselves." That is the evidence which the defendant has given on this occasion. He says that he was satisfied to some extent with what he looked at, and he desired to acquire it; but he said that he must have a packing-room. He could not mean the first floor of No. 48. Still he insists more than once on the necessity of having a packing-room. I am mentioning these facts in order to ascertain, as it is my duty to do, what I must take to be proved to have been the intention of the parties when they entered into the negotiation. He hunts about for a packing-room; the brother goes with him down into a cellar under No. 48, in the basement of No. 48; they looked about there, and the brother comes in and says, You cannot have it. No wonder, because there can be no

A access to it but from the floor of No. 48, that coloured brown; and that negotiation accordingly went off.

It would be impossible for me to connect—and there was a very faint attempt made to connect—the necessity which was present in the defendant's mind to have a packing-room with the magnificent first floor which he now says he had in his mind when he was present. The statement about putting up the inscription by
B no means encourages any such notion. The defendant desired to advertise to the public, by means of a large inscription on the front of that which was to be his, the trade which he was carrying on. He wished also to have a similar inscription over No. 48, and that was resisted. It was the subject of discussion between them, and the reason that it was resisted was explained to him to be this, because, said the plaintiff, “if we granted you that, it would look as if you were carrying on
C your business in our warehouse.” But, in order to accommodate him, an offer was made to him that he might insert a tablet (providing it did not interfere with the architectural decorations of No. 48) containing his name and business. These facts are beyond all question; both parties are agreed. Then the plaintiff writes a letter in which he speaks of the floor above No. 48, among other things. This is answered very readily by the defendant, who accepts the offer. Instructions are
D sent to the solicitors, instructions consisting only of this letter. Counsel for the defendant made a point that the plaintiff in his pleadings said that they had no other instructions. They must have had some other instructions. I should read the word “other,” used by him in the pleadings, as meaning no different instructions, no variation in form or otherwise from the words that appear in the letter.

Under the circumstances, the facts being as I have stated, am I, because
E the lease has been executed under seal demising to the defendant that which the plaintiff never meant to let to him—that which the defendant says he knew the plaintiff intended to keep for himself, that which he has never claimed at any period—am I to say that this agreement is to be held irrevocable? It would be against every principle that regulates the law relating to mistakes, and it would be directly at variance with the proved facts in this case. So far, therefore, as it
F may be said to be a common mistake—and it looks very like a common mistake, if it was true, as the defendant says in his defence, that he took it on the faith that the first floor of No. 48 was intentionally included in the letter of Nov. 13, 1883. Certainly he never said so until it is so stated in the defence which I am looking at now; and he has never said in his evidence that he intended to take that floor—the argument addressed to me has been this: The separation of No. 48
G brown and No. 48 blue is effected solely by means of a brick-on-end partition, and that is easily removed. People building brick-on-end partitions do not mean them to be easily removed, unless there is some purpose to remove them; and here, using the defendant's own evidence on this occasion, at that time the partition was effectually finished, and the defendant knew that the plaintiff intended to reserve it for his own use in his own business.

H The law being such as I have said, it is not necessary to say anything about how easily you can make holes in a partition, and how you can knock down a partition. You can pull down the front of a house with equal ease, if you have proper appliances and proper workmen to do it. What forces itself upon my attention is the reason why the partition was first made, why it was found to be in existence when the defendant first inspected it? Why, he knew from that time, as well as he
I knows now, that it never was the intention of the plaintiff that he should have that magnificent room, which formed one or two rooms which constituted the business place intended by the plaintiff for his own use, and to which the access was made by one staircase communicating with nothing but the upper room. But without being certain, as I cannot be certain on the facts before me, whether the mistake was what is called a common mistake—such a one as would induce the court to strike out of a marriage settlement a particular provision or limitation—whether it was that kind of common mistake or not, that there was to some extent a common mistake, I must, in charity and justice to the defendant, believe;

because I cannot impute to him the intention of taking advantage of any incorrect expression in this letter. He may have persuaded himself that the first floor of No. 48 was intended to be let to him, with all which I have nothing to do; but, whether there was a common mistake or not, it was plain and palpable that the defendant was mistaken, and that the plaintiff had no intention of letting his own shop, that which he had built and carefully constructed for his own means and ends. It is quite clear that he was mistaken.

Upon that ground, therefore, upon unquestioned testimony, I must say that the contract ought to be annulled. I think it would be right and just, and perfectly consistent with other decisions, that the defendant should have an opportunity of choosing whether he would submit (as the plaintiff asks that he should) to have the lease rectified by excluding from it the first floor of No. 48, whether he will choose to take his lease with that rectification, or whether he will choose to throw up the thing entirely, because the object of the court is, as far as it can, to put the parties into the position in which they would have been if the mistake had not happened. Therefore, I give the defendant an opportunity of saying whether he will or will not submit to rectification. If he does not, then I shall declare that the agreement is annulled. [The defendant having elected rectification, His LORDSHIP concluded] The decree will therefore be that the lease be rectified by omitting from it all mention of the first floor of No. 48, coloured brown on the model. The decree will be without costs.

Solicitors : *Prideaux & Sons; Phelps, Sidgwick & Biddle.*

[Reported by G. MACAN, Esq., Barrister-at-Law.]

Re NICHOLSON. Ex Parte QUINN

[QUEEN'S BENCH DIVISION (Bacon, C.J.), December 10, 1883]

[Reported 53 L.J.Ch. 302; 49 L.T. 811; 32 W.R. 296]

Solicitor—Lien—Extent of lien—Title deeds in possession prior to mortgage—Solicitor acting for both parties—Costs due from mortgagor—Sale of equity of redemption—Solicitor holding deeds for mortgagee.

Before a mortgage the title deeds of the property had been deposited for safe custody with his solicitors by the mortgagor who instructed his solicitors to prepare the mortgage, and the same solicitors acted for both mortgagor and mortgagee in the transaction. The mortgagor paid his solicitors the costs of the mortgage, but certain other costs remained due. The mortgagor filed his petition in bankruptcy, and the trustee sold the equity of redemption and applied to the solicitors for the title deeds, but they claimed a lien on them for their costs due from the mortgagor.

Held: on completion of the mortgage the solicitors held the title deeds for the mortgagee, and they could not set up a lien on the deeds for their costs due from the mortgagor.

Notes. Approved: *Barratt v. Gough-Thomas*, [1950] 2 All E.R. 1048. Referred to: *Barratt v. Gough-Thomas*, [1945] 2 All E.R. 414.

As to solicitor's lien on documents being no greater than client's right to retain. see 36 HALSBURY'S LAWS (3rd Edn.) 176; and for cases see 42 DIGEST 267 et seq.

A Cases referred to in argument :

Re Messenger, Ex parte Calvert (1876), 3 Ch.D. 317; 45 L.J.Bcy. 134; 34 L.T. 920; 42 Digest 268, 3023.

Re Snell (1877), 6 Ch.D. 105; 46 L.J.Ch. 627; 37 L.T. 350; 25 W.R. 823; 42 Digest 268, 3024.

B

Re Mason and Taylor (1878), 10 Ch.D. 729; 48 L.J.Ch. 193; 27 W.R. 311; 42 Digest 268, 3025.

Re Long, Ex parte Fuller (1881), 16 Ch.D. 617; 50 L.J.Ch. 448; 44 L.T. 63; 29 W.R. 448; 42 Digest 261, 2957.

Appeal from Liverpool County Court raising the question of a solicitor's lien on title deeds for costs.

C

Prior to 1881, John Nicholson, of Liverpool, builder, purchased certain houses, and deposited the title deeds with his solicitors, Messrs. Quinn & Sons, for safe custody. Being in need of money, on Mar. 4, 1881, he executed a mortgage of his houses to Gilbertson. The costs of and incidental to this mortgage were duly paid to Messrs. Quinn & Sons by the mortgagor. The solicitors continued to hold the title deeds of the mortgaged property. J. Nicholson subsequently presented a petition for bankruptcy, and Henry Bolland was appointed trustee. At this time

D

there were certain costs, amounting to £14 19s. 2d., due from the mortgagor to his solicitors, some of which had been incurred prior to the filing of the bankruptcy petition, and some afterwards. The trustee sold the mortgagor's interest in the property, which was the equity of redemption, for £331 15s. 7d., and called for the title deeds from Messrs. Quinn & Sons. They claimed a lien upon the deeds for their costs, and refused to give them up until such costs were satisfied. On Nov. 2, 1883, the county court judge made an order declaring that the solicitors were not entitled to the lien which they claimed, and that the proceeds of sale of the equity of redemption belonged to the trustee. The solicitors, Messrs. Quinn & Sons, appealed.

F

Mulholland for the solicitors.

F. O. Crump for the trustee in bankruptcy.

BACON, C.J.—When the facts in this case are considered, it is clear that there is no such lien as is claimed. A solicitor's right to lien on deeds depends upon possession. There was a time no doubt when the deeds were in the possession of Nicholson by his solicitors. Nicholson was desirous of borrowing a sum of money upon mortgage, and the same firm of solicitors acted for both mortgagor and mortgagee in the transaction. Their duties, however, in that transaction were of a totally different character. It was their duty to the mortgagee to deduce a good title to the property mortgaged, and to prove it by the production of the deeds as evidence of the title. When the mortgage money was paid, it was no less their duty to hand over the deeds to the mortgagee. At any time indeed after the completion of the mortgage, the mortgagee could have compelled them to hand over to him those deeds, and the existence of that right is totally inconsistent with any lien for the costs which the solicitors now claim against the trustee of the mortgagor. The mortgage was in an absolute form, and the property therein comprised becomes the property of the mortgagee, subject to the mortgagor's equity of redemption. The title deeds of the property became the property of the mortgagee, and no man can have a lien over the property of another for which that person has not contracted. The accident of the deeds having been permitted to remain in the hands of the solicitors cannot alter the rights of the parties; the deeds must belong to the mortgagee. It appears that the trustee in bankruptcy of the mortgagor has sold the property subject to the mortgage. If the purchaser desires to pay off the mortgage, he must go to the mortgagee and say, "There is my money, give me the deeds." The mortgagee could have no answer to give to that demand. He can make no title without the deeds; they are his, and

have always been his. When once the facts of this case are clearly stated, there can be no question but that the mortgagee is the person to whom belongs the property in these deeds. In my opinion, the lien which is claimed cannot be substantiated.

Appeal dismissed.

Solicitors: *F. Venn & Co.* for *John Quinn & Sons*, Liverpool; *W. W. Wynne & Son* for *J. P. Harris & Gorst*, Liverpool.

[*Reported by G. MACAN, Esq., Barrister-at-Law.*]

CHANDLER v. POCOCK

[COURT OF APPEAL (James, Cotton and Lush, L.JJ.), February 15, 1881]

[Reported 16 Ch.D. 648; 50 L.J.Ch. 380; 44 L.T. 115; 29 W.R. 877]

Power of Appointment—General power—Realty—Sale and conversion into consols—Exercise of power by will—Bequest of residue of personal estate—Wills Act, 1837 (7 Will. 4 & 1 Vict., c. 26), ss. 1, 27.

By a marriage settlement, made in 1832, real estate was settled to the use of husband and wife for their lives and after their deaths and in default of issue to the use of such persons as the wife should by will appoint. The real estate was sold by the trustees and the proceeds invested in consols under a power of sale in the settlement and a direction to lay out the proceeds in other lands and until so laid out to invest the proceeds in government securities. Subsequently the consols were transferred into the name of the wife and she made a will giving the residue of her personal estate to two persons absolutely. At her death the consols remained in her name.

Held: the gift of residue was made under s. 27 of the Wills Act, 1837; on the construction of that section put on it by s. 1 of the Act it was personal estate and operated as a valid execution of the general power of appointment of realty under the settlement; and, accordingly, the consols passed under the gift.

Notes. Considered: *Re Greave's Settlement Trusts* (1883), 23 Ch.D. 313; *Re Cleveland's Settled Estate*, [1893] 3 Ch. 224. Applied: *Re Harman, Lloyd v. Tardy*, [1894] 3 Ch. 607. Distinguished: *Re Jenkins, Tucker v. Jenkins* (1901), 46 Sol. Jo. 13. Referred to: *Basset v. St. Levan* (1894), 71 L.T. 718; *Re Wernher, Wernher v. Beit*, [1918] 2 Ch. 82; *Re Lyne's Settlement Trusts, Re Gibbs, Lyne v. Gibbs*, [1918-19] All E.R.Rep. 419.

As to effect of conversion of land into money, see 14 HALSBURY'S LAWS (3rd Edn.) 578; and for cases see 20 DIGEST (Repl.) 392 et seq. As to realty or personalty subject to a general power passing under a general devise, see 30 HALSBURY'S LAWS (3rd Edn.) 250; and for cases see 37 DIGEST 444 et seq. For ss. 1 and 27 of the Wills Act, 1837, see 26 HALSBURY'S STATUTES (2nd Edn.) 1327, 1347, respectively.

Case referred to:

(1) *Gillies v. Longlands* (1851), 4 De G. & Sm. 372; 20 L.J.Ch. 441; 17 L.T.O.S. 250; 15 Jur. 570; 64 E.R. 875; 20 Digest (Repl.) 393, 1147.

Also referred to in argument:

Lingen v. Sowray (1715), 1 P.Wms. 172; Prec. Ch. 400; 10 Mod. Rep. 38; Gilb. Ch. 91; 1 Eq. Cas. Abr. 175; 24 E.R. 343; sub nom. *Shorer v. Shorer*. 2 Eq. Cas. Abr. 327, L.C.; 20 Digest (Repl.) 356, 821.

- A *Guidot v. Guidot* (1745), 3 Atk. 254; 26 E.R. 948, L.C.; 20 Digest (Repl.) 354, 803.
- Adams v. Austen* (1829), 3 Russ. 461; 38 E.R. 648; 44 Digest 524, 3417.
- Lechmere v. Lady Lechmere* (1735), Cas. temp. Talb. 80; 2 Eq. Cas. Abr. 31, 501; 25 E.R. 673; sub nom. *Lechmere v. Earl of Carlisle*, 3 P.Wms. 211, L.C.; 20 Digest (Repl.) 356, 824.
- B *Blake v. Blake* (1880), 15 Ch.D. 481; 49 L.J.Ch. 393; 42 L.T. 724; 28 W.R. 647; 44 Digest 409, 2404.

Appeal by the plaintiffs from a decision of SIR GEORGE JESSEL, M.R., holding that a gift by the testator of all the residue of her personal property operated as a valid exercise of a general power of appointment by will over land sold under a power in her marriage settlement and the proceeds invested in consols and since transferred into the name of the testatrix and that the consols passed under the will.

By a settlement made in 1832 on the marriage of John Brown with Ann Lee, Edward Lee, her father, settled real estate, after the deaths of the husband and wife and failure of their issue, to such uses as Ann Lee should by will appoint, with remainder to the use of Edward Lee in fee. The settlement contained a power for the trustees to sell the real estate, with a direction that the trustees should lay out the proceeds of the sale in the purchase of other hereditaments to be settled to the like uses, and directed that, until so laid out, the proceeds should be invested in government or other securities, the income to be paid to the person or persons to whom the rents of the hereditaments to be purchased would be payable in case such purchase were then actually made. Edward Lee died in 1843, having by his will devised all his real estate to his nephew, Edward Lee Baldwin. John Brown died in 1853, and there was no issue of the marriage. In 1855 the trustees of the settlement sold all the settled real estates, and the moneys arising therefrom were invested in the purchase of £24,266 consols, which in 1875 were transferred into the name of Ann Brown. About the same time Ann Brown made her will, whereby, after appointing the defendants her executors and bequeathing legacies to the amount of upwards of £30,000, she gave and bequeathed all the residue of her personal estate and effects whatsoever to two persons absolutely. Ann Brown died in 1879, and her personal estate, exclusive of the sum of consols, was under £6,000. The plaintiff, who derived title under Edward Lee Baldwin, claimed to be entitled to the consols on the ground that they passed as real estate under the limitation in the settlement in default of appointment by Ann Brown. The defendants, by their defence, submitted that the will of Ann Brown operated as a valid execution of the power of appointment. SIR GEORGE JESSEL, M.R., held that the will did operate as a valid appointment of the consols. The plaintiff appealed.

Chitty, Q.C., and *J. G. Wood* for the plaintiff.

Davey, Q.C., and *Rigby* for the defendants.

JAMES, L.J.—In this case I am of opinion that the decision of SIR GEORGE JESSEL, M.R., ought to be affirmed. The testatrix had a power over the fund in question under the will; that is to say, it was treated as being liable to be invested in land, and she had power to appoint it. Therefore she had power to dispose of a thing by an instrument properly executed. What she did was this: Almost immediately before the execution of her will, there being this fund outstanding in the hands of trustees, the property being liable to be invested in land, she applied to have the fund transferred to her. I cannot attribute any object to her in asking for that transfer, or any object to the trustee in making the transfer to her, but an intention to reduce it into possession—to make it her own personal estate—which it would be, subject to any equity which might be afterwards enforced against her executors in case she died intestate; but she intended it to be her personal estate. She had made it her personal estate so far as she could. Then, by

her will, she gave the whole of her personal estate, subject to any equity, to certain persons, subject to certain legacies and other purposes mentioned in her will. A

The question then is: Was that gift by her liable to be defeated by a person who says: "You have not exercised the power of appointment over it, because it was real estate?" It was real estate, in the hands of the trustees. It was not liable to be recalled and made real estate by any person who had an equity paramount to her equity, who claimed under her will. But we must see whether she has done sufficient to destroy that equity, that is, the equity which could be enforced against her as a wrongdoer, treating her as having acted tortiously—whether she was a wrongdoer or not—and then they might say "You have got our estate, and you must give it back to us." So the question is raised. She gave all her personal estate—this was her personal estate—under a power in s. 27 of Wills Act, 1837, which says that a bequest of personal estate of a testatrix shall be deemed to include any personal estate which she had power to appoint in any manner she pleased. Beyond all question or doubt, this was personal estate. It was existing as personal estate *de facto*. Whether it is treated as personal estate liable to be invested in land or not, the testatrix in this case had power to appoint it generally in any manner she thought fit. She does give it. It seems to me to be impossible to cut down the words of the will so as to prevent the will having any operation over that which she made her personal estate so far as she could. She intended to give it, and did give it, as part of her personal estate, as far as she had power to do so, in any character she had power to deal with it, whether it was real or personal estate. It seems to me, therefore, that the decision of SIR GEORGE JESSEL, M.R., is right. B C D

COTTON, L.J.—I am of the same opinion. First, I think it better to dispose of an argument which was pressed upon us by counsel for the plaintiff to some extent, that the testatrix was a trustee of this fund. I often object to a name being used inappropriately, and an argument being founded upon an inappropriate and an improper use of a particular word. She was not a trustee. She took the money out in the name of a trustee, having it afterwards transferred into her own name in pursuance of an express intention, as far as she could, to make it her own and not to hold it as a trustee. It is true that there was a trust attaching to this money, and that yet she was liable to be called upon to re-transfer it to the trustee; and even if that was not done unless she disposed of the property, those entitled under the settlement might make claim against her to make good the amount out of her estate. She was not trustee of it and was not holding it as trustee, but she held it, as far as she could, as her own, subject to the rights in equity which those under the settlement might have. Therefore, it is impossible to say that this can pass under the devise of trust estate contained in her will. It is simply a question, therefore, whether it passes under the previous part of her will. E F G

This is not a contest between two persons taking under her will as to which devise or bequest most aptly described the matter in contest, but is a question whether there has or has not, having regard to the statute, been an exercise of the power under the one and the only one clause of the will which can have that operation. When I look at the words of s. 27 of the Wills Act, 1837, alone, I find it impossible to say that there has not been an exercise of the power as regards this fund, for it is personal estate; that is to say, it is property which, but for the will, passes to the executors, not to her executors, but property which would pass by law and devolve upon the executors of an administrator. H I

Then, though there was a trust which rendered it liable to be laid out again in land, and it would, therefore, to some extent in equity be impressed with the character of land, it is personal estate within the words of s. 27 and the construction put upon it by s. 1 of the Wills Act, 1837. When one comes to treat it as a question of construction and intention on the testatrix's part, we find she had done all that she could do to make this her personal estate, and to take it out of the settle-

A ment; and, having regard to the facts of the case and to the expression of opinion on her part independently of what there is in the will, I agree with SIR GEORGE JESSEL, M.R., that we can see sufficient here to justify us, if it is a question of construction, in construing the words of her will as applying to the fund which she dealt with in the manner she did. She has not done it effectually; because, if she had effectually withdrawn it from the settlement, and the trusts of it, it would have become absolutely personal estate, but it is only for the purpose of enabling us to construe the words of her will and to see what she meant by personal estate.

B It is not necessary to go through the cases which have been quoted. Two of them were cases where there was a contest between different appointors; but I must refer to *Gillies v. Longlands* (1) decided by KNIGHT BRUCE, V.-C., because he, in my opinion, expressly decided that case on the ground that there had been nothing done by the lady to show her wish or desire, as far as she could, that there should be a reinvestment in land. He deals first with the question whether the wife could do it so effectually, and answers the question in the negative, and then he says (4 De G. & Sm. at p. 379):

D "But, independently of this consideration, I can find no such act of the widow as shows that she intended to change the character of the fund; and we know that it is not the actual state of the fund, but the state in which it ought to be, that governs the case. Therefore this fund remained as it was immediately after the purchase of 1789."

E He assumes that she had no power effectually to put an end to the trust for investment in land, but he still considers whether there was anything on her part to show an intention to treat it, not as realty, but as personalty. In this case, in my opinion, we have what shows her intention, though I agree it is not a power absolutely to do it. Therefore the decision of KNIGHT BRUCE, V.-C., in *Gillies v. Longlands* (1) cannot in my opinion, be considered as in any way an expression of opinion opposed to our judgment in this case, the facts and the circumstances of this case being different on a very material point.

F LUSH, L.J.—I am of the same opinion.

G JAMES, L.J.—COTTON, L.J., has drawn attention to the fallacy of using the word "trustee." There is another fallacy. The will pointed it out as if this had been real estate. It is only that the heir-at-law would be entitled to it as if it were real estate, but it is quite a fallacy to say that it is real estate, because the gentleman who succeeds to it will take it as personal estate. It is not real estate. It is only quasi real estate. It is to be dealt with by the person who claims as if it had been real estate, and that is what s. 27 of the Wills Act, 1837, says.

Appeal dismissed.

Solicitors: *Rogerson & Ford; J. Crowdy & Son.*

H [Reported by FRANK EVANS, ESQ., Barrister-at-Law.]

FOWLER v. BARSTOW

[COURT OF APPEAL (Sir George Jessel, M.R., Baggallay and Lush, L.JJ.),
November 30, December 1, 1881]

[Reported 20 Ch.D. 240; 51 L.J.Ch. 103; 45 L.T. 603;
30 W.R. 112]

*Practice—Service out of jurisdiction—Defendant's application to discharge order
—Affidavits contesting that cause of action within jurisdiction—Admissibility.*

In an action against the defendant, who resided in Scotland, to recover money paid by the plaintiff as a result of misrepresentations which, it was alleged, had been made by the defendant and others concerning a colliery in Wales, the plaintiff obtained leave to serve the defendant in Scotland on an application supported by an affidavit stating that the cause of action arose within the jurisdiction. Upon service of the writ the defendant entered a conditional appearance, and made an application to discharge the order for service supported by an affidavit contradicting the plaintiff's affidavit, whereupon the plaintiff filed an affidavit in reply. On appeal by the defendant against refusal of the application to discharge the order for service and disallowance of the affidavits as inadmissible,

Held: on a motion to discharge an order for service out of the jurisdiction affidavits to contest the question whether the cause of action arose within the jurisdiction were admissible.

Notes. For R.S.C., 1875, Ord. 11, r. 3, see now R.S.C., Ord. 11, r. 4, as redrafted in the Rules of the Supreme Court (Revision), 1962.

Referred to: *Waterhouse v. Reid*, [1938] 1 All E.R. 235; *Malik v. Narodni Banka Ceskoslovenska*, [1946] 2 All E.R. 663; *Korner v. Witkowitz Bergbau und Eisenhuetten Gewerkschaft*, [1950] 1 All E.R. 558.

As to the effect of Supreme Court of Judicature Acts, see 9 HALSBURY'S LAWS (3rd Edn.) 402; and for cases see 16 DIGEST (Repl.) 197.

Case referred to:

(1) *Foley v. Maillardet* (1864), 1 De G.J. & S. 389; 3 New Rep. 361, 446; 33 L.J.Ch. 335; 9 L.T. 700; 10 Jur.N.S. 161; 12 W.R. 355.

Also referred to in argument:

Great Australian Gold Mining Co. v. Martin (1877), 5 Ch.D. 1; 46 L.J.Ch. 289; 35 L.T. 874; 25 W.R. 246, C.A.; 3 Digest (Repl.) 358, 82.

Diamond v. Sutton (1866), L.R. 1 Exch. 130; 35 L.J.Ex. 129; 13 L.T. 800; 12 Jur.N.S. 319; 14 W.R. 374; Digest (Practice) 371, 815.

Appeal by the defendant from a decision of CHITTY, J., refusing the defendant's application to discharge an order giving the plaintiff leave to serve the writ in the action on the defendant in Edinburgh and disallowing the defendant's affidavit and the plaintiff's affidavit to be read.

The action was brought against the defendant Charles Murray Barstow, who resided in Edinburgh, to recover £3,000, which was paid in 1875 by the plaintiff, in consequence, as of alleged false representations, which were made to him by the defendant and some others with regard to the Rhydygalad Colliery, near Mold, in the county of Flint.

On Oct. 6, 1881, the plaintiff obtained an order for leave to serve the writ in the action on the defendant at Edinburgh. This order was obtained upon an affidavit by the plaintiff which purported to show that in November, 1875, he was induced by the defendant and two others to take a substantial interest in the colliery, and after negotiation paid the defendant and the two others £1.125 for a fifth share in the colliery, and that he was induced to acquire such interest upon certain representations of those persons; that the whole of the negotiations which resulted in his paying the sum took place in the city of London; that he had since

A discovered that the representations so made to him were wholly untrue, that he had recently commenced an action for damages in respect of the misrepresentations complained of against two of the parties who lived in London, that he was now desirous of bringing a similar action against the defendant who resided in Edinburgh, and that it was very desirable to have the proposed action against the defendant tried in this court, especially having regard to the probability of its being tried

B together with the action against the parties living in London.

The writ having been served on the defendant he entered a conditional appearance and then applied to CHITTY, J., to discharge the order for service, and to set aside the service. In support of his application he filed an affidavit in which he swore that he never received any of the plaintiff's money and never had any negotiations with the plaintiff whatsoever; that he was not in London at the end of 1875, and never saw the plaintiff until February, 1876, when he saw him at Mold in Wales.

C On Nov. 7, 1881, the plaintiff filed another affidavit in reply. CHITTY, J., did not allow the defendant's affidavit or the plaintiff's affidavit to be used, and he refused the application. The defendant appealed.

Crossley, Q.C., and Birrell, for the defendant.

Grosvenor Woods for the plaintiff.

D **SIR GEORGE JESSEL, M.R.**—This case has now been much more fully discussed than it was possible for it to be discussed upon a motion day before CHITTY, J., and I am not sure that this court, in reversing the decision, will be really deciding adversely to what CHITTY, J., would have done if the question had been fully considered by him.

E In the first place, it is very important to ascertain what the present practice is under the Judicature Acts and rules, with respect to service out of the jurisdiction. By the preface to the rules, where there is no rule upon any point, the former practice is to prevail. It sometimes happened that the practice in equity differed from that at common law, and the Appeal Court decided generally that that which was the better practice should prevail, but of course it is only the Appeal Court

F that can say which is the better practice upon any particular point [but see now s. 36 of the Supreme Court of Judicature (Consolidation) Act, 1925, which provides for the concurrent administration of law and equity: 18 HALSBURY'S STATUTES (2nd Edn.) 474]. But where the old practice was the same in chancery and at common law, it still remained in force if no other provision was made by the rules.

G Under the Common Law Procedure Act, 1852, which was rather stricter in its terms as to service out of the jurisdiction than the Supreme Court of Judicature Act, 1873, it was the practice to allow a defendant who had been served out of the jurisdiction to file an affidavit to show that the plaintiff had no cause of action arising within the jurisdiction. And if, upon reading the affidavit, there was any doubt upon the matter, the court put the plaintiff upon an undertaking to have his action dismissed with costs, if it should turn out that there really was no

H cause of action within the jurisdiction. In equity the practice was equally well settled; the rules, however, were rather more lax than they are under the Act of 1873. The bill was ordered to be served, and the defendant put in his conditional appearance and was then allowed to file affidavits denying that there was any cause of action within the jurisdiction. The very point was decided by LORD WESTBURY, L.C., in *Foley v. Maillardet* (1) and that settled the practice. That

I being so, it is clear that the practice as to the admissibility of affidavits to contest the question whether the cause of action arose within the jurisdiction was the same in the common law courts and in chancery, and that is still the practice. Therefore affidavits are admissible for this purpose. I do not say to try the merits of the case, but only to try the forum.

No doubt, then, these affidavits ought to have been admitted. This is an action for deceit, and the allegation is that certain false representations were made by the defendant within the jurisdiction. It comes within the third branch of R.S.C., 1875, Ord. 11, r. 1. But it was suggested that such an affidavit as is

required by r. 1a, which is limited to cases where the defendant is resident in Scotland or Ireland, might be required in such an action as this. But r. 1a is carefully confined to that portion of r. 1 which relates to actions of contract. LUSH, L.J., and I were members of the committee which framed the rule, and we know therefore that that was the intention. It is also clearly expressed. A

Another ground taken by the defendant is, that r. 3 requires the plaintiff's affidavit to show whether the defendant is a British subject or not, and that that is not stated here. But the rule does not say that the order shall be discharged for an omission of what is not required. If what is omitted is wholly immaterial, there is no obligation on the court to discharge the rule. The object is this: If you serve a British subject with a writ you may serve him anywhere; but if the person to be served is out of the jurisdiction, and is not a British subject, he is only to be served with notice and not with the writ itself. Therefore the court must know whether it is to order the writ or only the notice to be served. But if the defendant is residing in Scotland, it is immaterial to state his nationality, for any one who is residing within the Queen's dominions may be served with the Queen's writ. If he is a foreigner, he owes the Queen a temporary allegiance while he is within her dominions. Though the rule is not so well expressed as it might have been, that is the object of it, and no court would discharge an order for service of a writ out of the jurisdiction in Scotland or Ireland because the affidavit did not state that the defendant was a British subject. [HIS LORDSHIP then referred to the affidavits, upon which he came to the conclusion that it was proved that the plaintiff had not a cause of action arising, within the jurisdiction.] The appeal must, therefore, be allowed, and the order for service discharged with costs in both courts. B C D E

BAGGALLAY, L.J.—I desire to state concisely my reasons for agreeing that this order should be discharged. This is an action for damages for misrepresentation. There is, of course, nothing upon the face of the writ to show the ground for service out of the jurisdiction; and, in order to obtain permission to do so, the plaintiff had to support his application by an affidavit, showing the grounds upon which the application was made, under R.S.C., 1875, Ord. 11, r. 3. That does not mean that the merits of the case are to be fully gone into, but that it must be shown that the misrepresentation took place within the jurisdiction. F

As at present advised, I think that the plaintiff's original affidavit was sufficient to obtain leave, reading it in the ordinary sense in which it is usual to read affidavits. I see now that there was a way of reading it which makes it insufficient. Then the defendant puts in an affidavit which, if true, shows that the plaintiff really had no grounds. I quite agree that an affidavit may be made by the defendant to show that the court had no jurisdiction to make the order; but the affidavit ought not to go beyond that. For that purpose, no doubt, it may be necessary, to some extent, to go into the merits. I think, therefore, that these affidavits ought to have been read; and, reading them all together, it is clear that the defendant's case is established. G H.

LUSH, L.J.—I am very glad to find that the practice is established in the Chancery Division as it has been in the common law division, where it has been the practice since the Supreme Court of Judicature Act, 1873, and indeed ever since the Common Law Procedure Act, 1852, to admit the defendant's affidavits. The difference between the practice under the Common Law Procedure Act and that under the Judicature Act is that under the Common Law Procedure Act, 1852, s. 18, the plaintiff issued his writ at his peril. He had to give notice of the writ in a foreign country, for it would be an affront to serve a writ upon a foreigner in his own country; but a British subject might be served anywhere. Then the question always arose whether the cause of action arose within the jurisdiction, and it was open to the defendant to go into evidence upon that point. The Judicature Act, however, requires leave to be obtained before the writ is issued, which, I think, is an improvement. What the court has to ascertain, before giving leave, I

A is whether the cause of action arose within the jurisdiction or not. But in the first instance the order is necessarily made *ex parte*, leaving it to the defendant to apply afterwards to discharge it. Then, as the court has to ascertain the true fact, it is necessary to go into evidence. Then, what is the state of things here? The plaintiff's affidavit made a good *prima facie* case. It is, in my opinion, sufficiently specific. But the defendant comes and says the affidavit is utterly untrue; and the plaintiff, in his affidavit in reply, does not deny a single material statement of the defendant. I have no doubt, therefore, that the appeal ought to be allowed.

Appeal allowed.

Solicitors: *Snell & Greenip; Keeping & Co.*

[*Reported by E. S. ROCHE, Esq., Barrister-at-Law.*]

PLATING CO. v. FARQUHARSON

[COURT OF APPEAL (Sir George Jessel, M.R., James and Cotton, L.JJ.), March 23, 1881]

[Reported 17 Ch.D. 49; 50 L.J.Ch. 406; 44 L.T. 389; 45 J.P. 568; 29 W.R. 510]

Contempt of Court—Advertisements inviting subscriptions towards costs of action—Reward offered for documentary evidence—Common interest in subject of litigation.

Contempt of Court—Attachment—Object of motion merely apology and costs—Undesirability.

An injunction had been granted to restrain the infringement of a patent and an appeal was pending. After notice of the appeal had been given, a newspaper published advertisements referring to the action and the appeal and inviting subscriptions from members of the trade towards the cost of the appeal and a reward of £100 for producing documentary evidence. On a motion to commit the publisher and printer of the newspaper for contempt of court,

Held: to justify an order for committal it must be shown that the advertisements on their face conveyed to the mind of a person of ordinary intelligence that they would tend to interfere with the administration of justice; where there was a common interest in a subject-matter under litigation those concerned might combine together to defend it and advertise for subscriptions to prosecute the litigation; accordingly, the advertisements having been inserted merely in the ordinary course of business, there was no ground to impeach their propriety.

Per COTTON, L.J.: Motions to commit where there is no real intention to ask for an order for committal, but only to obtain an apology and costs, are to be discouraged.

Notes. Considered: *Hunt v. Clarke* (1889), 58 L.J.Q.B. 490. Followed: *Metropolitan Music Hall Co. v. Lake* (1889), 58 L.J.Ch. 513; *Re New Gold Coast Exploration Co.*, [1901] 1 Ch. 860. Applied: *Martell v. Consett Iron Co.*, [1955] 1 All E.R. 481. Considered: *Morgan v. Carmarthen Corpn.*, [1957] 2 All E.R. 232. Referred to: *Butler v. Butler* (1888), 57 L.J.P. 42; *Bromilow v. Phillips* (1891), 40 W.R. 220; *Re Martindale*, [1891-4] All E.R.Rep. 1248; *R. v. Payne* (1896), 65 L.J.Q.B. 426; *Lee v. Aylesbury U.D.C.* (1902), 19 T.L.R. 106; *British Cash and Parcel Conveyors v. Lamson Store Service Co.*, [1908-10] All E.R.Rep. 146; *Scott v. Scott*, [1912] P. 241.

As to contempt of court by interference with fair trial, see 8 HALSBURY'S LAWS (3rd Edn.) 10 et seq.; and as to liability of printers and publishers in cases of advertisements involving contempt of court, see 30 HALSBURY'S LAWS (3rd Edn.) 556. For cases see 16 DIGEST (Repl.) 34 et seq.

Case referred to:

- (1) *Pool v. Sacheverel* (1720), 1 P.Wms. 675; 24 E.R. 565, L.C.; 16 Digest (Repl.) 34, 282.

Motion by the plaintiffs to commit the printers and publishers of the "Birmingham Daily Post" for contempt of court, on the ground that they had, since notice of appeal was given, published in that newspaper certain advertisements having reference to the action and the appeal, which would tend to prejudice the plaintiffs in the prosecution of the action and the appeal.

An action was brought to restrain an alleged infringement by the defendants of the plaintiffs' patent, known as Adam's patent for nickel plating by electricity, or electroplating articles made of copper or other baser metal. The defendants disputed the validity of the patent. On Feb. 17, 1881, BACon, V.-C., decided all the issues in favour of the plaintiffs, and granted the injunction asked for. On Feb. 26, 1881, the defendants gave notice of appeal, and the appeal was still pending. The advertisements were published on several days in March, 1881. One of them was headed "Important Notice to Nickel Platers and Manufacturers," and with the title of the action. It proceeded:

"Judgment having been given against the defendants for an alleged infringement of Adams's patent for nickel plating, it is proposed to carry the case into the Court of Appeal, provided the trade will come forward and subscribe the necessary funds for doing so. The defendants have been put to very great expense in defending this action, which has lasted several days, and if the verdict is not reversed it will deter any firm from practising the art of nickel plating by any process whatever, except the plaintiffs and their licensees."

The advertisement went on to state that the matter was of urgent and vital importance to all nickel platers, and earnestly solicited subscriptions, which would be received by the defendant's solicitor, whose name was given. The other advertisement complained of appeared among the "miscellaneous advertisements," and was as follows:

"Nickel Plating.—£100 reward to anyone who can produce documentary evidence that nickel plating was done previous to 1869.—Address P., 'Daily Post'."

In the same papers in which these advertisements appeared, and in the same column with the first of them, appeared an advertisement of the plaintiffs, headed "Caution to Electro-Nickel Platers and Dealers in Electro-Nickel Plated articles." It proceeded to state that the Chancery Division of the High Court had, in the judgment in the action, "fully established" the exclusive right of the plaintiffs under their patent, and it gave notice that the plaintiffs would take legal proceedings against infringers of their patent rights, but that they would be prepared to entertain applications for licences from persons desirous of using the invention.

Aston, Q.C., and *Seward Brice* for the plaintiffs.

Davey, Q.C., and *Phipson Beale* for the printers and publishers of the "Birmingham Daily Post."

SIR GEORGE JESSEL, M.R.—This is an application against the printer of a newspaper to commit him for contempt of court, for inserting two advertisements. The printer received the advertisements in the ordinary course of his business, with no more intention of interfering with the course of justice than the boy who carried out the newspapers. In order to commit the printer for contempt, you must show that on the face of the advertisements themselves, they conveyed to his mind such information that a person of ordinary intelligence conducting a newspaper must

A have known that they would tend to interfere with the administration of justice. Not only is nothing of the kind shown, but as far as I can see, there is no ground whatever for impeaching the propriety of the advertisements.

The first advertisement complained of follows an advertisement by the plaintiffs in the action, to the effect that the defendants had infringed their patent, which is called "Adam's Patent for Nickel-Plating," and that there has been a recent judgment which fully established their exclusive right. Whether that is quite accurate or not it is not now necessary to consider, because the motion is not against the plaintiffs for inserting that advertisement, but by the plaintiffs against somebody else; and I only remark upon it for the purpose of saying that the plaintiffs do not appear to have been very careful themselves as to stating exactly what the true state of matters was, because this advertisement was inserted after notice of appeal had been given, and therefore perhaps it is not quite accurate to say that "it is fully established" by the judgment in the Chancery Division.

The defendants advertised to this effect:

"Judgment having been given against the defendants for an alleged infringement, it is proposed to carry the case to the Court of Appeal, provided the trade will come forward and subscribe the necessary funds for so doing."

D They go on to say that they have been put to very great expense, and that if the verdict is not reversed it will deter any firm from practising the art of nickel-plating by any process whatever, except the plaintiffs and their licensees. The first part of that advertisement is a statement of fact; the second is matter of opinion, namely, whether it will deter or not. The advertisement goes on to say this:

E "The matter being of vital importance to all nickel-platers, your subscription is solicited, and the defendants venture to hope that this appeal will meet with a hearty response from all interested."

Then they say:

F "Several influential firms have come forward already and volunteered to pay their share of the expenses, and the defendants hope that their example will be followed by all in the trade."

I am utterly at a loss to know what there is improper in that advertisement. All the trade is interested in freeing the trade from a monopoly of any kind, whether by a patent or otherwise; and we know it is customary for all the traders who are interested in opposing a patent to combine to do so, on the same principle that people claiming a right of common were allowed to combine to assist the defendant who was attempted to be interfered with by the lord on the ground that the right of common did not exist, the doctrine being that when there was a common interest the persons entitled to it might combine to defend it. It is, within my certain knowledge, and has been for many years the common practice in patent cases, that if a patentee attacks one manufacturer the other manufacturers combine together to defend the case, so that the whole expense shall not be thrown on the one that is attacked; otherwise they might be attacked in detail, and, although it might be a bad patent, they might all lose their cases. I may mention, as an instance which has come before me in my court, the well-known combination of millers to defeat Bovill's patent. That being so, I can see nothing wrong in this advertisement, and certainly nothing to inform the printer that it was an interference with the course of justice; and there does not seem to me to be any ground whatever for complaining of it.

The other advertisement is this.

"Nickel-plating. £100 reward to anyone who can produce documentary evidence that nickel-plating was done previous to 1869."

It is said that that would induce people to forge documents. But, in the first place, £100 is not such a very large sum as that it would necessarily have that tendency; and, in the next place, documentary evidence is not very easily forged,

and I do not think it very likely that people would come forward for £100 reward who were professed forgers and tender a forged document. I think the whole notion is a wild one, and not grounded on any reasonable conclusion as to the effect of such an advertisement, which, I think, is a very harmless one. It is a very common form of advertisement. It is a constant practice to advertise offering a reward for the discovery of a lost deed or a lost will, or for a certificate of marriage or of baptism to prove heirship or kinship. That is done as a matter of course. Generally, no doubt, the amount of the offer is not quite so large as £100, but sometimes it is; and I never heard it suggested that those advertisements were illegal, or were not a proper mode of obtaining evidence. It seems to me that the whole notion of making motions of this kind against innocent people like the editors or printers of newspapers ought to be discouraged as far as possible. They lead to great waste of time, and to a considerable amount of law costs incurred by some one or other; and, as I said before, unless the court is satisfied that it is a contempt which does interfere with the administration of justice, of course the court ought not to interfere.

I must make one remark before I conclude, on a case that has been cited, of *Pool v. Sacheverel* (1). I do not profess to understand it as it is reported. In that case there seems to have been an advertisement issued for evidence to disprove a marriage by showing that a marriage certificate, which was alleged to refer to two people of different names which were the names mentioned in the certificate, did not really apply to persons who bore those names. That was treated by LORD PARKER, L.C., as being a direct inducement to subornation of perjury. But there the motion to commit was made against a party to the cause, and not against the editor or printer of a newspaper. On the facts stated in the report of that case I should not myself have come to the same conclusion. Of course if there were an attempt to suborn witnesses it would be a contempt of court, and an undue interference with the course of justice. With great respect, however, to that learned Lord Chancellor, I should not have come to the same conclusion on the same facts. But it does not appear to me that an advertisement for evidence to prove something not in the knowledge of the advertiser, but which he believes to be true, can be treated as subornation of perjury, because that means something done to induce people to come forward to prove that which the person asking him to prove it believes to be false; and on that distinction, it appears to me, the case ought to turn. However, it is not necessary now to say more than that that case does not apply to the case before us; but I do reserve to myself the fullest power of saying that if ever such a point should come before me sitting in the Court of Appeal, I should feel myself at liberty to disregard the conclusions which were come to by the Lord Chancellor in that case.

JAMES, L.J.—I am of the same opinion. If the motion had been made against the defendant himself, I think it must have failed. Made against the publishers of the newspaper, who only inserted this advertisement in the ordinary course of their business, it seems to me to be simply extravagant, and a thing to be strongly discouraged. In regard to the case which has been referred to, it appears to me inconsistent with the practice of the government of this country to offer rewards for the conviction of offenders.

COTTON, L.J.—I have arrived at the same result, and I need not repeat the reasons for our decision, which have been given by the Master of the Rolls; but I should like to add one word, namely, that I entirely disapprove of motions to commit where there is no real intention of asking the court to commit the party against whom the motion is made. Where counsel, in opening the case, says, "I do not ask for committal; all that I ask for is an apology and payment of costs."—when a motion is made in that sense—in my opinion it is a mere waste of the time of the court. My own view will be in future to give a person making such a motion, where there is no case for committal, no costs of his motion. I mention this now, so that the Court of Appeal may not in future be troubled with motions

A where there is really no case for committing the person against whom the motion is made.

SIR GEORGE JESSEL, M.R.—I think I ought to express my entire concurrence in what COTTON, L.J. has said about motions to commit.

B **JAMES, L.J.**—I certainly would not only not give them their costs, but I should feel inclined to make them pay costs in such cases. I think these motions are a contempt of court in themselves, because they tend to waste the public time in the most reckless manner.

Motion refused.

Solicitors: *W. Foster; S. Whitehead.*

C [Reported by E. S. ROCHE, Esq., Barrister-at-Law.]

D

ABOULOFF v. OPPENHEIMER & CO.

E [COURT OF APPEAL (Lord Coleridge, C.J., Baggallay and Brett, L.J.J.), November 3, 1882]

[Reported 10 Q.B.D. 295; 52 L.J.Q.B. 1; 47 L.T. 325; 31 W.R. 57]

Conflict of Laws—Foreign judgment—Enforcement—Defence to action—Foreign judgment obtained by fraud.

F It is an answer to an action brought in an English court to enforce an obligation created by a foreign judgment that the judgment in the foreign court was obtained by the fraud of the person seeking to enforce it.

G **Notes.** Considered: *Vadala v. Lawes* (1890), 25 Q.B.D. 310. Applied: *Ellerman Lines v. Read* (1927), 44 T.L.R. 7; *Syal v. Heyward*, [1948] 2 All E.R. 576. Referred to: *Re Henderson, Nouvion v. Freeman* (1887), 35 Ch.D. 704; *Manger, etc. v. Cash* (1889), 5 T.L.R. 271; *Jacobson v. Frachon* (1927), 44 T.L.R. 103.

As to the requirement that a foreign judgment should not have been obtained by fraud, see 7 HALSBURY'S LAWS (3rd Edn.) 147 et seq.; and for cases see 11 DIGEST (Repl.) 515 et seq.

Cases referred to:

- H (1) *Duchess of Kingston's Case* (1776), 1 East, P.C. 468; 1 Leach, 146; 20 State Tr. 355; 2 Smith, L.C. 12th Edn. 754; 21 Digest (Repl.) 225, 225.
- (2) *Williams v. Jones* (1845), 13 M. & W. 628; 2 Dow. & L. 680; 1 New Pract. Cas. 227; 14 L.J.Ex. 145; 4 L.T.O.S. 318; 153 E.R. 262; 11 Digest (Repl.) 527, 1401.
- I (3) *Godard v. Gray* (1870), L.R. 6 Q.B. 139; 40 L.J.Q.B. 62; 24 L.T. 89; 19 W.R. 348; 11 Digest (Repl.) 522, 1360.
- (4) *Schibsbj v. Westenholz* (1870), L.R. 6 Q.B. 155; 40 L.J.Q.B. 73; 24 L.T. 93; 19 W.R. 587; 11 Digest (Repl.) 505, 1220.
- (5) *Bank of Australasia v. Nias* (1851), 16 Q.B. 717; 20 L.J.Q.B. 284; 16 L.T.O.S. 483; 15 Jur. 967; 117 E.R. 1055; 11 Digest (Repl.) 503, 1212.
- (6) *Ochsenhein v. Papelier* (1873), 8 Ch. App. 695; 42 L.J.Ch. 861; 28 L.T. 459; 37 J.P. 724; 21 W.R. 516, L.C. & L.J.; 11 Digest (Repl.) 516, 1307.
- (7) *Flower v. Lloyd* (1879), 10 Ch.D. 327; 39 L.T. 613; 27 W.R. 496, C.A.; 36 Digest (Repl.) 994, 3399.

Also referred to in argument :

Wallingford v. Mutual Society (1880), 5 App. Cas. 685; 50 L.J.Q.B. 49; 43 L.T. 258; 29 W.R. 81, H.L.; 7 Digest (Repl.) 226, 632.

Cammell v. Sewell (1860), 5 H. & N. 728; 29 L.J.Ex. 350; 2 L.T. 799; 6 Jur.N.S. 918; 8 W.R. 639; 157 E.R. 1371, Ex. Ch.; 11 Digest (Repl.) 524, 1372.

Crawley v. Isaacs (1867), 16 L.T. 529; 11 Digest (Repl.) 511, 1269.

Don v. Lippmann (1837), 5 Cl. & Fin. 1; 7 E.R. 303, H.L.; 11 Digest (Repl.) 536, 1464. B

Robertson v. Struth (1844), 5 Q.B. 941; 1 Dav. & Mer. 772; 3 L.T.O.S. 75; 8 Jur. 404; 114 E.R. 1503; 11 Digest (Repl.) 502, 1204.

Appeal from an order of the Divisional Court (MATHEW and CAVE, JJ.), on a demurrer in an action brought by the plaintiff to enforce an obligation created in his favour against the defendants by a judgment of the District Court of Tiflis, Russia. C

Paragraph 1 of the statement of claim in the action alleged that on Mar. 9, 1877, in a suit between the plaintiff and the defendants in the action in the District Court of Tiflis, in Russia, it was ordered by the judgment of the court that the defendants should return to the plaintiff certain goods of the plaintiff, or in default that the plaintiff should recover their value amounting to a sum specified, and a fixed sum for costs, which sums the defendants were ordered to pay to the plaintiff, and that the judgment was still in force and unsatisfied. Paragraph 2 alleged that the defendants appealed against the judgment to the High Court of Tiflis, and the High Court affirmed the judgment of the District Court. In para. 14 of the defence the defendants pleaded that, if the judgments, or either of them, were obtained as alleged, each of them was obtained by the gross fraud of the plaintiff and of her husband, Gregor Melceovitch Abouloff, acting in collusion with her in fraudulently concealing from the District Court and the High Court that the whole of the goods were, as the fact was and as the plaintiff and her husband well knew, at the time the suit was commenced and during the whole time it was depending, and at the time of the alleged judgment, in the actual possession of the plaintiff and concealed by the plaintiff and her husband, except as to so much of the goods as the plaintiff and her said husband had from time to time secretly and fraudulently disposed of. The plaintiff demurred to para. 14 of the defence on the ground that the facts therein alleged could and ought to have been pleaded to the suit in the said District Court of Tiflis and High Court of Tiflis, and on other grounds. The Divisional Court held that the paragraph demurred to disclosed a good defence to the action, and gave judgment for the defendants. The plaintiff appealed. D E F G

Woolf and Abrahams for the plaintiff.

Benjamin, Q.C., and *Cohen, Q.C.* (*Horne Payne* with them), for the defendants.

LORD COLERIDGE, C.J.—In this case we have to decide on a demurrer to para. 14 of the defence, which is pleaded in these circumstances: The plaintiff alleges that she sued the defendants in the District Court of Tiflis, and obtained judgment for the return of certain goods or their value, and that this judgment was affirmed on appeal by the High Court of Tiflis, and is still in force and unsatisfied; an action is brought on this judgment in the High Court of Justice in this country, and to this action the defendants plead that, if it is true the action was brought and judgment recovered in the court of Tiflis, such judgment was obtained by the fraud of the plaintiff in deceiving the court at Tiflis by false and fraudulent representations. It is said that this action is an attempt to enforce in the High Court in this country a judgment which was obtained in the Russian court by the fraud of the same person who now seeks to obtain the benefit of such judgment. H I

In support of the demurrer it is argued that the defence pleaded is bad because the allegation of fraud must have been before the court at Tiflis, and the court

A must have decided that the existence of the fraud alleged was not established by the evidence. It is said that the fact was within the jurisdiction of the courts at Tiflis to examine, and they did examine as to it, or might have examined, and whether they came to the right conclusion or not cannot be tried here. That contention amounts to this, that it is to be taken on the pleadings that the courts in Russia were misled by the false statement of the plaintiff, and the defendants are
 B not at liberty to say so here by way of defence to the present action. This certainly appears to be a monstrous result.

Many authorities have been cited in the course of the argument, and they are in some respects conflicting, but I am unable to perceive in any of the cases, from the *Duchess of Kingston's Case* (1) down to the present time, anything which can have the effect of compelling us to decide that, where a judgment has been obtained
 C in a foreign court by fraud, this fact cannot be set up in an English court as a defence to an action on the foreign judgment brought by the person by whose own fraud that judgment was procured. As a matter of justice it is obvious that such a defence ought to be available, and if it were not so we should be compelled to fly in the face of the rule that no man can take advantage of his own wrong, and lay down as law that he could.

D It is not necessary to inquire at present as to what is the accurate mode of stating the way of enforcing foreign judgments in the courts of this country. The law as to this question has been elaborately discussed by PARKE, B., in *Williams v. Jones* (2) and by BLACKBURN, J., in *Godard v. Gray* (3) and *Schibsby v. Westenholtz* (4); but for the purpose of the present case I think it is enough to say that the courts in this country will enforce obligations created by foreign judgments, and it
 E is an answer to an action brought to enforce such an obligation to say that the judgment in the foreign court has been obtained by the fraud of the person who is seeking to enforce it here.

In the *Duchess of Kingston's Case* (1) the law is thus stated by DE GREY, C.J., in answer to the questions put by the House of Lords

F "But if it was a direct and decisive sentence upon the point, and, as it stands, to be admitted as conclusive evidence upon the court, and not to be impeached from within; yet, like all other acts of the highest judicial authority, it is impeachable from without; although it is not permitted to show that the court was mistaken, it may be shown that they were misled. Fraud is an extrinsic collateral act, which vitiates the most solemn proceedings of courts of justice. LORD COKE says it avoids all judicial acts, ecclesiastical or temporal."

G I do not know that the difference which exists has ever been more tersely or neatly stated than in this passage. The question is, whether the court which gave the foreign judgment has been misled intentionally by fraud which was intended to procure the judgment, and which has had influence in procuring the judgment. If it is so, since the *Duchess of Kingston's Case* (1) it can be pleaded. The principle has been stated over and over again; it has been stated by LORD CAMPBELL, C.J., in
 H *Bank of Australasia v. Nias* (5) and by LORD SELBORNE, L.C., in *Ochsenbein v. Papelier* (6), who cites the authorities and treats it as clear, and says (8 Ch. App. at p. 698):

I "I should be sorry to think that anything should fall from this court which might give the least colour to any doubt as to the power of a court of law to take cognisance of fraud in obtaining foreign judgments."

and again (*ibid.* at p. 700):

"The words used by BLACKBURN, J., in *Godard v. Gray* (3) were not intended to throw any doubt upon so clear a matter."

These authorities show that it is a clear proposition of law that an obligation arising on a foreign judgment may be answered on the ground that the foreign court has been misled by the fraud of the person seeking to enforce the obligation arising from the judgment.

There was an ingenious attempt made to distinguish the present case by accepting the proposition which I have stated, and attempting to bring the case within another proposition which is equally clear; namely, that the courts in this country will not examine a foreign judgment, and the Russian court must have decided the question raised by this defence and come to the conclusion that there was no fraud. I think the answer to this contention was given by counsel for the defendants, that the question whether the court was misled cannot have been submitted to the court, or have been at issue on the trial, and therefore can never have been decided, and consequently that the English courts are not discussing any question which has been submitted to the foreign courts. A B

Then it is suggested there is a limitation to the doctrine as to setting up the defence of fraud, which is that, if it were possible the same question could have been submitted to the court which gave the judgment, it cannot afterwards be raised. I do not think that the breadth of the general proposition is subject to such a limitation as this. I think that fraud is capable of being pleaded in answer to an action on the judgment, although all the facts might have been proved in the foreign court, but by fraud and perjury misleading the foreign court a judgment is obtained, where it is a fraud practised in order to obtain the judgment, and by which the judgment has been obtained. C D

I think, therefore, on all grounds—on the ground that no man can take advantage of his own wrong, and on the ground that it is a principle of law that no action lies on a judgment which has been obtained by the fraud of the person seeking to take advantage of the judgment—that this is a good defence, and the demurrer ought to be overruled. E

BAGGALLAY, L.J.—I agree that this appeal ought to be dismissed. The statement of claim alleges that an action was brought by the present plaintiff in the District Court of Tiflis, and that judgment was given in her favour for delivery of the goods claimed or payment of their value, which judgment was afterwards affirmed on appeal by the High Court at Tiflis. If that judgment were properly obtained the plaintiff would be entitled to recover in an action on the judgment in this country, but in para. 14 of the defence it is alleged that the goods were in the possession of the plaintiff while the suit was pending, and when the judgment was given, and that the plaintiff fraudulently concealed this fact from the court, and represented that the goods were not in her possession, and that the judgment was obtained by means of this fraudulent concealment and representation. This can have no other meaning than that the court was misled by fraud, practised for the purpose of obtaining judgment, and by means of which the judgment was obtained. It was contended by counsel for the plaintiff that, assuming the truth of the facts alleged in the defence, which must be assumed for the purpose of the demurrer, these facts may have been before the court at Tiflis, and so the court may have been mistaken and not misled within the meaning of the opinion of DE GREY, C.J., which has already been referred to. As at present advised, if all the facts had been before the court at Tiflis, and the court had not inferred the existence of fraud, still, if an English court saw that fraud was proved, which had been practised for the purpose of obtaining the judgment, and by means of which the judgment had been obtained, I should be prepared to hold that the judgment could not be enforced. F G H

BRETT, L.J.—I think that on the true construction of the statement of claim it means that the goods have not been returned to the plaintiff, for it alleges that the judgment is still in force and unsatisfied. Then para. 14 of the defence alleges that the judgment was obtained by the fraud of the plaintiff in representing to the court that the goods were not in the plaintiff's possession, when in fact they were. It seems to me that this is an allegation that the plaintiff for the purpose of deceiving the court committed a fraudulent and wicked deception on the court, and was successful in obtaining judgment by means of that deception. I

- A The action before us is solely an English action, brought in an English court, and to be decided according to English law. The obligation is recognised by English law, and judgment can be recovered in England. Here the obligation is imposed by the judgment of a foreign court, but I think the proposition would be the same if the original action had been brought in any court where an action could be brought on the judgment, and that the same doctrine would have been applicable.
- B The whole doctrine as to enforcing the obligation imposed by a foreign judgment is an English doctrine. I am prepared to say that the proposition already referred to, which was stated by DE GREY, C.J., and adopted by the House of Lords in the *Duchess of Kingston's Case* (1), contains a correct statement of the law on the subject, and I think that, if a judgment is procured by means of fraud, which fraud has been committed in order to procure the judgment, and
- C has procured it, an action on that judgment cannot be successful. I think this is an absolute proposition, and is founded, as the Lord Chief Justice has stated, on the proposition that no man can be allowed to take advantage of his own wrong, and also on the ground, as counsel for the defendants contended, that no obligation can be enforced in an English court which is obtained by the fraud of the person seeking to enforce such obligation.
- D Another point has been raised, which is this: It is said that it must have been shown in the court in which the judgment was obtained that the facts relied on as showing the plaintiff's fraud existed, and that the defendants must have given evidence in relation to those facts, and that if not this ought to have been negatived in the defence. Whether this last proposition is correct, or whether what the plaintiff seeks to put forward might be replied, is not very important. The real
- E question is, assuming those facts to be true, and to have been before the Russian court, are the defendants prevented from proving and relying on the plaintiff's fraud in an action on the judgment brought in an English court? I think that, even if the defendants gave the same evidence in the previous cause, this does not prevent their giving the same evidence, and relying on the fraud which that evidence proves, in an action in an English court. It is said that this should prevent their
- F giving such evidence, in order to prevent the reiteration of trials of the same issue; but with regard to that I agree with what has already been observed, that, as an issue in the cause, the question whether the court was deceived was not in issue at the trial at Tiflis. Here the issue in the first cause was, whether the defendants were wrongfully detaining the plaintiff's goods, and it would be a question of fact whether the defendants had the goods or not. The only issue in the second action
- G would be whether the judgment given by the Russian court in the first action was obtained by the fraud of the plaintiff, and this question may be determined by the same facts as those brought before the Russian court or by other facts, but it is not the same issue as was before that court. The only issue in the second action is as to the fraud of the plaintiff, by which it is alleged the judgment was procured. I think, therefore, that the fraud of the plaintiff, if it procured the
- H judgment, is a good defence; but I am strongly of opinion that the defendants cannot raise the question whether the judgment was erroneous by reason of a wrong appreciation of evidence or of law, or by reason of the fraud of witnesses, which was not the fraud of any of the parties. As to whether the want of jurisdiction can be raised, that question is not now before us.
- I I do not think there is anything to be found in any judgment which militates against our opinion in the present case, except, perhaps, an expression of doubt by JAMES, L.J., in *Flower v. Lloyd* (7). There, however, he is speaking of the falsehood and fraud alleged in that action, and I think the falsehood and fraud there charged was falsehood and fraud of servants, not of a party to the action, and I think also that it was not falsehood and fraud in a proceeding before the court. If the Lord Justice meant his remarks to extend to fraud of the party in a proceeding before the court, I cannot agree with them; what was said was not a decision binding on this court, but only the expression of a doubt. All the other judges whose decisions have been referred to think fraud is an extrinsic and

collateral matter which prevents the obligation that would otherwise arise on a judgment from being enforced. I accept the whole of that doctrine, and am of opinion that para. 14 of the defence in the present case shows a good defence, and the plaintiff's demurrer to it ought to be overruled, and the decision appealed from affirmed.

Appeal dismissed.

Solicitors: *Michael Abrahams & Co.; Emanuel & Simmonds.*

[*Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.*]

WEBB *v.* STENTON AND OTHERS

[COURT OF APPEAL (Sir Baliol Brett, M.R., Lindley and Fry, L.J.J.), June 7, 8, 1883]

[Reported 11 Q.B.D. 518; 52 L.J.Q.B. 584; 49 L.T. 432]

Execution—Garnishee order—Debt "owing or accruing"—Instalments of income payable by trustees—Sum advanced larger than next payment.

The judgment debtor was entitled under a will to an annual income for life payable by the trustees half-yearly and had assigned his interest by mortgage to secure the repayment of a loan. The trustees had advanced the debtor more than the amount of the next half-yearly payment. A creditor sought to attach the debtor's interest under the will by a garnishee order under R.S.C., 1875, Ord. 45, r. 2, which allowed all "debts owing or accruing" from the garnishee to the debtor to be attached.

Held: to obtain a garnishee order under R.S.C., 1875, Ord. 45, r. 2, the creditor had to show that a debt existed which either was then payable or would become payable at a future time; as there was no debt then due from the trustees there was no "debt owing or accruing" from the trustees to the debtor; and, therefore, the debtor's interest under the will could not be attached.

Further, there was adequate power to protect the interests of the creditor as, if this was a proper case, a receiver could have been appointed.

Notes. For R.S.C., 1875, Ord. 45, r. 2, see now R.S.C., Ord. 45, r. 1, as amended by the R.S.C. (Revision), 1962, Sched. 4, para. 12. Section 61 of the Common Law Procedure Act, 1854, has been repealed with savings: see 18 HALSBURY'S STATUTES (2nd Edn.) 444.

Considered: *Booth v. Trail* (1883), 12 Q.B.D. 8. Applied: *Macdonald v. Tacquah Gold Mines Co.* (1884), 13 Q.B.D. 535; *Wilmot v. Alton* (1896), 74 L.T. 813. Considered: *Re Greenwood, Sutcliffe v. Gledhill*, [1900-3] All E.R.Rep. 97; *Heppinstall v. Jackson*, [1939] 2 All E.R. 10; *Bagley v. Winsome*, [1952] 1 All E.R. 637. Referred to: *Barnett v. Eastman* (1898), 67 L.J.Q.B. 517; *Sutton, Carden & Co. v. Goodrich* (1899), 15 T.L.R. 397; *Wells v. Wells* (1914), 30 T.L.R. 437; *Re Pinto Leite & Nephews, Ex parte Visconde Des Oliveira*, [1928] All E.R.Rep. 371; *Hirschhorn v. Evans*, [1938] 3 All E.R. 491; *Seabrook Estate Co. v. Ford*, [1949] 2 All E.R. 94.

As to what debts are attachable, see 16 HALSBURY'S LAWS (3rd Edn.) 80, 81; and for cases see 21 DIGEST (Repl.) 723 et seq. As to the rights of judgment creditor on the appointment of a receiver, see 32 HALSBURY'S LAWS (3rd Edn.) 422; and for cases see 39 DIGEST 32 et seq.

A Cases referred to :

- (1) *Jones v. Thompson* (1858), E.B. & E. 63; 27 L.J.Q.B. 234; 31 L.T.O.S. 80; 4 Jur.N.S. 338; 6 W.R. 443; 120 E.R. 430; 21 Digest (Repl.) 724, 2214.
- (2) *Tapp v. Jones* (1875), L.R. 10 Q.B. 591; 44 L.J.Q.B. 127; 33 L.T. 201; 23 W.R. 694; 21 Digest (Repl.) 723, 2210.
- (3) *Re Cowan's Estate, Rapier v. Wright* (1880), 14 Ch.D. 638; 49 L.J.Ch. 402; 42 L.T. 866; 28 W.R. 827; 21 Digest (Repl.) 714, 2155.

B

Also referred to in argument :

- Hall v. Pritchett* (1877), 3 Q.B.D. 215; 47 L.J.Q.B. 15; 37 L.T. 671; 26 W.R. 95, D.C.; 21 Digest (Repl.) 734, 2261.
- Wilson v. Dundas and Stevenson*, [1875] W.N. 232; Bitt. Prac. Cas. 48; 1 Char. Cham. Cas. 124; 21 Digest (Repl.) 717, 2178.

C

- Nash v. Pease* (1878), 47 L.J.Q.B. 766, D.C.; 21 Digest (Repl.) 735, 2272.
- Wilson v. Rhodes* (1878), 8 Ch.D. 777, C.A.; 43 Digest 1028, 4678.

Appeal by the plaintiff from a decision of the Divisional Court (CAVE and DAY, JJ.) on a Special Case refusing a garnishee order to attach the interest of John Hatton (against whom the plaintiff had obtained a judgment for debt and costs) in the hands of the defendants, the trustees of the will of the Rev. Charles Fletcher.

D

John Hatton became entitled in August, 1882, under the will of the Rev. Charles Fletcher, deceased, for his life, to one fourth of one fourth share of the income arising from the trust fund under the will. The share of John Hatton amounted in value to the annual sum of £85 or thereabouts, payable half-yearly in the months of February and August. By a mortgage deed dated Oct. 31, 1882, John Hatton assigned his interest under the will to James Roger Allen to secure the repayment of £300, together with interest thereon after at the rate of five per cent. per annum. A payment of £60 had been made to John Hatton on account of his share of income due to him in consequence of the heavy expenses he had been put to by the recent illness and death of his wife. The question for the court was whether the interest to which John Hatton became entitled under the will was attachable under R.S.C., 1875, Ord. 45, r. 2, on Nov. 11, 1882.

F

Ord. 45, r. 2, provided that the court or a judge might, upon the affidavit of a judgment creditor or his solicitor,

"stating that judgment has been recovered and that it is still unsatisfied, and to what amount, and that any other person is indebted to the judgment debtor and is within the jurisdiction, order that all debts owing or accruing from such third person (hereinafter called the garnishee) to the judgment debtor shall be attached to answer the judgment debt."

G

By s. 61 of the Common Law Procedure Act, 1854 :

"It shall be lawful for a judge, upon the ex parte application of [a] judgment creditor, either before or after [an] oral examination, and upon affidavit by himself or his attorney stating that judgment has been recovered, and that it is still unsatisfied, and to what amount, and that any other person is indebted to the judgment debtor, and is within the jurisdiction, to order that all debts owing or accruing from such third person (hereinafter called the garnishee) to the judgment debtor shall be attached to answer the judgment debt. . . ."

H

I

Lumley Smith, Q.C., and *Castle* for the plaintiff.
Charles, Q.C., and *Vernon Smith* for the defendants.

Cur. adv. vult.

June 8, 1883. **SIR BALIOL BRETT, M.R.**—In this case a judgment creditor proposed to attach in the hands of the trustees of the judgment debtor moneys which he alleged were accruing debts from the trustees to the judgment debtor. The relation between the trustees and the judgment debtor is this: The judgment debtor was entitled as cestui que trust to a share of the proceeds of certain

property, which, if it came at all into the hands of the trustees, would come in half-yearly. On the facts there is nothing else which could be called a debt. There was no money in the hands of the trustees at the time when the order was applied for; but, if things went on well, there would be some money, which would afterwards come into their hands, and a share of this money would be payable to the judgment debtor. A

The question is whether on this state of facts the judgment creditor can obtain a garnishee order. The Divisional Court refused an order, on the ground that there was no debt owing or accruing at the time when the order was asked for which could be attached under the provisions of R.S.C., 1875, Ord. 45, r. 2. I am of opinion that their decision was right. It seems to me, on the plain meaning of that rule, that no order can be made under it unless some person at the time when the order is so made is indebted to the judgment debtor; if this is so, an order can be made to attach all debts owing or accruing. If there is a debt payable in presenti an order may be made to attach it. If there is a debt that is debitum in presenti, but is payable in the future, that is a debt, and, if that were the only debt in existence, it seems to me that the court could make an order, because the existence of such a debt would satisfy the words, "any other person is indebted to the judgment debtor." There are also the words "owing or accruing," and therefore I think that if there were only an accruing debt that would do, and, although there was no debt payable at the present time, an order might be made. B C D

Here the Special Case shows that there was no debt payable in presenti, and therefore the question is whether there was a debt accruing within the meaning of the words of the rule; if there is such a debt, an order may be made. It therefore becomes our duty to say what in our opinion the meaning of an accruing debt is. E

Can it mean any debt which may accrue at a future time, although there is no contract and no relation of any kind between the judgment debtor and the person sought to be made a garnishee at the time when the order is asked for? Merely to state such a proposition is enough to show that it is absurd, for, if it were true, an order might be made against anyone in the world. Then it must be something short of that; can it be this—a future debt, as to which there is some probability that it will arise? Who can say that is a debt in any sense? It is not a debt, and therefore that will not do. There must be something which the law recognises as a debt. In this rule, as well as in the Common Law Procedure Act, 1854, s. 61, the words are "debts owing or accruing," and there are two decisions of the Court of Queen's Bench as to the meaning of those words in the Common Law Procedure Act, 1854. F G

In *Jones v. Thompson* (1), decided on s. 61 of that Act, CROMPTON, J., said (E.B. & E. at p. 63, 64):

"I myself at chambers have always acted on the supposition that the garnishee clauses apply only to cases in which there is an existing debt, though it may be only accruing. On that principle I have refused to make orders attaching rent before it became due, and instalments of an annuity not yet due, because they were not yet debts." H.

WIGHTMAN, J. said in the same case (*ibid.* at p. 64):

"[Counsel for the plaintiff] relies on the words 'or accruing,' but I think that these words are intended to apply to those cases in which there is debitum in presenti, solvendum in futuro. I think that to bring the case within the statute there must be a debt, though it need not be yet due." I

And again, CROMPTON, J., said (*ibid.* at p. 64):

"There must, under this Act, be a debt as much as in bankruptcy. I do not agree that the use of the word 'accruing' makes a distinction on this point; there must be a debt, though it need not yet be due."

Anything more clear or decisive than that I cannot conceive; if we are to construe the words in Ord. 45, r. 2, in any other sense we must overrule that decision.

A In *Tapp v. Jones* (2), BLACKBURN, J., stated the law in the following terms (L.R. 10 Q.B. at p. 592):

"It is evident that the legislature had in view both present debts and future debts, debita in presenti, solvenda in futuro, for it speaks in the earlier part of the section of debts owing and accruing."

B It is obvious from this that he construed "debt accruing" in s. 61 as debitum in presenti, solvendum in futuro. That is a debt known to the law, and which the law has always recognised. The law has always recognised two kinds of debts, a present debt, and debitum in presenti, solvendum in futuro, and unless we are to put the interpretation on Ord. 45, r. 2, that the legislature has invented a new debt, I think we must adopt the view expressed in the two cases to which I have referred.

C It seems to me impossible to conceive that it was intended to invent a new debt. On the contrary, Ord. 45, r. 2, was framed after the decisions on the Common Law Procedure Act, 1854, which were well-known decisions, and contains the same words which had been interpreted in those cases in the way I have already stated. I am, therefore, of opinion that the meaning of accruing debt is debitum in presenti, solvendum in futuro, and it does not comprise anything further, however

D probable it may be that in the result there will be a debt, and however soon a debt is likely to arise. That is the interpretation which I put upon the words of the rule.

Then is there anything in the cases which is inconsistent with this view? There is the decision of HALL, V.-C., in *Re Cowan's Estate, Rapier v. Wright* (3). I do not say the order made in that case was not right, because it seems to me that

E there was a debt due, and if so, it does not matter whether it was a legal or an equitable debt. If there was a debt the order was right, and was not void because it included what could not be attached. The only effect would be that when the order came to be put in force it would prove to be unavailing as to part of what was sought to be attached. Therefore I do not say that the order in that case was not right, but it seems to me that the learned Vice-Chancellor thought that something might be within Ord. 45, r. 2, which was not a debt at the time. If that was

F his view, I am bound to say that to that extent I differ from him.

Then our attention has been directed to the form of order in SETON ON DECREES (4th Edn.), which it is said was approved by SIR GEORGE JESSEL, M.R. I will leave the question as to these forms to be dealt with by the lords justices, who have had more experience in these matters than I have; but it cannot be said that we are

G differing from any decision of SIR GEORGE JESSEL, M.R.

Therefore for these reasons I put this interpretation on the rule. What it is sought to attach here is obviously not a debt. No one, either in a legal or an equitable sense, can say it is debitum. The trustees are not liable; there may be no proceeds of the property, or they may die or cease to be trustees before there are any. All that can be said is that it is probable that money will come into their hands, which, if it does come into their hands, they will be bound to pay over to the cestui que trust. Then there would be an equitable debt; but until then there is no debt. For these reasons I am of opinion that the decision of the Divisional Court was right, and ought to be affirmed.

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LINDLEY, L.J.—I am of the same opinion. The point is one of some importance, and we are told that our decision is likely to disturb the existing practice. It is, therefore, necessary to look at the case very carefully. The question turns on the true construction of R.S.C., 1875, Ord. 45, r. 2, the words of which are substantially the same as those of s. 61 of the Common Law Procedure Act, 1854. It is important to observe the language used. The affidavit must show that the garnishee is indebted to the judgment debtor, so we have to consider in what sense and to what extent a trustee is a debtor to his cestui que trust. I agree that the word debt includes equitable debts; but then is the trustee a debtor to his cestui que trust? I cannot say that he is, until he has money in his possession, which

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it is his duty to hand over. If a trustee has £1,000 in his hands which he is bound to hold in trust for another person, I agree that this is a debt, and may be attached; but take the case of a person being a trustee of consols: he has no money, and he may never receive any dividends; you cannot say there that the trustee is a debtor until he receives some money which it is his duty to pay over. Take again the more difficult case of a trustee holding land, or a share in a business, or railway shares; is the trustee in such a case a debtor before he has any money in his possession? It would be straining language to say he was. The language of the rule includes any debt; it may be an equitable debt or a legal debt, a debt payable in the present or a debt accruing, but it must be a debt. It may be an accruing debt, payable in the future in consequence of a present obligation. That is the view taken by the judges of the Court of Queen's Bench in the cases to which the Master of the Rolls has referred.

I will consider the decision of HALL, V.-C., in *Re Cowan's Estate* (3), and I cannot read the judgment without seeing that the Vice-Chancellor was disposed to think that money coming to a *cestui que* trust from his trustee might be attached. The question there raised was whether money payable by a receiver was attachable, and the Vice-Chancellor decided that it was, and to that extent I agree that he was right. But with regard to moneys to become due, the Vice-Chancellor assumed he could make an order to attach such moneys, and to that extent I think the decision cannot be supported.

We have been referred to the forms in SETON ON DECREES (4th Edn.) at p. 312. The first form is that of a garnishee order nisi, and in point of form I think that order is unobjectionable; the words are "all debts due and owing or accruing due"; but in the form of the order absolute there is a departure from the language used in the form of the order nisi. The order absolute runs as follows:

"It is ordered that the defendant C. A., and the said S., the garnishee, do pay any sum or sums of money now in or hereafter to come to their hands as trustees of the will."

I do not know the circumstances under which this form of order was framed, and therefore whether the variation in language was the result of a slip, or was an intentional extension of the terms of the order nisi, I do not know, but in either case I am of opinion that the form of the order nisi is right, and that of the order absolute is wrong. The result seems to me to be this: you may attach all debts whether legal or equitable, but only debts owing or accruing, and money which may or may not become payable is not a debt. I agree that the appeal ought to be dismissed.

FRY, L.J.—I agree with the conclusion at which the other members of the court have arrived; the case is important, and therefore I will add a few words.

In my judgment the contention that the words "is indebted" and the words "debts owing or accruing" in R.S.C., 1875, Ord. 45, r. 2, refer to the same subject-matter is correct. It seems to me to be plain that there must be an actual present debt, either equitable or legal. No doubt under the Common Law Procedure Act, 1854, there must have been a legal debt, for an equitable debt had no meaning in the courts of common law, unless it were in an equitable pleading. But Ord. 45 is dealing with both law and equity, and I think its meaning is that there must be a debt, which may be either legal or equitable. I have no doubt that the requirements of the rule are satisfied by a present debt, whether payable now or in future, and that the words include all such debts.

The material question to be considered is this: Does the rule include debts which may hereafter arise, but which may or may not come into existence according to circumstances? I am of opinion that such a conclusion is excluded by the words of r. 2 and also by r. 3, which provides that

"service of an order that debts due or accruing to the judgment debtor shall be attached, on notice thereof to the garnishee, in such manner as the court or judge shall direct, shall bind such debts in his hands."

A It is impossible to say that a debt is in the hands of the garnishee when the debt does not exist. Then by r. 4, if the garnishee does not pay money into court, "and does not dispute the debt due or claimed to be due from him to the judgment debtor,"

B etc., execution may issue. How can a man be called upon to dispute a debt which does not exist? I cannot fail to see that there has been a difference of opinion as to the question.

The two decisions of the Court of Queen's Bench which have been referred to, *Jones v. Thompson* (1) and *Tapp v. Jones* (2), are not in unison with the language used by HALL, V.-C., in *Re Cowan's Estate* (3), where he said (14 Ch.D. at pp. 643, 644):

C "I consider therefore that the words of Ord. 45, r. 2, 'debts owing or accruing,' though they have been limited in construction by some authorities, ought not to be restricted so as to exclude such a fund as this, i.e., income ascertained to be the debtor's property during the whole of her life. To say that it should not be attached would be to leave her at liberty to deal with the future income by selling or mortgaging it. I cannot hold that such a construction of the rules would be the right one; on the contrary, I hold that the order nisi, which has been obtained rightly extended not only to the money actually in the hands of the receiver, if there were any at the time when it was made, but to future payments as well."

With that conclusion I cannot agree, and I adopt the construction adopted by the Court of Queen's Bench in the two cases to which I have referred.

E Holding, therefore, that the words of the rule only apply to debts due, whether payable in the present or in the future, I have to see whether they include the present case. Here there is clearly no debt payable in the present; is there any debt payable in the future? It seems to me that trustees are not equitable debtors to their cestui que trust until they have money in hand which they are bound to pay over, or until they are made liable for breach of trust, or for default in the performance of their duties as trustees. There is no suggestion in the Special Case that the trustees have any money in their hands which they are bound to pay over; on the contrary, the cestui que trust was overpaid at the date when the order was asked for. In my judgment the trustees were under no liability to pay money, and therefore the decision of the Divisional Court was right, and the appeal ought to be dismissed.

G I wish to observe that we are not laying down any rule which may have the effect of defeating the ends of justice, for I think there is power adequate to protect the interests of the judgment creditor. I think, if this is a proper case, a receiver might be appointed. I will make one more observation, as to the forms of order which have been relied on; although the orders in SETON ON DECREES may be useful as guides, still orders prepared at chambers are of less force than those which have undergone discussion in court.

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Appeal dismissed.

Solicitors: Cobbold & Woolley; G. H. Carthew for Stenton, Son & Metcalfe, Southwell.

[Reported by P. B. HUTCHINS, Barrister-at-Law.]

ROBERTSON v. ROBERTSON AND FAVAGROSSA

[COURT OF APPEAL (Sir George Jessel, M.R., Brett and Cotton, L.JJ.), July 18, 19, 1881]

[Reported 6 P.D. 119; 51 L.J.P. 5; 45 L.T. 237; 29 W.R. 880]

Divorce—Costs—Husband's liability to pay wife's costs—Wife unsuccessful in suit—Liability to pay costs not limited to amount of security.

Where a husband petitioner has been successful in a divorce suit against his wife, he is liable to pay his wife's solicitors their full costs unless they have been guilty of misconduct in the conduct of the defence, and not merely the amount he gave as security for these costs prior to the hearing of the suit.

Notes. Considered: *Smith v. Smith* (1882), 7 P.D. 84. Applied: *Otway v. Otway* (1888), 13 P.D. 141. Considered: *Russell v. Russell*, [1892] P. 152; *Ash v. Ash*, [1893] P. 222. Applied: *Kemp-Welch v. Kemp-Welch and Crymer*, [1910] P. 233. Followed: *Palmer v. Palmer and Stockley*, [1914] P. 116. Considered: *Franklin v. Franklin and Minshall*, [1921] P. 407; *Abrahams v. Buckley*, [1924] 1 K.B. 903. Explained: *P. v. P.* (1929), 73 Sol. Jo. 144. Considered: *Courage v. Courage* (1931), 47 T.L.R. 395; *Grist v. Grist*, [1931] All E.R.Rep. 201; *Mason v. Mason and Cottrell*, [1933] All E.R.Rep. 859; *J. N. Nabarro & Sons v. Kennedy*, [1954] 2 All E.R. 605. Referred to: *Thompson v. Thompson* (1886), 57 L.T. 374; *Campbell v. Campbell* (1887), 3 T.L.R. 558; *Haddon v. Haddon* (1887), 56 L.T. 716; *Butler v. Butler* (1890), 15 P.D. 126; *Hall v. Hall*, [1891] P. 302; *Walker v. Walker and Lawson* (1897), 76 L.T. 234; *Waudby v. Waudby and Bowland* (1901), 84 L.T. 571; *Beer v. Beer* (1906), 94 L.T. 704; *Sanders v. Sanders*, [1911] P. 101; *Betton-Bright v. Betton-Bright*, [1920] P. 338; *Silver v. Silver and Grenfell*, [1924] P. 163; *Gower v. Gower*, [1950] 1 All E.R. 27.

As to costs in divorce suits in general, see 12 HALSBURY'S LAWS (3rd Edn.) 398 et seq.; and for cases see 27 DIGEST (Repl.) 558 et seq.

Case referred to:

- (1) *Flower v. Flower* (1873), L.R. 3 P. & D. 132; 42 L.J.P. & M. 45; 29 L.T. 253; 21 W.R. 776; 27 Digest (Repl.) 567, 5203.

Appeal by the wife from an order of SIR JAMES HANNEN, P., granting the husband petitioner a decree nisi of divorce on the ground of the respondent wife's adultery. On the granting of the decree the learned judge also made an order as to the wife's costs of the suit, by which the husband was directed to pay her costs limited to the amount of the security he had given for the same. The wife contended that (i) on the evidence she was entitled to succeed on the merits, and (ii) in any event she was entitled to all the costs of the suit. The Court of Appeal dismissed her appeal on the first of the above grounds and the case is only reported on the issue of costs.

The wife appeared in person.

Inderwick, Q.C., and *Dr. Middleton* for the husband.

SIR GEORGE JESSEL, M.R.—The practice seems to be to require the husband to give security, or deposit in court, a sum to answer the wife's costs properly incurred. It seems also to be the practice that where the wife fails in her defence, and costs are awarded to her solicitor, the whole of his costs properly incurred are not ordered to be taxed, but only his costs properly incurred not exceeding the amount for which security has been given. In fairness to SIR JAMES HANNEN, it is right to say that this practice did not originate with him. He only follows the practice of his predecessors, SIR CRESSWELL CRESSWELL and LORD PENZANCE. The old practice of the ecclesiastical court was to tax and pay the whole of the wife's costs before the hearing. That was not limited to any sum secured or assessed

A beforehand. That was a very proper practice, and the reason why this practice has been departed from is very curious.

In the ecclesiastical court the whole evidence was taken by affidavit, before the cause came on to be heard, so that there was no difficulty in taxing the costs before the hearing. But when the Divorce Court was established in 1857 the English practice of oral evidence was introduced so that it then became impossible to tax the costs *a priori*. It is impossible to know beforehand what witnesses will be called or what their expenses will be. The practice was, therefore, introduced of making the husband give security for his wife's costs, and then, following a false analogy after the hearing, he was ordered to pay the taxed costs limited to the amount which, before the hearing, had only been guessed at. It is highly proper that a husband should pay for the costs of his wife's defence upon a charge of adultery. That is founded upon the old English law which gives the wife's property absolutely to her husband. It is, perhaps, easy for a husband to say that it is hard upon him to have to pay the charges of a false defence. That is his misfortune. But what is the wife able to say on the other hand? She may have brought her husband a fortune of £50,000, and yet be left without the means of defending herself against a false charge of unfaithfulness. Some means must be provided for the wife to carry on her defence, and that defence must be taken up by a solicitor. The solicitor must be paid for his services, and he can only look to the husband for payment. As SIR JAMES HANNEN said in *Flower v. Flower* (1), it is not the solicitor's fault that the wife is wrong, and he is not to lose the fair reward of his labour merely because the defence is not successful. Therefore, unless the solicitor himself has been guilty of misconduct in the conduct of the defence, he ought not to be deprived of his remuneration; but, on the contrary, when he has fairly and properly conducted the defence, the solicitor is entitled to be paid his full costs.

There is no ground in this case for saying that we cannot review the order, because the learned judge did not exercise his discretion at all; he only made the usual order as to the wife's costs. He only followed a rule which we, sitting as a Court of Appeal, consider to be erroneous. There is no suggestion in this case that the solicitor has not acted properly, and therefore he ought to have his full costs. Moreover, in disposing of this question, the old rule of the House of Lords upon divorce bills ought not to be lost sight of, which might be called the nobler rule, that no man of right feeling would wish that his wife should not have the means of fairly defending herself against so odious a charge. As Mrs. Robertson has failed upon one part of her appeal, but has succeeded on the other point, there will be no costs to either party.

BRETT, L.J.—I am of the same opinion.

COTTON, L.J.—On the question of costs, in my opinion this order cannot stand.

H It is unnecessary to go into the question whether it is just or not that the husband should provide for the costs of the wife. That was the old established rule in the ecclesiastical court; it was the practice of the House of Lords when bills were introduced for divorce, and it was founded on this. When the wife has to take proceedings against her husband, or he against her—all her property being in him—she ought to be provided at his expense with the means of bringing her case before the court or of properly defending the case brought against her; and whether she is successful or not, in my opinion the rule is to this effect, that the costs properly incurred in bringing her suit before the court, or in defending the attack made on her, ought to be paid by her husband. The order here does not say that these costs had been improperly incurred, but it gives the wife, or rather the solicitor employed by her, the costs of the defence, limited not to the amount at which they shall be ascertained by taxation but to the amount which has been paid into court, or which has been secured in consequence of someone, who could only guess, fixing a sum which probably would be sufficient to pay all costs properly incurred.

In my opinion that is quite wrong; and when one looks at r. 159, that in my opinion points to something rather different. It gives the judge a discretion in this way; that where there are certain steps taken improperly by those who are acting on behalf of the wife—witnesses called who ought not to have been called, and so on—those are costs which in his discretion he may disallow. But, in my opinion, it is not a proper thing under that order to say, “although I do not consider in my discretion that certain issues ought not to have been raised, or that certain witnesses ought not to have been called, I limit the amount of the wife’s costs to the estimate made before the amount was known.” That, in my opinion, is not a proper reading of this rule, and, as we can do it, the practice which has hitherto prevailed must be considered as one which is no longer to be followed.

Appeal as to costs allowed.

Solicitors: *Waddilove & Nutt.*

[*Reported by E. S. ROCHE, Esq., Barrister-at-Law.*]

ATTORNEY-GENERAL (ON THE RELATION OF DEVERILL) *v.* DORKING UNION GUARDIANS

[COURT OF APPEAL (Sir George Jessel, M.R., Cotton and Lindley, L.JJ.), March 22, 24, 1882]

[Reported 20 Ch.D. 595; 51 L.J.Ch. 585; 46 L.T. 573;
30 W.R. 579]

Sewage—Disposal—Nuisance—Local authority—Right to stop up sewer causing nuisance—Obligation to bring actions to restrain persons wrongfully using sewer—Injunction to compel performance of act beyond authority’s powers.

The relator, the owner of land bounded by a stream into which was discharged sewage from a sewer within the district of the defendants, a sanitary authority, alleged that the sewer was vested in the sanitary authority, that it was being used not only by persons who had a prescriptive right to discharge their sewage into it, but also by persons who had no such right, and that such user had become a nuisance, which was constantly increasing. He sought an injunction to restrain the defendants from causing or permitting sewage to be conveyed through the sewer into the stream other than sewage so conveyed by prescriptive right before the commencement of the action. The defendants had been endeavouring to provide a system of drainage for the district, but hitherto had been unable, without any negligence on their part, to acquire the necessary land.

Held: (i) by s. 27 of the Public Health Act, 1875 [see now s. 31 of the Public Health Act, 1936], the defendants were prohibited from creating any nuisance in the exercise of their powers to dispose of sewage, and, therefore, they could not stop up the sewer which would cause a great nuisance to the inhabitants of the district; their efforts to obtain facilities for constructing a new system of drainage had been unavailing; and an injunction would not be granted which would have the effect of compelling them to do something which they had no power to do: (ii) an action against the defendants for a mandatory injunction directing them to bring actions for injunctions to restrain persons who were not entitled to use the sewer from doing so would not lie.

Notes. Applied: *A.-G. v. Acton Local Board* (1882), 22 Ch.D. 221. Distinguished: *Charles v. Finchley Local Board* (1883), 23 Ch.D. 767. Applied: *R. v.*

- A** *Staines Local Board* (1888), 60 L.T. 261. Considered: *Warwick and Birmingham Canal Navigation Co. v. Burman* (1890), 63 L.T. 670; *A.-G. v. Clerkenwell Vestry*, [1891] 3 Ch. 527. Applied: *Ogilvie v. Blything Union R.S.A.* (1892), 67 L.T. 18. Distinguished: *Yorkshire West Riding Council v. Holmfirth U.S.A.*, [1894] 2 Q.B. 842. Considered: *Brown v. Dunstable Corpn.*, [1895-9] All E.R.Rep. 605; *Harrington v. Derby Corpn.*, [1905] 1 Ch. 205. Distinguished: *Foster v. Warblington District Council*, [1904-7] All E.R.Rep. 366; *Jones v. Llanrwst U.D.C.*, [1908-10] All E.R.Rep. 922; *Haigh v. Deudraeth R.D.C.*, [1945] 2 All E.R. 661; *Pride of Derby and Derbyshire Angling Association, Ltd. v. British Celanese, Ltd.*, [1953] 1 All E.R. 179. Referred to: *Hall v. Ewin* (1887), 37 Ch.D. 74; *Kirkheaton Local Board v. Ainley*, [1892] 2 Q.B. 274; *Bradford v. Eastbourne Corpn.*, [1896] 2 Q.B. 205; *Peebles v. Oswaldtwistle U.D.C.*, [1897] 1 Q.B. 384; *Baron v. Portslade-by-Sea Urban Council* (1900), 69 L.J.Q.B. 899; *West Riding Rivers Board v. Butterworth and Roberts* (1907), 98 L.T. 47; *Berton v. Alliance Economic Investment Co.* (1921), 38 T.L.R. 187; *Smeaton v. Ilford Corpn.*, [1954] 1 All E.R. 923.
- B** *District Council*, [1904-7] All E.R.Rep. 366; *Jones v. Llanrwst U.D.C.*, [1908-10] All E.R.Rep. 922; *Haigh v. Deudraeth R.D.C.*, [1945] 2 All E.R. 661; *Pride of Derby and Derbyshire Angling Association, Ltd. v. British Celanese, Ltd.*, [1953] 1 All E.R. 179. Referred to: *Hall v. Ewin* (1887), 37 Ch.D. 74; *Kirkheaton Local Board v. Ainley*, [1892] 2 Q.B. 274; *Bradford v. Eastbourne Corpn.*, [1896] 2 Q.B. 205; *Peebles v. Oswaldtwistle U.D.C.*, [1897] 1 Q.B. 384; *Baron v. Portslade-by-Sea Urban Council* (1900), 69 L.J.Q.B. 899; *West Riding Rivers Board v. Butterworth and Roberts* (1907), 98 L.T. 47; *Berton v. Alliance Economic Investment Co.* (1921), 38 T.L.R. 187; *Smeaton v. Ilford Corpn.*, [1954] 1 All E.R. 923.
- C** As to the duties of local authorities relating to sewage disposal, see 31 HALSBURY'S LAWS (3rd Edn.) 221-224; and for cases see 41 DIGEST 42-45. For the Public Health Act, 1936, see 19 HALSBURY'S STATUTES (2nd Edn.) 302.

D Cases referred to:

- (1) *Glossop v. Heston and Isleworth Local Board* (1879), 12 Ch.D. 102; 49 L.J.Ch. 89; 40 L.T. 736; 44 J.P. 36; 28 W.R. 111, C.A.; 38 Digest (Repl.) 35, 178.
- (2) *A.-G. v. Colney Hatch Lunatic Asylum* (1868), 4 Ch. App. 146; 38 L.J.Ch. 265; 19 L.T. 708; 33 J.P. 196; 17 W.R. 240, L.C. & L.J.; 38 Digest (Repl.) 22, 97.

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Also referred to in argument:

A.-G. v. Richmond (1866), L.R. 2 Eq. 306; 35 L.J.Ch. 597; 14 L.T. 398; 30 J.P. 708; 12 Jur.N.S. 544; 14 W.R. 686; 38 Digest (Repl.) 47, 240.

Goldsmid v. Tunbridge Wells Improvement Comrs. (1866), 1 Ch. App. 349; 35 L.J.Ch. 382; 14 L.T. 154; 30 J.P. 419; 12 Jur.N.S. 308; 14 W.R. 562, L.J.J.; 38 Digest (Repl.) 21, 94.

A.-G. v. Leeds Corpn. (1870), 5 Ch. App. 583; 39 L.J.Ch. 711; 34 J.P. 708; 19 W.R. 19, L.C. & L.J.; 38 Digest (Repl.) 40, 206.

A.-G. v. Cockermouth Local Board (1874), L.R. 18 Eq. 172; 38 J.P. 660; 30 L.T. 590; 22 W.R. 619; sub nom. *Workington Local Board v. Cockermouth Local Board*, *A.-G. v. Cockermouth Local Board*, 44 L.J.Ch. 118; 36 Digest (Repl.) 255, 61.

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Appeal from a decision of HALL, V.-C., in an action for an injunction.

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The relator, John Croft Deverill, was the owner and occupier of a dwelling-house, stables, gardens, meadow, and appurtenances in the parish of Dorking (the population of which in 1851 exceeded 5,000), bounded on the north by a stream flowing from west to east called the Pipp Brook; on the east by the river Mole, into which the Pipp Brook flowed; on the south by the grounds of another house; and on the west by a public thoroughfare called Pixham Lane. The plaintiff and his family had lived in this house for upwards of ten years. The town of Dorking lay to the south-west of the plaintiff's house. On Jan. 17, 1879, the action was commenced by the Attorney-General at the relation of the relator, against the guardians of the poor of the union of Dorking, the sanitary authority for the district. The statement of claim was delivered on Dec. 12, 1879, and alleged that the sewage of the entire town of Dorking and of a large portion of the parish was discharged by sewers and drains into the Pipp Brook, injuriously affecting the purity of the water to such an extent that the houses on the northern outskirts of the town were rendered unwholesome, and that the air was impregnated with an odour injurious to the public health; that the house of a miller was rendered almost uninhabitable by the state of the water; and that the relator and his family were most injuriously affected

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by the state of a pond called the Pixham Mill Pond, which was fed by the Pipp Brook, it being the practice to dam up the water at night after the mill had ceased working, and to let the water flow down in the morning, at which time particularly, it was stated, the rush of sewage down the stream was intolerable. The statement of claim then alleged that the defendants had used since the passing of the Health Act, 1875, and "now used" the said sewers for the purpose of carrying sewage into the Pipp Brook; that since 1875 new houses had been erected within the district in constantly increasing numbers, from which the sewage was being discharged through newly-constructed drains into the old sewers vested in the defendants; that the persons by whom such connections were made had not acquired any prescriptive right to throw into the sewers any sewage or filthy water; and that the public nuisance and private injury would increase unless restrained by the court. The Attorney-General claimed an injunction to restrain the defendants from causing or permitting the sewage or filthy water of the town or parish of Dorking, or any part thereof, to be conveyed through the sewers or drains within the sanitary district of Dorking (other than sewage or filthy water so conveyed by prescriptive right before the commencement of the action) into the Pipp Brook or into the ponds or lakes fed by the brook unless and until such sewage and filthy water had been sufficiently purified and deodorised so as not to create a nuisance.

By an amended statement of defence, delivered on May 25, 1880, the defendants denied that the whole, and said that only a portion, of the sewage of Dorking was discharged into the Pipp Brook, inasmuch as a great number of houses in Dorking were drained by means of cesspools. They denied that they had used, or were using, any sewers or drains for the purpose of carrying sewage into the brook, and said that the sewers and drains now in existence had been used for a great number of years, and before the house occupied by the relator was built; that the lessee of Pipp Brook Mill had recently taken a fresh lease of the premises, and continued to reside with his family in the house attached to the mill without inconvenience, and denied the fact of there being any nuisance.

They further said that in 1876 they had promoted a scheme for conveying the sewage of the town on to land in the adjoining parish of Mickleham, but the scheme met with so much opposition that it had to be abandoned after costing the defendants nearly £1,000; that they were now, in conjunction with the adjoining parish of Leatherhead, applying to the Local Government Board to constitute a district known as the Dorking Special Drainage District, and the parish of Leatherhead into a united district for the purpose of carrying out a system of sewerage under the provisions of s. 279 of the Public Health Act, 1875; and that such an application was made on Nov. 27, 1878, and was still before the local board for consideration. They further said that there were no sewers whatever vested in the defendants. The sewer referred to in the statement of claim, and all other sewers and drains in the district were either private sewers made by private persons under private roads, or drains vested in or under the control of authorities having the management of roads not being local authorities under the Public Health Act, 1875, and over which the defendants had no control. The defendants had made no connection with any public sewer, and they had no power to prevent owners or occupiers from making connections with or using the sewers. If any nuisance was created, which the defendants did not admit, the plaintiff ought to proceed against the persons who made connections with and used the sewers. The defendants did not admit that the houses had no prescriptive right to send their sewage into the brook, and said that that question could only be tried by proceedings against the owners or occupiers.

On Jan. 12, 1881, the action came on to be heard before HALL, V.-C., who gave judgment for the defendants. The Attorney-General appealed.

Horace Davey, Q.C., and Latham for the Attorney-General.

W. Pearson, Q.C., and Vaughan Hawkins, for the defendants, were not called on to argue.

A **SIR GEORGE JESSEL, M.R.**—This court is bound, as the court below was bound, by the decision in *Glossop v. Heston and Isleworth Local Board* (1), and even if I differed, which I do not, from the conclusions arrived at by the Court of Appeal in that case, I should be bound to decide this case in accordance with it unless I saw some substantial difference. As it appears to me there is no substantial difference whatever; indeed, I will go further, and say that there is no tangible difference, if I may use such an expression.

B As I understand *Glossop v. Heston and Isleworth Local Board* (1), there were sewers vested in the defendants, the local board, and I will assume that the sewers in the present case are vested in the guardians, or that they were vested in them at the time when this action was brought. It was undoubtedly so in the case of the local board in *Glossop v. Heston and Isleworth Local Board* (1). In that respect, C therefore, the two cases are alike. In the next place it is admitted here and was proved there that, as regards a large portion of the sewers, there are prescriptive rights, that is, that there are a number of persons who have the right, having used the sewer for more than twenty years, to send their drainage down the sewer. In the present case the main sewer was made more than twenty-four years ago, and it has been used ever since, and largely used. In *Glossop v. Heston and Isleworth* D *Local Board* (1), it appears that one of the sewers had been used certainly from the time of Oliver Cromwell, if not before, and, therefore, it was a very old sewer indeed, subject to a question whether another sewer had not been substituted for it with the right to persons having a prescriptive right to use the substituted sewer as they had used the old sewer. In that respect the two cases are alike. In the next place, this is the same as *Glossop's Case* (1) in that it is a case of gradual E increase of nuisance. That is, in addition to the persons who have prescriptive rights, there are a great many people who have no prescriptive rights but drain their houses into this sewer, and by reason of that additional sewage the nuisance to the plaintiff's stream is very much increased.

The defendants say that in order to construct a new system of drainage, which is what they ought to do, and what they intend to do when they can, they must F acquire land; and they have endeavoured to acquire land, but unfortunately they have not been successful. They are making further endeavours which they hope will be successful. Upon that point, I think it is as well to show what they have done. The action in the present case was commenced on Jan. 17, 1879. The Public Health Act, 1872 [repealed by Public Health Act, 1875], came into operation on Aug. 10 of that year, and as early as in October the defendants employed Sir G Joseph Bazalgette to report. He reported in December of that year. They found a G difficulty in dealing with his report because they thought that the sewer did not comprise the whole, and consequently, after a great deal of deliberation, they applied, in December, 1874, to the Local Government Board to make them a new drainage district. The Local Government Board do not seem to have hurried themselves for it was not until February, 1877, that the request was complied with. H During the interval the defendants employed another engineer, Mr. Birch, and he told them to get twelve acres of land to make the sewage works. They gave notices accordingly, whereupon the Local Government Board directed one of their inspectors to hold an inquiry under the Local Government Act. This inquiry took place, but they were so strongly opposed that their counsel advised them not to contest the matter further, but to give it up and try to get some other power. We I are told by affidavit that these abortive proceedings cost the defendants upwards of £1,000. Therefore, they were in earnest.

They started again, and after they got the new power, the Local Government Board, in June, 1878, appointed a committee to confer with the representatives of the parish of Leatherhead as to a joint scheme, and another application was made on Nov. 27, 1878, to constitute the Dorking Special Drainage District and the parish of Leatherhead a united district. In November, 1879, this action having been brought in January, 1879, the Local Government Board directed an inquiry to be held before Mr. Arnold Taylor upon the application. He made an adverse

report, and thereupon the Board declined to proceed with the matter further until a portion of the parish of Leatherhead was constituted a special drainage district. Now, such last-mentioned special drainage district having recently been formed, the application of the defendants is still before the Local Government Board for consideration. They go on to say in their affidavit that they have by every means in their power sought to obtain suitable land for the reception of the sewage, but without success, and they are now, in addition to the aforementioned application to the Local Government Board, seeking the advice of their engineer, Mr. Birch, as to an alternative scheme to be proceeded with, should such application be refused. They are not neglecting to put their general powers into execution any more than the defendants were in *Glossop v. Heston and Isleworth Local Board* (1). I especially mention this because I do not wish it to be inferred that, if these public bodies do neglect to exercise their power, that is a reason for not compelling them to exercise it. However, that is not the present case.

This being the position of matters, what does the relator complain of? He says this: "The sewers being vested in you, the defendants, you allow or permit persons having no prescriptive right of drainage to drain through your sewers into my stream, and thereby cause additional and serious additional pollution." There are two points to be considered here. Would the relator have any right of action at common law irrespective of these Acts of Parliament, by reason of this ownership of the sewers which I assume for this purpose is vested in the defendants; and, secondly, if he would not, does the Rivers Pollution Act or any other Act give him a right of action?

As to the first point, which does not seem to have been very much discussed in the previous case, we must remember that the vesting of the sewers in the local authority gives them a very limited right of ownership. I am not prepared to say that they are in the same position as a landowner through whose land a sewer, an artificial work, runs. It by no means follows that they have the same rights as he has. He can stop up the sewer without asking anybody. But as I read this Act of Parliament I am by no means prepared to say that this local sanitary board can stop the sewer up, and thereby cause a most frightful nuisance to the inhabitants of the district whose drainage it is their business to protect and perfect. That is the first difficulty in the way—that the vesting is not an absolute right of ownership, but a modified and limited right of ownership, and it does not, in my opinion, give them a right to stop up the sewer. But, even assuming they had an absolute right of ownership, could they bring an action at law? I think they could not.

This is the case of a landowner with running through his land a sewer, through which persons above have a prescriptive right of drainage and of sending sewage. He cannot stop up the sewer against them. But other persons also above who have no such prescriptive right send sewage down the sewer. As he cannot stop up the sewer, how is he to prevent it? I know of no means except by bringing an action and obtaining an injunction to prevent the persons who were not entitled to drain into the sewer doing so. Whether he could get such an injunction or not must depend upon circumstances. In the case I put, it by no means follows that he sustains any damage. It may be utterly immaterial to him, as it is in this case, whether there is more or less sewage thrown down. It does not matter to him in the least. Could he maintain an injunction? My present impression is that he could, but if he could not maintain an injunction then, these people, by going on for twenty years, would get a prescriptive right, and he would be entitled to an injunction upon the ground of permanent injury to his property by prescription being acquired over it. Therefore, for this purpose, he could get an injunction. Then the person whose land is situated lower down the stream which is polluted says: "You can obtain an injunction to restrain these people sending the sewage down your sewer, and, therefore, I will bring an action against you." What for? "Because you do not bring an action for an injunction against the people who are sending the sewage through your land." Suppose he says: "I do not care about prescription; so many people already have prescriptive rights of sending this sewage

A into the sewer that I do not care about other people getting them too." Is he compelled to bring an action for the purpose of asserting his title to prevent a prescription as to which he is perfectly indifferent? It is a most singular thing to say so.

B Independently of that, did one ever hear of an action against a man because he did not bring an action against his neighbour. It is impossible to suppose that any such action could be maintained. If one could maintain it, one would get an injunction against a man for not bringing an injunction action against his neighbour. As it is the only means of preventing the nuisance, it comes to an order that he shall bring an action for an injunction against all his neighbours who are sending sewage down without a prescriptive right into the sewer. That is, he would have to fight in every case the question of prescription and acquiescence, and fifty other questions which might arise. How can we tell in the absence of the people what the defence might be? He may have lost his right by acquiescence or in various other ways. No such action has ever been heard of at common law, and I am sure no such action has ever been heard of in equity. If there is no action at common law where do you get the right under the statute? The only rights under the statute are given to prevent the local authority from committing a nuisance. They say: "We have done nothing at all. We found the sewers in this state, and we left them there." Besides that they have a general scheme of drainage which they are endeavouring to put in force, and as to which I say, without negligence or without the imputation of negligence upon them, they are doing the best they can. Is that a case which gives the relator any right to an injunction? I think it does not.

E I come to the last ground. It appears to me that there is one sentence in the judgment of CORON, L.J., in *Glossop v. Heston and Isleworth Local Board* (1), which puts an end to this case altogether. He says this (12 Ch.D. at p. 127):

F "But it would be contrary to the course of the court to make a decree of that nature against the defendants, unless the court is satisfied that there is some particular mode by which they can carry into effect this scheme of drainage, and in that way exercise the powers of this Act of Parliament."

The court is asked to enjoin a man or corporation under penalties to prevent a state of things being allowed to continue without being aware of any means by which he can stop it. Surely that cannot be right. You are not to send a man to prison for not preventing what he cannot prevent. In *A.-G. v. Colney Hatch Lunatic Asylum* (2) LORD HATHERLEY said that one could not make an order to do a thing which was impossible. I agree with the statement of CORON, L.J., that before you can make an order directing a man to do something—for that is the effect of the injunction; it is negative in form, but it is positive in fact—you must be satisfied that he can do it. As I said before, I am not only not so satisfied, but, upon the present evidence, I think the defendants cannot prevent the use of the sewer which is complained of.

H There is one other ground that was not mentioned in *Glossop v. Heston and Isleworth Local Board* (1), but which appears to me to be a very important ground, and that is that, in granting an injunction which is a very delicate jurisdiction, the court always looks at the balance of convenience. I agree that where there has been an injury to the plaintiff's property, it is no answer to say: "We have invaded your property because it is more convenient to us." But where there is a continuance of a state of things which you find existing, and which it is only by the intervention of Parliamentary powers you can stop, would it be right to grant an injunction when you cannot compel the exercise of the Parliamentary powers, the effect of which would be to cause a most frightful injury to the town of Dorking? I am now assuming that they could physically stop up the sewer. Would it be right to order them to stop it up, leaving the town of Dorking to go undrained, and so probably cause disease, which would be utter destruction to the town, because there is a temporary injury to the plaintiff? That is a consideration which the

court must not lose sight of when it is asked to grant a mandatory injunction. I am by no means prepared to say what the rights of the plaintiff would be if the defendants neglected to put in force their Parliamentary powers, but I am prepared to say that the court would find some remedy for him in that case.

It appears to me that this case is not fairly distinguishable from *Glossop v. Heston and Isleworth Local Board* (1), and that the learned judge in the court below rightly considered himself bound by that case in coming to the conclusion that he did, and I think that we are equally bound, and, therefore, this appeal ought to be dismissed.

COTTON, L.J.—In this case I assume that the sewers are vested in the defendants. It is not necessary in the view which I take to give any opinion upon it in this case, but I assume, for the purpose of the argument, what I have no doubt is the case, that the stream in which the relator is interested is in a very bad state and is becoming daily worse. But does that entitle the relator to a decree and injunction against the defendants? The defendants are doing nothing. They are not making any new sewer or being active in exercising any power which they have under the Public Health Act, of turning sewage into any different course from that in which it previously went. In that state of things, in my opinion, the case is exactly the same in principle, although there are minute differences, as *Glossop v. Heston and Isleworth Local Board* (1). I adhere to the opinion that was there expressed by me.

True, under the Act of Parliament these sewers have become vested in the defendants [see Public Health Act, 1936, s. 7]. Under the Act they cannot close up those sewers without providing that which is necessary for the purpose of carrying away the sewage, nor can they close up any sewer which would create a nuisance [see s. 31 of Act of 1936]. Could it be for a moment said that closing up this sewer without providing another system of sewage would not cause a great nuisance to every householder who had previously drained into these sewers? It is not only so as regards those already drained into the brook; but, under the Act of Parliament, every householder has a right, if his house is within a certain distance of this sewer, of conducting his drain into it, and, that being so, no permission is required from the defendants to enable any householder having a new or old house to connect his drain with this sewer. Therefore, they are not using their sewer for the purpose of carrying this drainage in the same way as a body or a person would be doing who permitted or allowed persons to turn their sewage into a sewer when those persons could not make any connection with the sewer except by the permission or with the authority of the person in whom the sewer was vested. In my opinion, therefore, it cannot be said that the defendants are using this sewer for the purpose of conveying this sewage, which I assume, causes a nuisance to the plaintiff.

It is said that that would not be in accordance with s. 17 of the Public Health Act, 1875 [s. 31 of the Act of 1936], which says:

“Nothing in this Act shall authorise any local authority to make or use any sewer, drain, or outfall for the purpose of conveying sewage or filthy water into any natural stream or watercourse. . . .”

I pointed out how, in my opinion, they are not to be considered as themselves using, either by conveying, or by granting permission for sewage to be conveyed, into the stream by means of this sewer. The construction of the section is, as I understand it, that the Act does not give authority to use or do anything so as to commit a nuisance, and, as was pointed out by JAMES, L.J., and I think also by myself, in our judgments in the *Glossop Case* (1), that it comes simply to this, that, if you want, for the purpose of doing anything, to rely upon authority given by the Act, you must do that thing so as not to commit a nuisance. Here the defendants are doing nothing. They are not constructing a new system of sewers. It was said that they are using this sewer by allowing it to be used as part of the existing

A system of drainage, which is vested in them. They are not substituting a new system of sewage, and, in my opinion, the mere fact that they have not substituted a new system of sewage cannot make a using of this sewer by them, when it is used without any leave granted by them, under the rights which are granted by the Act to householders.

That being so, in my opinion, they are doing no illegal act; and the injunction ought not to be granted. But it is said that they can prevent this being done, and, therefore, that an injunction ought to be granted for the purpose, as I understand the argument, of compelling them to exercise for the benefit of the plaintiff those rights which they have of preventing this nuisance. I have dealt with the question of closing up the sewer. It is said that they may prevent the nuisance in two ways, by bringing an action or by taking proceedings under the powers of the Act against the persons who are in fact causing the nuisance by sending their sewage into the sewer. The Master of the Rolls has dealt with this part of the case, and, I must say, except where a person has bound himself by contract to bring an action—which, of course, is a different question—I never heard of anyone bringing an action against another person because that other person did not bring an action which the plaintiff could as well bring himself. If here there is a nuisance committed by the persons who are sending their sewage, either de novo or continuing to send it, into the sewer, and thence into the stream, the plaintiff can bring an action just as well as the defendants, except that it is said he has not the same knowledge. But does the fact that the defendants know of evidence which the plaintiff does not know entitle the plaintiff to bring an action against the defendants for not bringing an action which the plaintiff himself at law may bring, although he may have some difficulty in proving his case? I never heard of any such principle and, in my opinion, there is none.

It was said—and that was, I think, really the principal argument—that, although the defendants here are not actively doing anything which causes the nuisance, although they are doing nothing the doing of which can be stopped by granting an injunction, they may indirectly be compelled to exercise the powers of an Act of Parliament which would be a benefit to the plaintiff by preventing the sewage coming into the stream. I repeat here what I said in the *Glossop Case* (1), that, in my opinion, if that is the object to be attained, it ought to be done by an order directing the defendants to exercise their powers, and not by way of injunction, which is to have that indirect effect.

Independently of that, there has been no default, as the Master of the Rolls has pointed out, on the part of the defendants to exercise their powers. They have been trying to exercise their powers, but they cannot do so. There is a fatal objection to what is asked by the relator as the ground for the injunction. In my opinion, it would not be right to grant an injunction to restrain the defendants from allowing this sewage to come into the stream, when it does not appear that there is any means under the authority given by the Act of Parliament by which they can divert the sewage from the stream. It is said that that is contrary to all the cases decided with reference to this matter. In my opinion, it is contrary to not one of them. In all the cases which have been referred to, the defendants who were restrained had done something actively to turn the sewage into the stream or on to the land of the parties complaining of it. In the present case it is not material to consider whether the defendants could get rid of their sewage by any other means. The Act of Parliament has given them power to get rid of their sewage, provided they can do so without committing a nuisance. If they cannot do so without committing a nuisance the Act of Parliament does not authorise them to do it, and they are in the same position as individuals who do a wrong to their neighbour without any Parliamentary authority. It is immaterial to consider whether it could be done under any of the powers given to them by the Act without committing a nuisance. Here the defendants are doing nothing, and they are sought to be compelled to exercise the powers of the Act, when it does not appear that the exercise of the powers would prevent the injury or loss to the relator of

which he complains. In my opinion, that would be a fatal objection to the granting of an injunction for the purpose which the relator here tries to achieve indirectly by his application for an injunction. In my opinion, the decree dismissing the information and bill was right, and, therefore, the decree appealed from ought to be affirmed.

LINDLEY, L.J.—I am of the same opinion. I will only add, having looked carefully at *Glossop v. Heston and Isleworth Local Board* (1), I do not see how to distinguish this case from that in substance.

Solicitors: *Walters, Deverell & Walters; Duncan, Warren & Gardner* for *Hart, Hart & Marten*, Dorking.

[Reported by E. S. ROCHE, Esq., Barrister-at-Law.]

MURRAY v. SCOTT
AGNEW v. MURRAY
BRIMELOW v. MURRAY

[House of Lords (The Earl of Selborne, L.C., Lord Blackburn and Lord Watson), April 24, 25, 28, 29, May 23, 1884]

[Reported 9 App. Cas. 519; 53 L.J.Ch. 745; 51 L.T. 462;
33 W.R. 173]

Building Society—Borrowing money—Power to borrow—Rule authorising borrowing, without limit of amount specified, “as occasion may require”—Borrowed money charged on funds and property of society—Credit of members not pledged—Validity of rule.

Building Society—Rule—Validity—Rule valid unless effect to make society different from building society formed and carried on under Building Societies Acts.

By a rule of a building society enrolled under the statute 6 & 7 Will. 4, c. 32 (passed in 1836 to regulate building societies and repealed by the Building Societies Act, 1874): “The trustees or directors for the time being of this society may, from time to time as occasion may require, borrow and take up at interest any sum or sums of money from the society’s banker, or from any banker, or from any other person or persons; any borrowed money shall be a first charge on the funds and property of the company.”

The only real and true limit of the rule-making power of a building society as to a matter not governed by the general law of the realm or by any express statutory prohibition is that the power cannot be exercised so as to make the society a thing different from a building society formed for the purposes and in the manner defined by the Building Societies Acts. It might have that effect if the rule authorised borrowing, or the use of money borrowed, for purposes other than those of a building society within the Acts, or if it enabled the trustees or directors to pledge the credit of the individual members of the society without limit in a manner inconsistent with the limitation of the value and amount of the shares and subscriptions by which the common stock or fund of the society was to be raised as prescribed by the Acts. The rule set out above did neither of those things. It only authorised borrowing “as occasion may require,” manifestly for no other purposes than the proper purposes of the society. It did not authorise the trustees or directors to pledge in any way the personal credit of any individual members of the society. It expressly

- A made all borrowed money "a first charge on the funds and property of the society," of which the base was necessarily the total amount of the contributions of members, and the creditors could have no recourse except against such funds and property. Accordingly, the rule, although it contained no limitation on the amount to be borrowed, was valid, and persons advancing money to the society under it were entitled to rank as creditors against the assets of the society in priority to the members thereof of all classes.
- B So held by the Court of Appeal.

C Per LORD BLACKBURN: Although a limit as to the amount which the trustees or directors are authorised to borrow is obviously highly expedient, I do not see how such a limitation can on any principle be said to affect the question whether the borrowing is repugnant to the principles of the society. . . . A rule authorising borrowing so as to charge the funds of the society, but not the persons of the members, is valid though there is no limit placed on the amount which can be borrowed.

Notes. Provisions regarding the rules of building societies are now contained in ss. 4 & 5 of the Building Societies Act, 1962: 42 HALSBURY'S STATUTES (2nd Edn.) 64-66.

- D Considered: *Re Middlesbrough, Redcar, Saltburn-by-the-Sea, and Cleveland District Permanent Benefit Building Society* (No. 2) (1885), 53 L.T. 203; *Re Mutual Aid Permanent Benefit Building Society* (1885), 30 Ch.D. 434; *Re West London and General Permanent Benefit Building Society*, [1894] 2 Ch. 352; *Sinclair v. Brougham*, [1914-15] All E.R.Rep. 622. Referred to: *Brooks & Co. v. Blackburn Benefit Society* (1884), 9 App. Cas. 857; *Blackburn and District Benefit Building Society v. Cunliffe, Brooks & Co.* (1885), 29 Ch.D. 902; *Birch v. National Union of Railwaymen*, [1950] 2 All E.R. 253.

E As to borrowing by a building society, see 3 HALSBURY'S LAWS (3rd Edn.) 611-615; and for cases see 7 DIGEST (Repl.) 513 et seq.

Cases referred to:

- F (1) *Laing v. Reed* (1869), 5 Ch. App. 4; 39 L.J.Ch. 1; 21 L.T. 773; 34 J.P. 134; 18 W.R. 76, L.C. & L.J.; 7 Digest (Repl.) 514, 222.
- (2) *Cox v. Hickman* (1860), 8 H.L.Cas. 268; 11 E.R. 431; sub nom. *Wheatcroft v. Hickman*, 9 C.B.N.S. 47; sub nom. *Cox v. Hickman, Wheatcroft v. Hickman*, 30 L.J.C.P. 125; 3 L.T. 185; 7 Jur.N.S. 105; 8 W.R. 754, H.L.; 36 Digest (Repl.) 435, 91.
- G (3) *Re National Permanent Benefit Building Society, Ex parte Williamson* (1869), 5 Ch. App. 309; 22 L.T. 284; 34 J.P. 341; 18 W.R. 388, L.J.; 7 Digest (Repl.) 536, 360.
- (4) *Re Victoria Permanent Benefit Building Investment and Freehold Land Society, Hill's Case, Jones' Case* (1870), L.R. 9 Eq. 605; 39 L.J.Ch. 628; 22 L.T. 777; 34 J.P. 532; 18 W.R. 967; 7 Digest (Repl.) 514, 223.
- H (5) *Re Professional, Commercial, and Industrial Benefit Building Society* (1871), 6 Ch. App. 856; 25 L.T. 397; 19 W.R. 1153, L.J.J.; 7 Digest (Repl.) 514, 225.

Also referred to in argument:

- Chapleo v. Brunswick Building Society* (1881), 6 Q.B.D. 696; 50 L.J.Q.B. 372; 44 L.T. 449; 29 W.R. 529, C.A.; 7 Digest (Repl.) 519, 256.
- I *Blackburn Building Society v. Cunliffe, Brooks & Co.* (1882), 22 Ch.D. 61; 52 L.J.Ch. 78; 48 L.T. 33; 31 W.R. 98, C.A.; affirmed sub nom. *Brooks & Co. v. Blackburn Benefit Society* (1884), 9 App. Cas. 857; 54 L.J.Ch. 376; 52 L.T. 225; 33 W.R. 309, H.L.; 7 Digest (Repl.) 515, 230.
- Dobinson v. Hawks* (1848), 16 Sim. 407; 12 L.T.O.S. 238; 12 Jur. 1037; 60 E.R. 931; 7 Digest (Repl.) 489, 71.
- Re Kent Benefit Building Society* (1861), 1 Drew. & Sm. 417; 30 L.J.Ch. 785; 4 L.T. 610; 25 J.P. 805; 7 Jur.N.S. 1045; 9 W.R. 686; 62 E.R. 439; 7 Digest (Repl.) 487, 58.

- Re Durham County Permanent Investment, Land and Building Society, Davis' Case, Wilson's Case* (1871), L.R. 12 Eq. 516; 41 L.J.Ch. 124; 25 L.T. 83; 36 J.P. 164; 7 Digest (Repl.) 514, 228.
- Dewhurst v. Clarkson* (1854), 3 E. & B. 194; 2 C.L.R. 1143; 23 L.J.Q.B. 247; 23 L.T.O.S. 109; 18 J.P. 535; 18 Jur. 693; 2 W.R. 199; 118 E.R. 1114; 25 Digest (Repl.) 320, 91.
- Kelsall v. Tyler* (1856), 11 Exch. 513; 25 L.J.Ex. 153; 26 L.T.O.S. 226; 20 J.P. 150; 156 E.R. 933; 25 Digest (Repl.) 346, 276.
- Moye v. Sparrow* (1870), 22 L.T. 154; 18 W.R. 400; 7 Digest (Repl.) 513, 221.
- Mullock v. Jenkins* (1851), 14 Beav. 628; 21 L.J.Ch. 65; 18 L.T.O.S. 203; 51 E.R. 426; 7 Digest (Repl.) 520, 265.
- Grimes v. Harrison* (1859), 26 Beav. 435; 28 L.J.Ch. 823; 33 L.T.O.S. 115; 23 J.P. 421; 5 Jur.N.S. 528; 53 E.R. 966; 7 Digest (Repl.) 520, 266.
- Re Patent File Co., Ex parte Birmingham Banking Co.* (1870), 6 Ch. App. 83; 40 L.J.Ch. 190; 19 W.R. 193, L.J.J.; 9 Digest (Repl.) 708, 4701.
- Re Florence Land and Public Works Co., Ex parte Moor* (1878), 10 Ch.D. 530; 48 L.J.Ch. 137; 39 L.T. 589; 27 W.R. 236, C.A.
- Re Colonial Trusts Corp., Ex parte Bradshaw* (1879), 15 Ch.D. 465; 10 Digest (Repl.) 766, 4983.
- Re Hallett's Estate, Knatchbull v. Hallett* (1880), 13 Ch.D. 696; sub nom. *Re Hallett's Estate, Knatchbull v. Hallett, Cotterell v. Hallett*, 49 L.J.Ch. 415; 42 L.T. 421; 28 W.R. 732, C.A.; 43 Digest 1021, 4614.
- Pennell v. Deffell* (1853), 4 De G.M. & G. 372; 1 Eq. Rep. 579; 23 L.J.Ch. 115; 22 L.T.O.S. 126; 18 Jur. 273; 1 W.R. 499; 43 E.R. 551, L.J.J.; 43 Digest 1021, 4612.
- Western Bank of Scotland v. Addie, Addie v. Western Bank of Scotland* (1867), L.R. 1 Sc. & Div. 145, H.L.; 35 Digest (Repl.) 31, 217.
- Diggle v. Higgs* (1877), 2 Ex.D. 422; 46 L.J.Q.B. 721; 37 L.T. 27; 42 J.P. 245; 25 W.R. 777, C.A.; 25 Digest (Repl.) 422, 61.
- Re Phoenix Life Assurance Co., Burges and Stock's Case* (1862), 2 John. & H. 441; 31 L.J.Ch. 749; 7 L.T. 191; 9 Jur.N.S. 15; 10 W.R. 816; 70 E.R. 1131; 10 Digest (Repl.) 1057, 7336.
- Houldsworth v. City of Glasgow Bank* (1880), 5 App. Cas. 317; 42 L.T. 194; 28 W.R. 677, H.L.; 9 Digest (Repl.) 256, 1631.
- Spackman v. Evans* (1868), L.R. 3 H.L. 171; 37 L.J.Ch. 752; 19 L.T. 151, H.L.; 9 Digest (Repl.) 446, 2919.
- Evans v. Smallcombe* (1868), L.R. 3 H.L. 249; 37 L.J.Ch. 793; sub nom. *Evans v. Smallcombe, Re Agriculturist's Cattle Insurance Co.*, 19 L.T. 207, H.L.; 9 Digest (Repl.) 445, 2918.
- Houldsworth v. Evans* (1868), L.R. 3 H.L. 263; 37 L.J.Ch. 800; sub nom. *Houldsworth v. Evans, Re Agriculturists' Cattle Insurance Co.*, 19 L.T. 211, H.L.; 9 Digest (Repl.) 447, 2922.
- Phosphate of Lime Co. v. Green* (1871), L.R. 7 C.P. 43; 25 L.T. 636; 9 Digest (Repl.) 440, 2872.

Appeals from decisions of the Court of Appeal (SIR GEORGE JESSEL, M.R., COTTON and BOWEN, L.J.J.) in appeals from the Vice-Chancellor of the Chancery Court of Lancaster (H. F. Bristowe, Q.C.), in cases arising in the winding-up of the Guardian Permanent Benefit Building Society, reported 23 Ch.D. 440.

In the first case the appeal was brought by Mr. Adam Murray, the official liquidator of the Guardian Permanent Benefit Building Society, from an order of the Court of Appeal reversing an order of the Vice-Chancellor. The society carried on business in Manchester. It was formed in 1870, and was enrolled under the Act 6 & 7 Will. 4, c. 32. It was being wound-up in the Lancaster Chancery Court, under an order made on Nov. 14, 1881. The rules contained the following:

"Rule 32. The trustees or directors for the time being of this society may, from time to time as occasion may require, borrow and take up at interest any

- A sum or sums of money from the society's banker, or from any banker, or from any other person or persons; any borrowed money shall be a first charge on the funds and property of the company."

The rules when printed were submitted to the barrister appointed to certify the rules of building societies and certified by him.

- B On appeal from the Vice-Chancellor the Court of Appeal held that r. 32, being a rule giving an unlimited power of borrowing money to the directors of a building society, was void although it had been certified by the certifying barrister, and that persons advancing money under it on the security of the deposit of the title deeds of borrowing members must, in the winding-up of the society, give up their securities and prove against the residue of the assets after payment of the outside creditors and unadvanced members.

C *Ambrose, Q.C., Maberly and Edwin Jones* for Murray, the official liquidator, the appellant in the first and the respondent in the two other appeals.

Cozens-Hardy, Q.C., and Buckley for the respondent Scott.

Davey, Q.C., and Hopkinson for the appellants Brimelow and Agnew.

- D Their Lordships took time for consideration.

May 23, 1884. The following opinions were read.

- THE EARL OF SELBORNE, L.C.**—The principal question on these appeals is as to the validity of r. 32 which authorises the trustees or directors of the Guardian Permanent Benefit Building Society to borrow money "from time to time as occasion may require," without any limitation of the amount to be so borrowed, but with the provision that "any borrowed money shall be a first charge on the funds and property of the society." The words, "as occasion may require," when read in connection with the rest of the rules, necessarily mean when and as there may be occasion to borrow money for the purposes and objects of the society, as defined by r. 1. Any borrowing for other purposes, or other objects, would be a breach of the duty of the trustees or directors under those rules, and certainly cannot be taken to be authorised by the terms of r. 32. In point of fact no money was borrowed or applied for any unauthorised purpose. Rule 32 has all the force and authority which it can derive from the mutual contract and agreement of the members of the society, and from the certificate and allowance of the barrister appointed for that purpose under the Friendly Societies Acts, incorporated (by reference) into the [repealed] Act 6 & 7 Will. 4, c. 32 [which regulated benefit building societies], under which this society was formed. Unless, therefore, it was illegal and ultra vires for the members of such a society to make and for the barrister to allow and certify such a rule, the debts contracted by virtue of it are well charged upon the general funds and property of the society, and ought to be allowed and provided for out of such funds and property in priority to the shares and interests of all classes of members.

- H The Vice-Chancellor of the Duchy of Lancaster, and the Court of Appeal, considered it to have been settled, by authorities which they ought to follow, that any rule of such a society, formed under the Act of 6 & 7 Will. 4, by which borrowing money without some limit of amount was authorised, was repugnant to and inconsistent with the provisions of that statute, and, therefore, incapable of being made legal by any consent of members or allowance of the certifying barrister. But, when the authorities which were supposed to establish this proposition are referred to, none of them is found to be really a decision upon that point; they all seem to depend upon a dictum of LORD HATHERLEY, L.C., in *Laing v. Reed* (1), to the effect that, although a limited borrowing power, if expressly given by a rule duly certified, would be good (as was decided in that case), a rule authorising the trustees "to raise an unlimited sum of money wholly regardless of the contributions which might be made by the members," would be "contrary to the intent and scope of the Act." I am not sure in what sense these words "wholly regardless of the

contributions," etc., were meant by LORD HATHERLEY to be understood, but I subscribe to the doctrine laid down in the same case by GIFFARD, L.J., that the test ought to be whether the rule (not being contrary to any express prohibition in the statute) was one which made the society "a thing different from a benefit building society." If not, and if it "merely provided a method of conducting business" (i.e., the proper business of a benefit building society), it could not be illegal or ultra vires, being made by the proper authority, and certified in the proper manner. Without disparagement to the weight justly due to those learned judges who in several later cases have referred, with apparent approval and concurrence, to LORD HATHERLEY's dictum, I think that in this state of authority the point cannot be regarded as settled, and that your Lordships ought to decide it according to your own view of the true effect of the statute.

Upon principle it seems clear that if a borrowing power may be (as both LORD HATHERLEY and GIFFARD, L.J., rightly, in my opinion, decided it to be) not only consistent with, but reasonably conducive to, the proper objects of a benefit building society (though not so necessary as to be implied unless expressly given), it must be competent for the members of the society to make, and for the barrister to certify, a rule conferring such a power, and if it be contended that such a power could only be given under certain conditions and limitations, the law prescribing and defining those conditions and limitations must be in some way discoverable from the statute, otherwise the authority competent to give the power must also be competent to define its extent, and to prescribe the conditions (if any) under which it is to be exercised. In *Laing v. Reed* (1) the power was expressly limited, so that the money borrowed was at no time to exceed two-thirds of the amount for the time being secured by mortgages to the society, and the same limit has since been prescribed by law to societies within the Building Societies Act, 1874 [repealed except for ss. 1, 4, 7, & s. 32 (partly) by Building Societies Act, 1962], by which rules giving borrowing powers are expressly authorised. But the subject is not in any way regulated, or even so much as mentioned, in the Act of 6 & 7 Will. 4, and the particular terms in which LORD HATHERLEY expressed himself in *Laing v. Reed* (1) were probably influenced by the circumstances of the case which he had then before him.

The only limitations of the general power to make rules and regulations conferred by the Act of Will. 4 upon the members of such societies (beyond the necessity of having them certified), which are discoverable from the statute, are generally and equally applicable to all such rules and regulations. They must be (i) "Wholesome rules and regulations for the government and guidance of the society," that is, of a society formed for the purposes and in the manner defined by the Act; (ii) not repugnant to any express provisions of the Act; and (iii) not repugnant to the general laws of the realm. It cannot be alleged that the omission of the rule in question to prescribe any fixed or ascertainable limit of the amount to be borrowed is repugnant to any express prohibition of the Act, or to any general law of the realm. Nor can it reasonably be contended that the word "wholesome" renders every rule or regulation (though agreed to by the members of the society and duly certified) void in law if, in the opinion of a court of justice, it is of more or less questionable expediency, or not accompanied by all such checks and safeguards as a judge may think desirable for excluding the possibility of any abuse.

The only real and true limit of the rule-making power, as to a matter not governed by the general law of the realm or by any express prohibition in the statute, must be that pointed out by GIFFARD, L.J. The power cannot be so exercised as to make the society a thing different from a benefit building society formed for the purposes and in the manner defined by the Act. It might have that effect if the rule authorised borrowing, or the use of money borrowed, for purposes other than those of a benefit building society, as so defined, or if it enabled the trustees or directors to pledge the credit of the individual members of the society without limit in a manner inconsistent with the limitation of the value and amount of the shares and subscriptions by which the common stock or fund of the society was to be raised as

A prescribed by the Act. But the rule now in question does neither of these things. It only authorises borrowing "as occasion may require," manifestly (as I have already said) for no other purposes than the proper purposes of the society, which appears, by all the other rules, to be a benefit building society, as defined by the Act, and nothing else. It does not authorise the trustees or directors to pledge, in any way, the personal credit of any individual members of the society (unless indeed they think fit, by way of security only, to pledge their own); it expressly makes all borrowed money "a first charge on the funds and property of the society," of which the base is necessarily the total amount of the contributions of members, and the creditors can have no recourse except against such funds and property.

C I am, therefore, of opinion that r. 32 of this society is valid in law, and that the appellants in *Brimelow v. Murray* and *Agnew v. Murray* are entitled to rank as creditors against the assets of the society in priority to the members thereof of all classes, including those represented by the respondents in *Murray v. Scott*, as to whom the order, which is the subject of the appeal of *Murray v. Scott*, is, in my opinion, correct, and ought to be affirmed.

D The only other point on which I think it necessary to say anything is as to the claim of the creditors represented by the appellants *Brimelow* and *Agnew* to special equitable charges upon certain properties mortgaged to the society, the title deeds of which were deposited with them by way of security for the advances made by them under r. 32. I think that this claim is inconsistent with the true meaning of that rule, which I understand to be that all the moneys borrowed under it are to have the benefit, equally and *pari passu*, of a first charge upon the general funds and property of the society. If the directors could pledge particular assets of the society to particular lenders under that rule, the other lenders under the same rule would be deprived *pro tanto* of that first charge which the rule gives them, and the successive borrowing operations would have a different incidence upon the funds of the society from that intended and authorised. I, therefore, agree on this point (though for a different reason) with the reversal by the Court of Appeal of the judgment of the Vice-Chancellor of Lancaster. The several orders complained of by the appeals of *Brimelow v. Murray* and *Agnew v. Murray* ought, therefore, in my opinion, to be reversed, except so far as they direct the delivery up to the official liquidator of the deeds and documents therein respectively mentioned. For the rest of both those orders there should be substituted a declaration to the following effect: "That subject to and after payment in full of the costs of the winding-up of the society including the costs of all the appeals to this House, and in the second place of the debts of the creditors of the said society, other than persons having advanced moneys to the society, the assets of the society should be applied in payment of all persons having advanced on loans to the said society, or the trustees or directors thereof, whose claims remain unsatisfied, in full, if the assets are sufficient, or if not, of a dividend *pari passu* and *pro rata*. The surplus, if any, should be applied in payment of the amounts due to those members of the society who are represented by the claimant Scott; in full if there be sufficient, if not, in payment of a dividend *pari passu* and rateably, in priority to the members who are not holders of deposit or paid-up shares, and the residue, if any, to the other shareholders." With that declaration (which includes a provision for the costs of all three appeals) these cases should be remitted to the court below.

I LORD BLACKBURN stated the facts, and continued: I have come to the conclusion that the orders made in the two cases of *Brimelow v. Murray* and *Agnew v. Murray* ought to be varied in the manner which the Lord Chancellor has stated, and that the order in *Murray v. Scott* is right, and should be affirmed, subject to the effect of the variation in the other orders, which will produce a great practical difference in the result.

The Vice-Chancellor of the County Palatine, in his judgment says:

"Rule 32 of the rules [of the society] confers upon the trustees or directors thereof a power to borrow money without any limit or restriction as to amount,

but in my judgment this power, being without a limit, is bad, and indeed this was almost admitted in the argument, and the point is covered by LORD HATHERLEY's judgment in *Laing v. Reed* (1), and other cases." A

He does not by name cite any other case than *Laing v. Reed* (1), but evidently thought there were others. In the Court of Appeal SIR GEORGE JESSEL, M.R., in *Calvert's Case*, says (23 Ch.D. at p. 450):

"This is a building society with a rule which empowered the governing body of the society to borrow unlimited sums of money. This rule has been certified and been acted upon to a very considerable extent. But it is now well settled by the law that in such a society as this an unlimited power to borrow is not authorised, and that consequently such borrowing is beyond the powers of the society. Still all has been done here perfectly bona fide. The persons who made the rule, as well as those who acted upon it by borrowing and lending, all acted under a common mistake in law that that was a lawful rule, and was binding on the society." B C

He proceeds to state that on the winding-up it appeared that a large part of what formed the assets of the society was derived from money

"obtained in some shape or other from people who lent their money either without security or on equitable deposits or mortgages of property to the society, and the present respondent is one of those persons. Such borrowing from her was unauthorised, and consequently her loan to the society did not create either a legal or an equitable debt from the society to her." D

COTTON and BOWEN, L.JJ., concurred.

It appears from the report that the counsel who argued for the then respondent before the Court of Appeal, as well as those before the Vice-Chancellor did not, at least strenuously, deny that the rule was ultra vires, apparently relying more upon other grounds. But the very learned judges were not passive instruments in the hands of the counsel, and, even if it had been admitted, certainly would not have given this judgment unless they had believed that it was settled that, though according to *Laing v. Reed* (1), the authority of which was not impeached, and which indeed was binding on the Court of Appeal, though not on this House, a rule similar to that in question if it contained a limit as to the amount to be borrowed was good, yet that a rule not containing such a limit as to amount was ultra vires. Counsel not having urged the point may account for SIR GEORGE JESSEL, M.R., not entering into the reasons further than saying it "was well settled"; but that does not deprive the present respondent of the benefit of the fact that the judges in the Court of Appeal, two of whom, SIR GEORGE JESSEL, M.R., and COTTON, L.J., had had as much experience in this branch of the law as anyone, and certainly much more than I can pretend to, thought it well settled. I for a time thought it probable that there were some decisions not known to me which supported their opinion. The research of counsel has produced all the authorities known to them, and my own research and the inquiry which I have made of the surviving members of the Court of Appeal lead me to the conclusion that the whole of the authorities—certainly all the reported cases—have been brought before the House. E F G

I will first, before going to the cases, consider the statute 6 & 7 Will. 4, c. 32. It begins with a preamble, H

"Whereas certain societies commonly called building societies have been established in different parts of the kingdom, principally among the industrious classes, for the purpose of raising by small periodical subscriptions a fund to assist the members thereof in obtaining a small freehold or leasehold property, and it is expedient to afford encouragement and protection to such societies, and the property obtained therewith." I

I think it material to see what authority, if any, to borrow would be given to the managers of such a society at common law, and then to consider the language of the Act. The statute 6 Geo. 1, c. 18, s. 18, commonly called the Bubble Act, had

A been repealed by 6 Geo. 4, c. 91, and from that time I know of nothing to render it illegal for any number of persons to agree together that each would take a share of a specified amount on which he should bind himself to the others, or to a trustee for the others, to make small periodical payments till the whole was paid up, and to do this for any legal purpose such as the purpose of raising a fund to be applied for the object recited in this preamble, each member as between himself and
B the other members being liable only to the extent of his share, and as between themselves only liable to pay at the time and in the manner stipulated.

In LINDLEY ON PARTNERSHIP (1st edn.), p. 152, after examining the authorities, the author arrives at the conclusion, in which I agree, that the legality at common law of societies not otherwise objectionable than because the members held shares may be considered as finally established. There might probably be practical difficulty in carrying on such a society with safety, or perhaps at all, without the aid of a statute. In order to apply the fund for the purpose indicated in the preamble to the statute 6 & 7 Will. 4, c. 32, the shareholders must employ somebody (whether directors or paid agents not members) to transact the necessary business, and, as some expense must be incurred for these purposes, in conformity with the maxim quando aliquid mandatur, mandatur et omne per quod pervenitur
C ad illud, the members who gave the agents authority to incur that expense were liable as their principals, and unless either some statute or the bargain made with the persons to whom the liability was incurred confined their recourse to the funds of the society inclusive of the amounts which the society could enforce against the shareholders, those members would be liable personally to the full extent of all their means. The amount of such liabilities to outside creditors would, however,
D generally be small.
E

In the present case, while the whole of the liabilities of the society exceeds £80,000, the liability to the outside creditors is little more than £200. But it is not necessary for the purpose of managing such a fund to borrow money, and the managers, therefore, would not merely as such have authority to borrow. The members might, if they pleased, authorise them to do so, so as to charge not only
F the funds of the society, but also their individual responsibility. It would be very injudicious to do so, but they might do it. I do not think that even before *Cox v. Hickman* (2) it could have been held that they became partners, and so necessarily gave the authority. They might also (I am still speaking of matters as they were before the statute was passed) authorise the managers to borrow money from those who were willing to lend it, on the terms that the lenders should
G have a charge on the funds of the society, and on the unpaid subscriptions of the shareholders, but should have no recourse against the members further than the society or its trustee had recourse against them, yet give them no authority to borrow on any other terms. I see nothing to prevent such a bargain being good, though I do see that practically there would be great risk, in the absence of a statute, of not being able to establish that the loans were made on those terms.

H After reciting the preamble to which I have referred the legislature proceed to enable any number of persons to form such societies (which I think they could do at common law), and to make rules "so as such rules shall not be repugnant to the express provisions of this Act, and to the general laws of the realm." And they provide that such rules should be certified and registered, so that all who dealt with the society might see what the rules actually were, and I
I think that those who dealt with the society could not say that any authority beyond what would be implied from the management of the fund was given, unless it was given by the rules which they ought to have examined. This removed one great practical difficulty in the way of working such societies. There is no provision in the statute that I can find that prevents the members of such a society from being personally liable to anyone who had a debt exigible from the society, but if the debt was contracted under a rule which required that the debt should only be contracted on the terms that the funds of the society should be liable, and not the persons of the members, the liability would be so limited. Whether any particular

rule did so limit the responsibility or not was a question which must have depended upon the construction of the rule. The statute 6 & 7 Will. 4, c. 32 was not artificially drawn. It is obvious that those who promoted it were influenced mainly by a wish to help the industrious classes to obtain dwelling-houses or small plots of land, and probably supposed that by limiting the maximum of a share to £150 they had secured that the shareholders should use the society only for the purpose of obtaining mortgages not above the value of £150. It was very soon found out that there was nothing to prevent a person who wished as a speculative builder to borrow £15,000 from taking 100 shares if he could find a society willing to lend so much on mortgage. Societies were formed and registered under the Act as building societies on a very large scale. In some of those, rules were framed more or less resembling r. 32 in the present case, under which the managers acted as those of this society have done. In others, without any rule to authorise or purporting to authorise it, the managers of the society acted in the same way.

After a protracted parliamentary inquiry the Building Societies Act, 1874, was passed, repealing the Act of 6 & 7 Will. 4, c. 32, but by s. 8, amended by the Act of 1875, saving the existing societies unless they registered under the new Act, which the present society has not done. In 1857 SIR RICHARD BETHELL [afterwards LORD WESTBURY] when Attorney-General, gave an opinion for the guidance of the certifying barrister which I take from the report in the Parliamentary Papers 1869, No. 399, p. 121. It was as follows:

"I am of opinion that a rule authorising the raising of money for the purpose of the society would be repugnant to the fundamental principles of the society, and that it cannot be certified as a rule in conformity with law and with the provisions of the statute."

This opinion was questioned, and in 1869 a bill was filed by William Heron Laing, a member of the Northern Counties Permanent Building Society, on behalf of himself and all other shareholders of the society (except the defendants), against the trustees of that society, for an injunction to restrain them from acting on r. 18 of that society, which had been, it was admitted on the bill, duly certified by MR. TIDD PRATT as long ago as 1851.

The rule is set out at length in the report of *Laing v. Reed* (1) in 39 L.J.Ch. at p. 2, thus:

"XVIII.—1. That the trustees for the time being may from time to time, as occasion shall require, borrow and take up at interest any sum of money from any banker with whom the funds of this society shall be deposited, or from any other person, to procure which the trustees may give their own personal security, and they shall be indemnified out of the first funds of this society which shall be received. 2. That the parties lending money to the trustees of this society pursuant to the provisions herein contained shall be allowed interest for the same at the rate of and not exceeding 5 per cent. per annum, such interest to be payable half-yearly or otherwise, as may be agreed upon, and that all loans shall be repayable to the lender by giving twenty-eight days' notice, on any monthly meeting night of the society. 3. That for securing the repayment to the person or persons advancing the same, of all moneys to be borrowed by the trustees on behalf of the society as aforesaid, it shall be lawful for them the said trustees to give, or authorise to be given, such form of security as may be legal and as the trustees shall think proper and necessary for and in respect of the same. 4. That no trustee (unless by his consent expressly signified in writing on the security to be given to any lender) shall become responsible for any sum or sums of money so borrowed as aforesaid. 5. That the total sum of money to be borrowed under this rule shall not at any one time exceed two-thirds of the amount for the time being secured by the mortgages to the society, including the mortgage or mortgages for which such advance or advances may be required."

- A In the report in the LAW REPORTS, 5 Ch. App. 4, the rule is very much abridged, and I think the abridgment has misled many persons (including MALINS, V.-C., in a case which I shall presently refer to) as to what the legal effect of the rule was, and consequently as to what was the actual decision of the Court of Appeal in *Laing v. Reed* (1), and, perhaps, though I say this with less certainty, as to what LORD HATHERLEY meant in a part of what he is reported as saying. The rule seems
- B to me to limit the recourse of the lenders to the funds of the society and the securities actually given under para. 3, and to exclude the previous liability of any member, except of those who had given as lenders their personal security. I should have said this even if para. 1 stood alone, but when para. 4 is read with it I think it is quite clear. Paragraph 5 adds a limitation, not as to who should be liable, but as to the amount to be borrowed.
- C The rule now in question, 32, as I construe it, does not contain any power to borrow on the security of the members, that given being only to make the moneys borrowed a first charge on the society's funds and property, and, therefore, so far is, I think, identical with that of *Laing v. Reed* (1). But there is no limitation on the amount to be borrowed, and in that respect the rule now in question differs from that which in *Laing v. Reed* (1) was held valid. The bill was demurred to
- D avowedly for the purpose of raising the question whether the rule was, as SIR RICHARD BETHELL had advised, repugnant and void or not. MALINS, V.-C., refused to decide this question on demurrer. There was an appeal before LORD HATHERLEY, L.C., and GIFFARD, L.J. The judgments were verbal. Conciseness was not among the many merits of LORD HATHERLEY. The report in the LAW JOURNAL was probably abridged, that in the LAW REPORTS is evidently much abridged. After stating
- E that he thought that the demurrer was a proper mode of raising the question of law, he proceeds (I quote from the report in the LAW JOURNAL) to say (39 L.J.Ch. at pp. 6, 7):

- "If the law prohibits the raising of such sums of money, no certificate of the barrister could make it any better. But does the Act of Parliament in effect
- F prevent or forbid any such arrangement being made as has here been made? If the rule had been a rule by which the society were authorised through the medium of its trustees to raise an unlimited sum of money, wholly regardless of the contributions made by the members, the effect would be plainly contrary to the spirit of the Act. . . . In substance it comes to this: so far from being contrary to anything in the Act it is simply a regulation by which they say,
- G We are desirous of making available for the objects of the Act (that is admitted by the bill), for the purpose of purchasing freehold lands, our contributions and fines and other payments in the best possible manner for us all; and to say that will injure one or other when the company is framing its rules is nothing to the purpose—they are the best judges of that. The whole body form the rules,
- H each judges for himself, and they carry the rules by a majority, and submit them to the barrister."

I think these expressions, which are left out in the abbreviated report in the LAW REPORTS, throw some light on what LORD HATHERLEY was thinking of when he spoke of raising an unlimited sum of money "wholly regardless of the contributions made by the members."

- I GIFFARD, L.J.'s judgment is much the same in both reports. SIR RICHARD BETHELL's opinion had been cited in the argument, and GIFFARD, L.J., evidently had its terms in his mind when he explains what he thinks would be "repugnancy" to the Act, viz., a rule making the society a society different from that specified in the Act. I do not find a word in his judgment to indicate that he relied on the limit of the amount contained in para. 5. The decision, which has never been reversed or even questioned, was that that particular rule, which, as I construe it, confined the recourse of the lenders to the personal security of such trustees as by express writing made themselves responsible, who were to be indemnified out of the

first funds of the society and to the securities which might be given to the lenders. **A**
and which also limited the amount to be borrowed, was valid.

This decision was on Nov. 4, 1869. On Dec. 17, 1869, GIFFARD, L.J., pronounced judgment in *Re National Permanent Benefit Building Society, Ex parte Williamson* (3), and there he says (5 Ch. App. at p. 312):

"The matter itself is a very simple one. This company is what is called a benefit building society. Until the recent decision of the court in *Laing v. Reed* (1), it was doubted whether, even if you put a limited borrowing power among the rules of a society of this sort, that particular rule would be legal. But what we have here is a limited benefit building society, without any power to borrow, and the rules and very nature of that society show that it would be contrary to its constitution to borrow money so as to bind the company or to make the individual members of the company, as members, liable for borrowing money, because the whole constitution of the society is that the members are to make certain monthly payments, and in consideration of these monthly payments and the fines provided by the rules, they are to receive certain loans."

What is here decided is that a society under this Act has no power to borrow unless its rules authorise it so to do, and that is, I think, as well settled to be law as anything not yet decided by this House can be. **D**

I do not think that the actual decision in *Laing v. Reed* (1) ought to be put higher than that a rule which authorised borrowing, but was so expressed as on its construction not to make the members as such liable for the money borrowed, and which also had a limit as to the sum to be borrowed, was valid. It left it open to anyone to say that, had not both these limits existed, non constat that the decision would not have been different. I think also that the language of LORD HATHERLEY is such that it might fairly be argued that LORD HATHERLEY attached weight to the limit as to amount contained in para. 5 of the rule. I do not think that could be said of GIFFARD, L.J. The legislature in the Act of 1874, by s. 14, expressly limited the liability of members, as such, in societies under that Act, in all cases. And in s. 15, while by sub-s. (1) authorising borrowing, and thereby showing that the legislature did not think it expedient to adopt SIR RICHARD BETHELL's opinion that all borrowing was repugnant to the fundamental principle of such a society, they did also by sub-s. (2) show that they thought it expedient at least to put a limit on the amount to be borrowed. But though such limit as to the amount which the trustees are authorised to borrow is obviously highly expedient, I do not see how such a limitation on the amount can on any principle be said to affect the question whether the borrowing is repugnant to the principles of the society. As counsel for the appellants Brimelow and Agnew forcibly put it in his argument, whether there should be a limit on the amount is a question not of principle but of expediency. If all borrowing power is repugnant to the fundamental principle of the society, it cannot be that a power to borrow a sum limited in amount is not repugnant. **E**
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But though this is my opinion, it certainly was not that of MALINS, V.-C. In March, 1870, *Hill's Case* (4), came before MALINS, V.-C. There had been a set of rules certified by the barrister, among which had been a rule empowering the directors to borrow money, but on the revision of those rules in 1861 that rule was, in consequence of the opinion of SIR RICHARD BETHELL, struck out. The rules subsequent to 1861 contained no power to borrow. The revision of the rules had been apparently conducted in a somewhat slovenly manner, and r. 19, as certified in 1861, contained language that alluded to the rule previously struck out. The Vice-Chancellor said that it did not give any power to borrow at all. That being so, all that it was necessary to decide was that there was no power to borrow, so that members were not liable as individuals to pay calls made in the winding-up for the purpose of paying the lenders, and that was apparently all that the Vice-Chancellor did decide. But though it was quite unnecessary, in a case where there was no such rule, to say anything about the validity or invalidity of a rule giving **I**

A a borrowing power, the Vice-Chancellor did give a judgment on that question, expressing his dissent from *Laing v. Reed* (1), which, even if wrong, was binding on him, and, to my mind, his reasoning is unsatisfactory. Yet it is upon this altogether unnecessary opinion, and, as far as I can discover, upon this alone, that SIR GEORGE JESSEL, M.R., must have acted when he said that it was settled.

B MALINS, V.-C., assumes, without giving any reasons for it, that a rule giving a power to borrow, if valid at all, must give a power so as to enable those who borrowed to pledge the credit of the members as individuals. Whether a rule which authorised the managers to pledge the members as individuals was ever certified or not I do not know; it certainly would be eminently inexpedient that there should be such a power. Whether, if such a rule existed, it would be valid is a question which has never, as far as I can find, been raised; it certainly was not raised in *Laing v. Reed* (1). I think there is ground for saying that LORD HATHERLEY meant to say that a power to raise money on the security of the individual members, irrespective of the amount of their contributions, would, in his opinion, be repugnant to the objects of the Act. I am by no means prepared to decide that question either way until it arises, which it never has hitherto, and certainly does not in the present case. But a rule giving power to borrow from D those who were willing to accept as their only security the funds of the society, including the contributions which members might as such pay to the society, and the personal liability of such persons as chose to pledge their personal liability, stands on a very different footing. The Vice-Chancellor does not seem to have perceived that there might be such a distinction, and certainly not to have perceived that such a distinction did exist in the rule in *Laing v. Reed* (1).

E The only other case of those brought before your Lordships' notice which I think it necessary to refer to is *Re Professional, Commercial, and Industrial Benefit Building Society* (5) in 1871. The language of JAMES, L.J., has been cited as showing that he was under the impression that *Laing v. Reed* (1) was to be understood in the limited sense put upon it by MALINS, V.-C., in *Hill's Case* (4), and though it is clear that no such point needed to be decided by JAMES, L.J., I think F that any opinion which he expresses on such a point is worthy of great attention. There had been an additional rule made in March, 1870, which on inquiry at the registrar's office it appears was duly certified, though the expressions attributed to JAMES, L.J., had made that seem doubtful. That rule was in terms not substantially differing from the first paragraph of r. 18 in *Laing v. Reed* (1). It did not contain anything equivalent to para. 5. The question to be decided was, whether G the society should be wound-up on the petition of persons who, if it was wound-up, would, or at least might be, contributories, but who certainly were not creditors. JAMES, L.J., is reported to have said (6 Ch. App. at p. 861): "Then the petitioners say: We have a strict right to an order, we are contributories." The lord justice points out that no statutable proof of inability to pay its debts was given against the society, and proceeds (*ibid.*):

H "Nor has the insolvency been proved otherwise to the satisfaction of the court. It has not been proved to my satisfaction that there is any debt whatever in respect of which the society could be liable. First of all, a society of this kind is not entitled to borrow money except under a particular rule. It is no part of its business to borrow money. It may incur debts, no doubt, to a certain extent: it must, for instance, incur office rent and employ a solicitor and a secretary, and to that extent probably there is always some small amount of debt which everybody of this kind must incur. But beyond this it is very I difficult to see what debts it could legally incur."

So far, what he says is in exact conformity with what I have endeavoured to state as my view of the law, but he goes on (*ibid.*):

"But it appears that the society having gone on receiving deposits from persons other than members, and having incurred a debt to its bankers, passed a resolution authorising the trustees to borrow money for the purposes of the society.

I am of opinion that, in accordance with the decided cases that resolution was expressed in terms far too wide to make it a valid or binding resolution, and therefore there never was any debt which the society, qua society, could be sued upon."

Speaking as he was on Aug. 1, 1871, the decided cases can only have been *Laing v. Reed* (1), *Ex parte Williamson* (3), and *Hill's Case* (4). He proceeds to point out that to some extent at least they might come on the funds of the society. MELLISH, L.J., is far more cautious. He says (*ibid.* at p. 864):

"Then, as respects their liability [their individual liability as contributors to make good the loans], I agree with the lord justice that in all probability they were never liable to anything, but, even if they were liable, all the alleged creditors of the society have joined in a release, and I have no doubt that that release is an effectual protection."

Though JAMES, L.J., had not any need to decide this, and may not have put his mind to this point, he does, I think, intimate that his impression was that the rule not limiting the amount of money to be borrowed, was, according to *Laing v. Reed* (1), not valid. I have already expressed my reasons for coming to a different conclusion, but I think JAMES, L.J.'s expressions are an authority against me. I do not think, however, it can in any possible view of it be held to settle the law. If the rest of the noble and learned Lords agree with me in thinking that a rule authorising borrowing so as to charge the funds of the society, but not the persons of the members, is valid, though there is no limit such as that in para. 5 of the rule in *Laing v. Reed* (1), it is necessary to decide whether the specific securities pledged to the lenders can be made available. That, I think, is a question depending on the construction of the rule. If there had been an express clause enabling them to mortgage specifically property of the society (and perhaps one similar to para. 3 of the rule in *Laing v. Reed* (1) might be so construed), I think that the reasoning I have submitted to the House leads to the conclusion that the specific pledges would be good; and the same would perhaps follow if such a power to pledge specific property was implied. But there is certainly no express power to pledge given, and I think that the terms of the rule, which make all the loans a first charge on the funds, which would lead the lenders to believe that in the event of a winding-up at least they would all come in *pari passu*, are quite sufficient to negative an implied power to mortgage, even if such a power could be implied from a power to borrow. I do not, however, think there is any ground for such an implication, even if this did not negative it. *Murray v. Scott*, I think, was rightly decided by the Court of Appeal. I am relieved from any necessity for saying more about it than that I quite agree in the reasons given by SIR GEORGE JESSEL, M.R. The result is, that I agree in the proposed judgment.

LORD WATSON.—The questions brought before the House in these appeals have been so fully and exhaustively treated by my noble and learned friends that I shall content myself with indicating some of the considerations which have induced me to concur in the judgment which has been moved.

One of the most important of these questions relates to the validity of r. 32, which gives the directors power, from time to time as occasion may require, to borrow money from the society's banker, or from any other banker or person. In both the courts below it was assumed to be settled law that the rule was invalid because it does not impose any limit upon the amount which the directors are authorised to borrow. It cannot with strict accuracy be said that the power conferred is absolutely without limit, seeing that it is only to be exercised "as occasion may require," which plainly implies that it is not to be exercised at all except in the case of a loan being required for the purposes of the society in the course of its legitimate transactions as a benefit building society. It is obvious, however, that the kind of limit which was assumed to be necessary in order to validate the rule was that indicated by LORD HATHERLEY in *Laing v. Reed* (1),

A viz., a pecuniary limit proportionate to the trading capital of the society derived from the contributions of its members.

I agree with your Lordships that there is nothing in the provisions of 6 & 7 Will. 4, c. 32, which either expressly prohibits or can by reasonable implication be held to disable the members of a benefit building society, whose constitution and powers are still regulated by that Act, from authorising their directors to borrow money, although in the absence of such authority the directors would not have that power. Upon this point *Laing v. Reed* (1), and the cases which followed it, to which I need not specially refer, are all direct precedents, and so far I do not doubt that they were well decided. But it was contended at your Lordships' Bar, and the Vice-Chancellor of the County Palatine, as well as the learned judges of the Court of Appeal, seem to have thought, that these cases form a series of decisions to the effect that any authority to borrow given by the members to their directors is wholly void unless it be qualified by a limitation of the amount to be borrowed such as I have described. An examination of these cases, all of which have been already noticed by LORD BLACKBURN, satisfies me that in none of them was the present question as to the validity or invalidity of that which has been termed an unlimited power to borrow raised and decided. The doctrine that such a power is ultra vires of the society, and, therefore, void, had its origin in the opinion of LORD HATHERLEY in *Laing v. Reed* (1), an opinion which was referred to as authoritative in subsequent cases, although the point did not then arise for judicial determination. In *Laing v. Reed* (1) the sum authorised to be borrowed was restricted to two-thirds of the total amount for the time being secured to the society by mortgage, so that there was no question before the court as to the legality of an unlimited power. But it certainly appears to me that LORD HATHERLEY in that case sustained the power on the express ground that it was limited as to amount, and that the limit was proportioned to that part of its contributed capital which the society had advanced to its members, or lent on mortgage, and I think the noble and learned Lord did intend to lay down the law to the effect that without some limitation of that character the power would have been invalid.

F I prefer the test of its legality applied by GIFFARD, L.J., to the rule which he had to consider along with LORD HATHERLEY in *Laing v. Reed* (1):

"Does this rule merely provide a method of conducting business, or is it a rule making the society a thing different from a benefit building society?"

G The legality of such a rule appears to me to depend upon the natural and probable results of the due exercise of the power which it confers, and not upon the consequences of its possible abuse by unscrupulous or fraudulent directors. It is quite conceivable that a benefit building society might find legitimate uses for borrowed money to an amount exceeding two-thirds of its contributed capital, and it is also conceivable that a power to take on loan not more than two-thirds might be abused, and the money embarked in transactions foreign to the legitimate business of the society. No power the exercise of which will necessarily or naturally involve a violation of the statutory constitution of the society can be sustained as valid by a court of law; but, on the other hand, it appears to me to be beyond the functions of the court to lay down a hard and fast rule, dictated by considerations of expediency, which may give some societies more latitude than they require, and may restrict the legitimate business of others.

I I am, accordingly, of opinion that r. 32 is unexceptionable. As I read the rule it merely empowers the directors to raise money by way of loan when that becomes necessary for the purpose of carrying on the proper business of the society, and it does not appear to me to admit of serious dispute that the sums actually borrowed by the directors, though of large amount, were exclusively employed by them for that purpose. There is another question, attended with much nicety, and of great importance to some of the litigants, which relates to the right of those creditors who lent money to the society upon the faith of specific securities. What would have been the precise rights of those creditors if r. 32 had not contained the

declaration that "any borrowed money shall be a first charge on the funds and property of the society." or if there had been added to the rule the further declaration that it should be lawful for the directors to give lenders such form of security as might be legal, and as the directors might deem proper, are questions which I do not think it necessary for the purposes of the present case to determine. The rules of this society do not give, at any rate they do not expressly give, authority to the directors to borrow on mortgage, and the declaration in r. 32 appears to me to be so expressed as to qualify the power of the directors, and to fix the security which is to be given alike to all lenders to the society. As the rule stands it conveys an intimation to lenders that all loans are to constitute a first charge upon the assets of the society, and it would, in my opinion, be inconsistent with any reasonable construction of the rule to hold that the directors were thereby authorised in the first place to borrow largely on the faith of that intimation, and then to make over the whole property and funds available for payment of these loans in pledge to preferable creditors. I have, therefore, come to the conclusion that lenders holding specific securities must nevertheless come in *pari passu* with unsecured creditors who have advanced money to the society in reliance upon r. 32.

Orders accordingly.

Solicitors: *Pritchard, Englefield & Co.*, for *Boote & Edgar*, Manchester; *Marsland, Hewitt & Everett*, for *Addleshaw & Warburton*, Manchester; *Phelps, Sidgwick & Biddle*, for *Sale, Seddon, Hilton & Lord*, Manchester.

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

STOOMVAART MAATSCHAPPIJ NEDERLAND *v.* PENINSULAR AND ORIENTAL STEAM NAVIGATION CO.

[HOUSE OF LORDS (The Earl of Selborne, L.C., Lord Blackburn, Lord Watson and Lord Bramwell), June 2, 5, July 26, 1882]

[*Reported* 7 App. Cas. 795; 52 L.J.P. 1; 47 L.T. 198;
31 W.R. 249; 4 Asp.M.L.C. 567]

Shipping—Collision—Damages—Both vessels to blame—Division of loss—Ship suffering greater damage to receive half damages in respect thereof less half the damages in respect of the damage sustained by other vessel.

Two ships, the *V.* and the *K.*, were damaged in a collision for which in an action brought in the Admiralty Division they were found both to blame. The *V.* had sustained the greater amount of the damage, and the owners of the *K.* paid the amount of their liability into court. In an action by the owners of the *K.* to limit their liability,

Held (LORD BRAMWELL, dissenting): the owners of the *V.* were entitled to prove against the fund in court for a moiety of the loss and damage sustained by them less a moiety of the loss and damage sustained by the *K.*, and to be paid in respect of the balance due to them after such deduction *pari passu* with the other claimants out of the fund.

Notes. Distinguished: *The Hector* (1883), 8 P.D. 218. Considered: *London Steamship Owners' Insurance Co. v. Grampian Steamship Co.* (1890), 24 Q.B.D. 663. Referred to: *Hettihewage Siman Appu v. Queen's Advocate* (1884), 9 App. Cas. 571; *The Gertrude, The Baron Aberdare* (1888), 13 P.D. 105; *The Dictator*, [1891-4] All E.R.Rep. 360; *The Englishman and The Australia*, [1895] P. 212; *S.S. Tongariro v. S.S. Drumlanrig, The Drumlanrig*, [1911] A.C. 16; *Mersey Docks*

A *and Harbour Board v. Hay*, [1923] A.C. 345; *Young v. Merchants Marine Insurance Co.*, [1932] All E.R.Rep. 928; *The Banca, Commerciale Italiana*, [1943] 1 All E.R. 480; *Morrison Steamship Co. v. S.S. Greystoke Castle (Cargo Owners)*, [1946] 2 All E.R. 696; *The Liverpool (No. 2)*, [1960] 1 All E.R. 465.

B As to division of loss where damage is caused by the fault of two or more vessels, see 35 HALSBURY'S LAWS (3rd Edn.) 696-702, and for cases see cases there cited and 41 DIGEST 922-925. For the Merchant Shipping Act, 1894, see 23 HALSBURY'S STATUTES (2nd Edn.) 395, and for Merchant Shipping (Liability of Shipowners and Others) Act, 1958, see *ibid.*, vol. 38, p. 1091.

Cases referred to :

- C** (1) *The Lord Melville* (1816), cited in 2 Sh. Sc. App., p. 402.
 (2) *The Woodrop-Sims* (1815), 2 Dods. 83; 165 E.R. 1422; 41 Digest 783, 6438.
 (3) *De Vaux v. Salvador* (1836), 4 Ad. & El. 420; 1 Har. & W. 751; 6 Nev. & M.K.B. 713; 5 L.J.K.B. 134; 111 E.R. 845; 29 Digest (Repl.) 246, 1844.
 (4) *The Petersfield v. The Judith Randolph* (1789), cited in 2 Ecc. & Ad. at p. 110, n.; 164 E.R. 835; 41 Digest 801, 6615.
D (5) *Hay v. Le Neve* (1824), 2 Sh. Sc. App. 395; 41 Digest 785, f.
 (6) *The Washington* (1841), 5 Jur. 1067; 41 Digest 738, 5862.
 (7) *The Seringapatam* (1848), 3 Wm. Rob. 38.
 (8) *The Tecla Carmen* (1859), Lush. 79.
 (9) *Chapman v. Royal Netherlands Steam Navigation Co.* (1879), 4 P.D. 157; 48 L.J.Ch. 449; 40 L.T. 433; 27 W.R. 554; 4 Asp.M.L.C. 107, C.A.; 41 Digest 924, 8134.
E (10) *Wilson v. Dickson* (1818), 2 B. & Ald. 2; 106 E.R. 268; 41 Digest 918, 8093.
 (11) *Brown v. Wilkinson* (1846), 15 M. & W. 391; 16 L.J.Ex. 34.
 (12) *The Dundee* (1823), 1 Hag. Adm. 109; 166 E.R. 39; 41 Digest 930, 8193.
 (13) *Gale v. Laurie* (1826), 5 B. & C. 156; 41 Digest 162, 28.
 (14) *Hoskins v. Pickersgill* (1783), 3 Doug.K.B. 222; 99 E.R. 623; 29 Digest (Repl.) 89, 352.
F (15) *R. v. Lordale* (1758), 1 Burr. 445; 95 E.R. 394; 42 Digest 663, 731.
 (16) *Harmer v. Bell, The Bold Buccleugh* (1852), 7 Moo.P.C.C. 267; 19 L.T.O.S. 235; 13 E.R. 884, P.C.; 41 Digest 927, 8168.
 (17) *Ex parte Rayne* (1841), 1 Q.B. 982; 1 Gal. & Dav. 374; 10 L.J.Q.B. 354; 5 L.T. 185; 113 E.R. 1409; 1 Digest (Repl.) 243, 1388.
 (18) *Hall v. Ody* (1799), 2 Bos. & P. 28.

G Also referred to in argument :

- Prehn v. Bailey, The Ettrick* (1881), 6 P.D. 127; 45 L.T. 399; 4 Asp.M.L.C. 465, C.A.; 41 Digest 896, 7881.
The R. L. Alston (1882), 8 P.D. 5; 48 L.T. 469; 5 Asp.M.L.C. 43, C.A.; 41 Digest 764, 6168.
H *General Steam Navigation Co. v. Hedley, The Velocity* (1869), L.R. 3 P.C. 44; 6 Moo.P.C.C.N.S. 263; 39 L.J.Adm. 20; 21 L.T. 686; 18 W.R. 264; 3 Mar.L.C. 308; 16 E.R. 725, P.C.; 41 Digest 744, 5955.
Aitchison v. Lohre (1879), 4 App. Cas. 755; 49 L.J.Q.B. 123; 41 L.T. 323; 28 W.R. 1; 4 Asp.M.L.C. 168, H.L.; 41 Digest 866, 7367.
The Milan (1861), Lush. 388; 31 L.J.P.M. & A. 105; 5 L.T. 590; 1 Mar.L.C. 185; 165 E.R. 167; 41 Digest 692, 5221.
I *The Calypso* (1856), Sw. 28; 26 L.T.O.S. 206; 4 W.R. 303; 1 Digest (Repl.) 219, 1076.

Appeal from a decision of the Court of Appeal.

The action was brought by the respondent company, the owners of the steamship *Khediye*, to limit their liability in respect of the damage arising out of a collision between that vessel and the steamship *Voorwards*, belonging to the appellant company, which took place in May, 1878. In *Stoomvaart Maatschappij Nederland v. Peninsular and Oriental Steam Navigation Co.* (5 App. Cas. 876) the House of Lords held that both vessels were to blame, and in accordance with the Admiralty

rule each was condemned to pay the moiety of the other's damage. This action was brought by the owners of the *Khedive* to limit their liability under the Merchant Shipping Act Amendment Act, 1862, s. 54 [see now Merchant Shipping Act, 1894, s. 503]. The owners of the *Khedive* paid the amount of their liability into court. The owners of the *Voorwarts*, which had sustained the greater amount of damage, contended that they were entitled to set off the moiety of the damage sustained by the *Khedive*, and to prove against the fund in court for the balance; but the contention on the other side was that they should prove for the whole moiety of the loss sustained by them, and be paid in respect of such moiety *pari passu* with the other claimants on the fund.

Sir Farrer Herschell, Q.C., Webster, Q.C., and Phillimore for the appellants.
Butt, Q.C., Benjamin, Q.C., and Myburgh, Q.C., for the respondents.

Their Lordships took time for consideration.

July 26, 1882. The following opinions were read.

THE EARL OF SELBORNE, L.C.—This case has been to me one of unusual difficulty. In the courts below judicial opinion has been equally divided, and I fear that, even in your Lordships' House, there is not unanimity. In most cases the argument from abstract justice and equity is (in *re dubia*) of great importance; but here it seems to me that there is little, if any, room for that argument. Whatever in this case was the liability to damages within the meaning of the Merchant Shipping Act Amendment Act, 1862, to that liability the statutory limitation must be applied. That liability depends upon a rule of the Admiralty jurisdiction, which to myself has always seemed arbitrary; and in examining the practice and procedure of the Court of Admiralty, in order to ascertain the true results of that rule, we not only enter upon a branch of forensic jurisprudence, the forms of which are different from those of the common law courts (in which other questions of liability to damage usually arose), but we find important variations in those forms themselves.

The rule was thus stated by **SIR WILLIAM SCOTT**, in *The Lord Melville* (1):

"When it [i.e., loss by collision at sea] happened by the common fault of both parties, the ancient rule of the Admiralty was, that it should be considered a common loss, to which both parties were liable."

In *The Woodrop-Sims* (2) the same very learned judge said:

"The rule is that the loss must be apportioned [meaning equally apportioned] between them, as having been occasioned by the fault of both of them."

The Merchant Shipping Act Amendment Act, 1862, [repealed by Merchant Shipping Act, 1894, of which see s. 503 (1) (ii) as amended by the Merchant Shipping (Liability of Shipowners and Others) Act, 1958], provides that in all cases of collision, where there is no loss of life or personal injury (no special reference being made in the Act to the particular case of both ships being in fault), the owners of any ship "shall not be answerable in damages in respect of loss or damage to ships, goods, merchandise, or other things" to an aggregate amount exceeding £8 for each ton of the ship's tonnage. This is a limitation of the amount for which the owner shall be "answerable in damages;" it does not make him, in any case, "answerable in damages" upon any principle or to any extent upon or to which he would not have been so "answerable" if the Act had not passed. Nor does it relieve him, wholly or partially, from any loss to which he might have been subject, otherwise than by liability in damages. If, for instance, his whole ship were wholly lost in a collision, for which it was alone to blame, he must bear that whole loss, in addition to his liability in damages, as limited by the statute, to the owners of the other ship, and also to the owners of any cargo. And, if the true result of the Admiralty rule is, as the Master of the Rolls and **BRETT, L.J.**, considered it to be, that in a case in which both ships are to blame only one of them is really liable in damages to the other, such damages representing a moiety of the difference of the aggregate loss, beyond the point at which the one loss balances the other, the fact that the rest

A of the loss must be borne by each shipowner who has suffered it is quite consistent with the limitation of liability by the Merchant Shipping Act Amendment Act.

The question is whether there are in these cases two cross liabilities in damages of each shipowner to the other for half the loss which that other has sustained, or only one liability for a moiety of the difference of the aggregate loss beyond the point of equality. If both parties were solvent, and if there were no statutory limit of liability, the result either way would practically be the same; because up to the point of equality the loss would be borne, in the one view, by the owner who suffered it, and, in the other view, the one liability would be compensated by, or set off against, the other, according to an equity which would certainly have been enforced in the Court of Admiralty. If, however, by the effect of a supervening bankruptcy before judgment, or of the statutory limitation of liability, the position of the two parties were rendered unequal, so that a claim by the one would only be to receive a dividend out of a fund, while a claim by the other would be payable in full, the distinction may become important. But a consequence arising out of circumstances foreign to the rule itself ought not to be regarded in the determination of this question, whether it may tend practically to disturb or to maintain that equality of participation in the loss arising from a common fault, which is the principle of the Admiralty rule.

The solution of this question appears to me to depend upon the true effect of the procedure, and the forms of decrees of the Admiralty Court in this class of cases; for the new method of procedure under the Judicature Acts, by claim and counter-claim, cannot, in my opinion, make any difference. If the course of the court had been to deal with the whole controversy between the owners of the two ships in a single proceeding, the natural result of the rule would, I think, certainly be that for which the appellants contend. If both ships had suffered an exactly equal amount of damage, ascertained in the same suit, it cannot be conceived that the court, acting on such a rule, would adjudge the owner of the one ship to pay any damages at all to the other. In general, this would not happen, but one ship would have suffered more damage than the other. The natural result of this inequality of loss would seem to be not that either owner should pay anything to the other up to the point at which (if there had been no such difference) the loss would have been equal, but that the difference only should be equally divided between them, the one bearing and the other paying a moiety of that difference.

The whole difficulty, as it seems to me, arises out of the fact that the course of the Court of Admiralty was not, and, from the nature of the case, hardly could have been, to deal with the whole controversy between the owners of the two ships in a single suit. When a suit for collision was brought it was always by one party alleging the other party to be in fault; and there was also generally (when both were ultimately found to blame, and when both had sustained damage) a cross suit by the other party, with a like allegation of fault against his opponent. At the hearing, whether of one such suit only, or of two such suits, heard separately, or conjoined, the court, when it determined that both ships were to blame, usually pronounced in each suit a separate decree. It cannot be denied that the more common and recent form of such decrees seems (*prima facie*, at all events) favourable to the contention of the respondents. In each suit there was, as I have said, a separate decree declaring that both ships were in fault, "and that the damage arising therefrom ought to be borne equally" by the owners of both ships; and afterwards proceeding to "condemn" the defendants and their bail "in a moiety of the damages proceeded for by the plaintiffs;" and referring it to the registrar, assisted by merchants, to assess the amount of such damages (with or without costs, as the court might think fit). Under every such decree the registrar made a report, finding that a moiety of the damages sustained by the plaintiffs amounted to so much, and (ordinarily) computing interest thereon from the date of the decree. A moiety of the damages sustained by the other party (if plaintiff in a cross suit) was in like manner found (also with interest) sometimes by the same, and sometimes by a separate report. It does not appear that, on the face of the reports made under

this form of decree, any balance was ever struck; but, unless the parties, by a voluntary settlement, rendered further resort to the court unnecessary, the proper course would have been for that plaintiff to whom a balance was due to apply to the court for a monition requiring the other party to pay it. A monition was seldom issued in practice: indeed, counsel in his argument for the respondents stated that he had been unable to find one on the records of the court. But there cannot, I think, be any doubt that, if issued, it would have been in favour of one plaintiff only and that for the balance, representing one moiety of the excess of the aggregate loss beyond equality, and the interest thereon, and the costs (if any) to which that plaintiff might be entitled. B

The computation of interest by the registrars in cases of this class might, at first sight, seem to imply that there was, in that stage, an ascertained judgment debt carrying interest. But I think this cannot be a correct view, whatever (in other respects) may be the effect of the decrees under which the registrars acted. C It does not appear to have been the general course of the court that those decrees should contain any direction as to interest; and I think it more probable that the principle on which interest was computed under them is that mentioned by Mr. SEDGWICK in his book on DAMAGES (chap. 15, pp. 373 and 385-7), where he treats of the power of a jury to allow interest as in the nature of damages, for the detention of money or property improperly withheld, or to punish negligent, tortious, or fraudulent conduct, or the destruction of or injury to property involving the loss of any profit which might have been made by its use or employment. I understand the Master of the Rolls and BRETT, L.J., to have been of opinion that everything in this course of procedure, prior to monition, was not in form only (according to the style of the Admiralty Courts), but substantially interlocutory; that the decree was not, either before or after the report of the registrar, equivalent to a final judgment constituting a liability in a certain amount of liquidated damages; that, for this purpose, a monition (which, both in form and in substance, would be an order to pay) was necessary; that such monition could only issue for a moiety of the excess of the aggregate loss beyond the point of equality, in conformity with the principle of the rule declared on the face of the decree itself; and that there was, therefore, no liability in damages except for that balance. D

BAGGALLAY and CORRON, L.JJ., on the other hand, thought that the amount of the liability of each party to pay damages to the other was fixed by the decree in the suit of each plaintiff, and that the monition was merely a step towards execution. E

If no light could be obtained from any other source than the analogy of the forms of procedure in courts of common law and equity, I should have found great difficulty in dissenting from the conclusions of BAGGALLAY and COTTON, L.JJ. G But, in determining the effect of Admiralty procedure, authorities in the Admiralty Court ought to prevail over reasoning founded upon the procedure of other tribunals. I referred in the outset to the terms in which the "ancient rule of the Admiralty" was stated by Sir William Scott in *The Lord Melville* (1); and I recur to them for the purpose of observing that they would hardly seem to be quite accurate if the loss to be "apportioned" (according to the other form of expression used by him) were only that of one ship considered separately and without regard to the loss of the other. H At all events, the phrase "a common loss" seems to me to point, more naturally, to what LORD DENMAN, C.J., understood to be the result of the Admiralty rule. In *De Vaux v. Salvador* (3), he said (4 Ad. & El. at p. 431)

"... a positive rule of the Court of Admiralty requires the damage done to both ships to be added together, and the combined amount to be equally divided between the owners of the two." I

The observation which I have ventured to make upon Sir William Scott's words is, in itself, slight, and would be of no weight at all if there were no precedents of the Court of Admiralty in accordance with LORD DENMAN's statement of the rule. But there do appear to be such precedents, older than the forms recently in use, and differing from them. Whatever else may be doubtful in this case, it is, at all

A events, certain that the ancient rule of the Admiralty and the present rule are the same. The earliest recorded precedent is that of *The Petersfield v. The Judith Randolph* (4), decided by SIR JAMES MARRIOTT in 1789 (following, as it would seem, a case determined in Queen Anne's time), which was treated by LORD GIFFORD when delivering the opinion of this House in *Hay v. Le Neve* (5) as an authority for the application of the Admiralty rule, which the House of Lords ought to follow. In

B *Hay v. Le Neve* (5) the question which is now so important did not arise, because there only one of the ships which came into collision had sustained any damage. But a decision, so recognised by this House, is entitled to great weight on all points relating either to the principle or to the application of the rule.

The exact terms of the final judgment entered up in *The Petersfield v. The Judith Randolph* (4) were thus stated to the House of Lords by LORD GIFFORD :

C "The judge by his interlocutory decree pronounced, that both ships were in fault, and that the *Judith Randolph* was most in fault, and decreed that the whole damage sustained by the owners of the ship *Petersfield* and her cargo, which was sunk and lost, as well as the £230 damages and expenses given against the ship *Petersfield*, and the costs of suit here on both sides, be borne equally by the parties to this suit; and assigned for liquidation of damages and

D taxation of expenses the third session of next term; and referred the liquidation of the said damages and expenses to the registrar, taking to his assistance two merchants."

This form of decree agrees with LORD DENMAN's statement of the rule. Its effect is, I think, clear: £230 damages and expenses had been ascertained (I presume,

E in a suit brought by the owners of the *Judith Randolph*) as the amount of the loss and expenses suffered by the *Judith Randolph*, in a moiety of which (as I suppose) the *Petersfield* had been "condemned." But the amount of the loss and expenses suffered by the *Petersfield* was, as yet, unascertained. Let it be supposed, for illustration's sake, that, when ascertained, the loss and expenses suffered by the *Petersfield* and her cargo might amount to £1,770, which, added to £230,

F would make £2,000. This decree certainly could not and did not mean that the owners of the *Petersfield* and her cargo, who had suffered in damages and expenses £1,770, should be liable in £1,000 damages and costs to the owners of the *Judith Randolph*, whose total loss and expenses did not exceed £230, and should themselves be entitled to receive back from the owners of the *Judith Randolph* the exact amount which they so paid. The effect of that operation would

G simply be that the parties would be left in the same position as they would have been at common law, each bearing his own total loss. The effect of such a form of decree could, therefore, only be that the owners of the *Petersfield* and her cargo should bear their own greater loss to the extent of £1,000, and that the owners of the *Judith Randolph*, after bearing the whole amount of their smaller loss, namely, £230, should pay the residue of £1,000, being a moiety of the difference of the aggregate loss, to the owners of the *Petersfield*. This is, in substance, that mode of

H applying the Admiralty rule for which the appellants here contend.

DR. LUSHINGTON appears to have followed this precedent in 1841, referring expressly to *Hay v. Le Neve* (5), in *The Washington* (6), when, two cross actions being tried by agreement at the same time, he "decreed the damages, costs, and expenses of both parties to be thrown together, and to be equally divided." It

I further appears to me that this view of the real meaning of the procedure in such cases goes far to reconcile with sound principle the course taken by DR. LUSHINGTON in *The Seringapatam* (7) (3 Wm. Rob. at p. 44) and *The Tecla Carmen* (8), which (in the former case especially) would otherwise have seemed arbitrary, and hardly consistent with the respect due to those decrees of Her Majesty in Council in favour of the owners of the *Harriett* and the *Tecla Carmen*, the fruits of which he thought himself entitled to withhold from the plaintiff, unless (in the one case) they would "submit to the deduction of a moiety of the damages which had been sustained by the owners of the *Seringapatam*" (without a decree in any cross suit),

and (in the other) until a cross suit should be brought to hearing. These authorities are, I think, sufficient to prove that the course of the Court of Admiralty has been to use its powers over its own procedure, so as either at the hearing of a cross suit after decree and report in the original suit, or at the hearing of two conjoined suits, or in that later stage at which a monition might be applied for, to bring about the same result as if the whole controversy between the owners of the two ships had been, from the first, dealt with in one proceeding, and this, not by way of set-off, but in a manner which can only be explained as resulting from the view which that court took of the principle, and the just consequences, of its own rule.

One further observation I desire to make, as offering (what seems to me) a not improbable explanation of the ordinary form of decree. It is that, as every suit of this kind was originally brought by a plaintiff alleging his adversary to be in fault (and not admitting the existence of fault on both sides), and as each suit was or might be separately brought to a hearing, the form of the decree made separately in each suit, before "liquidation of damages," would naturally be such as might be applicable to the possible case (which actually occurred in *Hay v. Le Neve* (5)) of that plaintiff's ship only having suffered any damage; in which case the moiety of that damage only which was mentioned in that decree would be taken into account. My conclusion, upon the whole, is that the opinion of SIR GEORGE JESSEL, M.R., and BRETT, L.J., ought to prevail, and that the judgment appealed from should be reversed. In arriving at this conclusion, I have not only the hesitation which I must always feel in differing from the opinion of my noble and learned friend LORD BRAMWELL, but I am also bound to acknowledge that my own impression down to the conclusion of the arguments, had been different. A fuller consideration of the authorities to which I have referred has convinced me that they are not reconcilable with the judgment of the Court of Appeal.

LORD BLACKBURN.—In this case two ships, the *Voorwarts* belonging to the appellants, and the *Khedive* belonging to the respondents, came into collision, and damage was thereby occasioned to each of the ships and to the cargo on board, so that the owners of each ship and the owners of the cargo each sustained loss arising from the same accident, and each had a claim for recompense from those who were responsible. No loss of life or personal injury was incurred. It was ultimately determined that the collision arose from the fault of both ships, and according to the rule in the Admiralty, that being so, the whole damage arising from the collision ought to be borne equally by the owners of the two ships, without inquiring in what degree each was to blame. There was no fault or privity on the part of the owners of the *Khedive*, and they were entitled to take steps for limiting their liability; and as the moiety of the damage in any view of the case exceeded the amount to which their liability was limited, they instituted an action for this purpose in the Admiralty Division, bringing that amount into court, and making the owners of the *Voorwarts* and all other persons claiming damages from the collision, defendants. The amount of the damage to the *Voorwarts* exceeded the damage to the *Khedive*, and the question which it is intended to raise is whether the owners of the *Voorwarts* were to prove for the whole moiety of the loss and damage sustained by them and to be paid in respect of such moiety *pari passu* with the other claimants on the fund, which is the contention of the respondents, or whether they were to prove for the moiety of the loss and damage sustained by them, less a moiety of the loss and damage sustained by the *Khedive*.

One practical difference is that if the respondents are right the amount to be paid out of its fund in court to the owners of the cargo, who are not to blame, will be diminished, for the benefit of the *Khedive* which was to blame, and, as was said by BAGGALLAY, L.J., in *Chapman v. Royal Netherlands Steam Navigation Co.* (9)

"it certainly strikes one as improbable that such an apparently inequitable result should be in accordance with a true construction of the Merchant Shipping Acts; but, if such be their true construction, we are bound to adopt and act upon it, however inequitable the result may be."

A Perhaps it is too strong to call the result inequitable, but I think it is certainly one which the legislature were not likely to have wished to bring about, and that, if they had had it brought to their notice, they probably might have altered the language of the Acts, so as to make it clear that they did not intend to bring about such a result. Whether, on the true construction of the Acts as they are framed, the result follows is the question. Another result is that, as between the ship-owners, the ship which seeks to limit its liability will always, whether its damage be greater or less than the other, obtain a benefit; whether that is to be wished depends upon which was most to blame.

B This is in substance an appeal from the decision in *Chapman v. Royal Netherlands Steam Navigation Co.* (9), in which the question was decided, and it was so argued. In that case the *Savernake* and the *Vesuvius* had come into collision, and both were to blame. The owner of the *Savernake* brought the amount of his statutable liability into court, and made the owners of the *Vesuvius* and all other claimants defendants. SIR GEORGE JESSEL, M.R., in that suit, declared

C "that the defendants, the Royal Netherlands Steam Navigation Co., are entitled to prove for the moiety of the loss and damage sustained by them, less a moiety of the loss and damage sustained by the *Savernake*, and to be paid in respect of such balance *pari passu* with the other claimants out of the fund in court."

D That is the declaration which the appellants say ought to be made here, and if it were made the rest of the order would easily be framed. But this declaration was altered in the Court of Appeal by a majority consisting of BAGGALLAY and COTTON, L.JJ., BRETT, L.J., dissenting and thinking that the declaration of SIR GEORGE JESSEL, M.R., was right, so that as far as mere weight of authority goes it was pretty equal.

E I need hardly say that the question is one of difficulty. On the best consideration I can give I think that SIR GEORGE JESSEL, M.R., and BRETT, L.J., were right. The solution of the question before the House depends upon two questions: First, what is the true construction of the statutes putting a limit on the liability of ship-owners to make recompense in damages to those injured by a collision brought about in whole or in part by the negligence of their servants? Secondly, what is the nature of the recompense in damages awarded by the rule of the Admiralty between the owners of the two ships which came into collision, when both were to blame? I will first consider the statutes.

F The first Act which limited the liability of shipowners in cases of collision was the G 53 Geo. 3, c. 159 [1813], and though that Act has been repealed by the Merchant Shipping Repeal Act, 1854, I think its provisions are material in construing those provisions which have been by the Act of 1854, as amended by the Merchant Shipping Act Amendment Act, 1862, substituted for those contained in it. The statute 53 Geo. 3, c. 159, begins by a recital that it was expedient to prevent any discouragement to merchants and others from being interested in shipping belonging to this realm, and it was confined to British ships. Section 1 enacted:

H "No person, owner or part owner of any ship, shall be subject or liable to answer for or make good any loss or damage arising or taking place by reason of any act, neglect, matter, or thing done, omitted or occasioned without the fault or privity of such owner, which may happen [to the cargo of the ship] or to any other vessel, [or to any goods being in or on board any other vessel] I further than the value of his or their ship or vessel, and the freight due, or to grow due for and during the voyage which may be in prosecution, or contracted for at the time of the happening of such loss or damage."

In 1818 in *Wilson v. Dickson* (10) the Court of King's Bench decided that the value of the ship was to be taken as "the existing value at the time when the loss takes place." In *Brown v. Wilkinson* (11), in 1846, PARKE, B., intimates a strong opinion that the value, if it was *res integra*, ought to be taken as the value at the time of the commencement of the voyage, but adds (15 M. & W. at p. 398):

"As however, the point has been decided by the case referred to, we should pause before we overruled that authority. It is not, however, necessary in this case to do so, for we think that according to the true meaning of that decision the value at the time of loss, to which the damages were then restrained, is the value at the moment the loss commences by the collision, whence the injury, and it is not to be reduced by the consideration that the defendant's vessel is about to founder, at which time it is really of no value, for that would be to exempt the defendant altogether, which the statute certainly does not contemplate under any circumstances."

This was quite sufficient to suggest the expediency of substituting a fixed rule for ascertaining the amount of the limit of liability, as was afterwards done, though not till 1862, by the Merchant Shipping Act Amendment Act of that year, s. 64. In the interval between these two cases, that of *The Dundee* (12), was decided by LORD STOWELL, in 1823. That was a case of collision in which the *Dundee* was solely to blame, and, consequently, her owners were liable for the whole loss. The question there raised was what was to be included in the word "appurtenances" in the 53 Geo. 3, c. 159, a question no longer of importance since the repeal of that statute.

On a prohibition in *Gale v. Laurie* (13), the King's Bench put the same construction on the words as LORD STOWELL had done, so that the point, if still important, would probably be held concluded by authority. But the judgment of LORD STOWELL contains a great deal material to the present inquiry. He begins (1 Hag. Adm. at pp. 120, 121) by saying that the loss arose from

"a want of that attention and vigilance due to the security of other vessels that are navigating on the same seas, and which, if so far neglected as to become, however unintentionally, the cause of damage of any extent to such other vessels, the maritime law considers as a dereliction of bounden duty, entitling the sufferer to reparation in damages. The quantum of reparation due in such cases has been differently measured in the maritime laws of different commercial countries, and of the same commercial country, among others our own, at different periods. The ancient general law exacted a full compensation out of all the property of the owners of the guilty ship upon the common principle applying to persons undertaking the conveyance of goods [HIS LORDSHIP, interposing: I should rather say undertaking the management of anything likely to do mischief unless attention and vigilance is used by those who manage it], that they are answerable for the conduct of the persons whom they employed, and of whom the other parties who suffered damage knew nothing, and over whom they had no control. To this rule our own country conformed; and it is not to be denied that the term compensation is not very accurately applied to any restitution that falls short of a fair and full indemnification for the injury done. But Holland having introduced a law for the protection of its navigation, that persons interested in it should not be liable beyond the value of that property of their own which they exposed to hazard—their ship, freight, apparel, and furniture—England followed in successive statutes, by which it protected owners from responsibility beyond their interests, first, in the case of embezzlements committed by some of the crew of the ship herself (7 Geo. 2, c. 15 [1733]), and in a succeeding statute (26 Geo. 3, c. 86 [1786]), this protection was extended to the case of embezzlements committed by other persons. The legislature proceeded in a later statute (53 Geo. 3, c. 159 [1813]) to give the same protection in the case of all losses otherwise produced. The latter statute, which most immediately applies to the present question, in the first enacting clause subjects the ship, tackle, apparel, and furniture and its freight, but in the following clauses, particularly in the 7th and 8th, the word 'appurtenances' is introduced, and is repeated as subject to contribution."

He then discusses the nature of the fishing stores on a Greenland voyage, and *Hoskins v. Pickersgill* (14), in which it was held that fishing stores were not in-

A cluded in the word "furniture" in the construction of a policy of insurance, and proceeds (ibid. at p. 124):

B "I am not sufficiently aware whether this would govern the construction of the same word occurring in an Act of Parliament or in the phraseology of a court in which its meaning is, perhaps, more to be collected from its proper and genuine import than from a prevailing understanding controlling its proper meaning in a contract between two individuals whose words were not to be carried beyond their own intentions in the contract. But it is unnecessary for me to pursue that question further, because it is an admitted fact that this mode of initiating a suit, by the arrest of the ship, tackle, apparel, and furniture, is the ancient formula of the court, though leading to a full remedy affecting all the property of every kind belonging to the owners. The same formula has existed and operated its remedy under all the variations by which the remedy has been modified. It has been no further restricted than as the statute has restricted it; but the initiatory terms 'tackle, apparel, and furniture' founded the suit sufficiently to enable it to embrace all the objects which the statute left subject to its operation. These restrained them only by their own particular restrictions. The same words went as far as the general law went, notwithstanding the narrowness of those terms, and they must now go as far as the general law, limited only by that statute, extends."

E Before going further, I may observe, first, that neither in *Wilson v. Dickson* (10), *The Dundee* (12), nor in *Brown v. Wilkinson* (11), did any question arise as to how a court of equity was to work the jurisdiction given it in cases where there were several losses to several parties arising out of the same collision, and the fund brought into court was to be distributed among them rateably, which is the present case. In each of these cases there was one loss only. Next, that LORD STOWELL treats it as quite clear that, though the mode in which the Court of Admiralty founded its jurisdiction was by a seizure of the ship, the recompense in damages decreed by that court could be enforced against the owners out of all their property of every kind, so that the result was that by the general law the owners might be made to pay to their uttermost farthing the recompense in damages decreed by the Court of Admiralty, however small the value of their ship when seized was. PARKE, B., in *Brown v. Wilkinson* (11), says:

G "From the practice of the Court of Admiralty no light could be derived on this question, for that court proceeds in rem, and can only obtain jurisdiction by seizure, and the value when seized is the measure of liability."

H It is not, I think, necessary to decide between these very high authorities. If it were, I should wish to make further search among the cases on prohibition; but prima facie one would say that LORD STOWELL was more familiar with the subject, and, therefore, more likely to be accurate. And lastly, that LORD STOWELL seems to me to think that the recompense in damages was to be regulated according to the established law in the Court of Admiralty, which is my own opinion. What that established law is, is a question which I will discuss hereafter.

Where there were several losses occasioned to several persons by one act of negligence of those for whom the owner was responsible, the 53 Geo. 3, c. 159, s. 7, permitted the owner to file a bill

I "in any court of equity having competent jurisdiction against all the persons who shall have brought any such actions . . . and all other persons who shall claim to be entitled to any recompense for any loss or damage arising or happening by the same separate and distinct accident, act, neglect, or default, or on the same occasion to ascertain the amount of [the value], and for the payment and distribution thereof rateably among the several persons claiming recompense as aforesaid, in proportion to the amount of the several losses or damages sustained by such persons so claiming such recompense according to the rules of equity and as the case may require."

There are carefully drawn provisions requiring the plaintiff in such a bill to make all persons whom he knows of as having any claim for recompense arising out of that one transaction, defendants, so that they may, if they please, claim; and by s. 10 it is enacted that the court in which the bill is filed shall have full powers for ascertaining the value and the amount of the losses or damages claimed by the defendants respectively, and "generally to do what may appear to be just" in such suit. By the Merchant Shipping Act, 1854, this statute was repealed, and other enactments provided in the ninth part of that Act, ss. 504 and 505, were repealed by the Merchant Shipping Act Amendment Act, 1862, and for these was substituted s. 64 of that latter Act.

It is in these words :

"The owners of any ship, whether British or foreign, shall not in cases where any of the following events occur without their actual fault or privity, that is to say : 1. Where any loss of life or personal injury is caused to any person being carried in such ship; 2. Where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board such ship; 3. Where any loss of life or personal injury is, by reason of the improper navigation of such ship as aforesaid, caused to any person carried in any other ship or boat; 4. Where any loss or damage is, by reason of improper navigation of such ship as aforesaid, caused to any other ship or boat, or to any goods, merchandise, or other things whatsoever on board any other ship or boat, be answerable in damages in respect of loss of life or personal injury, either alone or together, with loss or damage to ships, boats, goods, or merchandise, to an aggregate amount exceeding £15 for each ton of their ship's tonnage, nor in respect of loss or damage to ships, goods, merchandise, or other things, whether there is in addition loss of life or personal injury or not to an aggregate amount exceeding £8 for each ton of the ship's tonnage."

The case which we have to deal with falls within the fourth of these heads, and, as I think in respect of such losses the only difference intended to be made from the law as it was under 59 Geo. 3, c. 159, was to extend the protection to foreign ships as well as British, and to substitute as the limit of liability a fixed and easily ascertainable sum for the value of the ship, freight, and appurtenances.

As regards the mode in which the limitation of liability was to be worked out where there were more persons than one who had sustained loss from the same separate neglect or on the same occasion, the elaborate provisions of 59 Geo. 3, c. 159, are repealed, and in lieu of them is substituted s. 514 of the Merchant Shipping Act, 1854, which I think was intended to give the jurisdiction to any court of equity in any part of the British dominions, and in Scotland to the Court of Session, but to make no other difference in the substance of the law. And I think, though the words are changed—principally I think with a view to brevity even at the risk of obscurity—they ought to be construed with reference to the former law and the extent to which it was intended to alter it. And, doing so, it seems to me that the phrase "be answerable in damages" is not to be confined to the damages to be recovered or enforced in an action directly brought against the owner, but it is to be construed as meaning that the aggregate of the recompenses which he has to distribute under s. 7, "according to the rules of equity, and as the case may require," shall be so limited. This is an important link in my chain of reasoning.

I think that the principle laid down in *R. v. Lordale* (15), as to the construction of statutes in *pari materia* applies; if I am wrong in this, so much of what I rely on is *debile fundamentum*, and I agree that so far *fallit opus*. If I am right, I cannot but think that if BAGGALLAY and CORTON, L.JJ., had had their attention called to the very wide words of s. 7 and s. 10 of the 53 Geo. 3, giving the court of equity, whose powers the Master of the Rolls was exercising, every power for distribution of the value among the several persons entitled to such recompenses, and "generally to do therein as shall appear to be just," and had agreed with me in

A thinking that though these words are not repeated in the Merchant Shipping Act, 1854, s. 514, the previous law is to be borne in mind when construing that section, their opinions might have been different; at least, BAGGALLAY, L.J., would have more fully developed his reasons for thinking that the true construction of the Act compelled him to put a construction on it, which he, in the passage already cited, calls "apparently inequitable in its result." And COTTON, L.J., would have given

B his reasons for saying as he does that the result the Master of the Rolls had come to was "apparently against the words and meaning of the Merchant Shipping Act."

But the argument at your Lordships' Bar was mainly rested on the effect of the rule in Admiralty in the Court of Admiralty, and the proceedings in the Court of Admiralty, before there was any limitation of liability at all. That court has jurisdiction over both the parties to a collision. Either of them may, if he pleases,

C abandon or not exercise his right to claim a recompense from the other. But when one does institute a suit the other cannot baffle him by refusing to appear, even though his ship is not within reach of the court; the institution of the suit gives a maritime lien against the ship, forming the foundation of an inchoate right to seize the vessel whenever it comes within the reach of the court, even though in the meantime it had become the property of a bona fide purchaser without

D notice: *The Bold Buccleugh* (16). And according to LORD STOWELL in *The Dundee* (12), the Court of Admiralty, when it seized the ship, could enforce a full remedy affecting all the property of every kind belonging to the owners, however small the value of the ship seized might be. These cases were not cited by BRETT, L.J., but they seem to me strong authorities in favour of the view he took of the Admiralty procedure.

E In the present case, as in most others, both parties appeared and both made claims. And the great question was whether both, or only one, and, if so, which, of the vessels was to blame. It was ultimately decided that both were to blame, and then the court pronounced the judgment which since the decision of this House in *Hay v. Le Neve* (5) has always been pronounced in such cases, viz., that the

F collision in question in the cause was occasioned by the fault or default of the master and crew of the *Khedive*, and by the fault or default of the master and crew of the *Voorwaarts*, and that the damage arising therefrom ought to be borne equally by the owners of the *Khedive* and the owners of the *Voorwaarts*. I say that this has always been the form of the judgment since *Hay v. Le Neve* (5). I do not think that such could have been the form of the judgment before that case, for it

G would have had an important bearing on the question then in issue, and not only was LORD GIFFORD, who presided, a very accurate lawyer, but it appears from the report that he consulted LORD STOWELL, who furnished him with authorities, and would certainly have quoted the form of the judgment if it had then existed. Before the decision in *Hay v. Le Neve* (5) LORD STOWELL had in *The Woodrop-Sims* (2) laid down that when both ships were to blame "the rule of law is that the

H loss must be apportioned between them, as having been occasioned by the fault of both of them." As the *Woodrop* was solely to blame he had no occasion to say on what principle it was to be apportioned. In *The Lord Melville* (1), a case not reported anywhere, as far as I can find, but cited by LORD GIFFORD in *Hay v. Le Neve* (5) from a shorthand note of the judgment furnished to him, he said:

I "The ancient rule of the Admiralty was that it should be considered a common loss to which they were justly liable."

I do not doubt that "justly" is a misprint for "jointly."

The court of Session had in *Hay v. Le Neve* (5) apportioned the damage by making the ship most to blame bear two-thirds of it, and the ship least to blame one-third, and the question before the House was if this was right? In that case only one of the ships had put in a claim, and there was no cross-claim—why, I do not know—but the House had not to consider any question arising from the absence of a cross-claim. LORD GIFFORD consulted LORD STOWELL, and was furnished by

him with a note of a decision of SIR JAMES MARRIOTT. That was in a case in which the *Petersfield* and the *Judith* had come in collision, and both were to blame, but the *Judith* most, and in which—I do not quite understand how—the *Judith* had recovered £230 damages against the *Petersfield*. The decision of SIR JAMES MARRIOTT was,

“that the whole damage sustained by the *Petersfield* and her cargo, as well as the £230 damages and expenses given against the ship *Petersfield*, and the costs on both sides, be borne equally by the parties in this suit.”

I may observe that LORD STOWELL introduced a rule that, though the damages were to be divided, each party should, in such cases, bear his own costs, and that it has been determined that the liability of the shipowner to make good costs is in no way affected by the statutes limiting his liability: see *Ex parte Ruynne* (17).

In these authorities the decision of the House of Lords was that the damages arising from the collision ought to be borne equally by the owners of the two ships in fault. I do not think attention was called to the effect which this might have on the interest of the innocent owners of cargo. In the possible event of one set of owners proving insolvent while the others were solvent, the owner of the cargo would, if the rule was as laid down in *The Lord Melville* (1) that the owners were liable jointly, receive full indemnification for his loss from the solvent owners; by the rule as laid down in *Hay v. Le Neve* (5) he only gets one-half from them, and gets a dividend only from the insolvent owners. This rule has been stigmatised as *judicium rusticorum*, and is justified on the ground of general expediency avoiding interminable litigation at the cost of some inevitable injustice in particular cases. But if the recompense in damages which the one ship is to make to the other is to be considered as quite a distinct thing from that which the other is to make to it, this injustice is increased in a manner which is not only not inevitable, but which, as it seems to me, it requires some subtle and technical reasoning to bring about. It was not disputed that in practice, when the damages were ascertained, and it proved that the damage to one ship was greater than that to the other, the balance, and the balance only, was paid. SIR GEORGE JESSEL, M.R., in *Chapman v. Royal Netherlands Steam Navigation Co.* (9), said that balance “was all that is ever recovered in the action, that is the substance of it.” He had just before said that “the monition finally issues for the balance.” Inquiry has been made and it turns out that the parties to collision suits having always given substantial bail; there is no instance to be found in which a monition ever issued at all, the money being always paid without anything in the nature of an execution. But I think it can be hardly doubtful that if in any case it ever should be necessary to issue a monition it would not be issued for more than the balance. Had the statute of 53 Geo. 3, c. 159, been unrepealed, and had the Master of the Rolls been exercising the jurisdiction given in such wide terms by s. 7 to determine “according to the rules of equity, and as the case may require,” and by s. 10 “generally to do therein as shall appear to be just,” I do not think that there could be much doubt that he did right in making his order according to the substance of what was done.

I have already expressed my opinion that the statute now in force, though couched in different words, is to be construed as giving the same power as was given by the repealed Act. The very ingenious argument of counsel for the respondent was I think this: there was from very early times a jurisdiction exercised by the courts of common law, and I presume by all superior courts, to prevent their process being abused or used for the purposes of oppression, and, therefore, when A. had obtained a judgment in one court against B., on which he was about to issue execution for the full amount, the court, on its being brought to their notice by B. that he had obtained a judgment against A., either in the same court or another, on which he could issue execution against A., would restrain A. from issuing execution on the judgment in their court except on the terms that he consented to set the one against the other, and would issue execution only for the balance.

A There were differences of practice in the Queen's Bench, and in the Common Pleas at one time, as to the extent to which the interests of the attorneys were considered: see *Hall v. Ody* (18); but those I need not notice, and it was argued with great ingenuity that the cross-claims of the two ships which had come into collision were as distinct as any two actions in different courts, and that the undenied practice merely arose from the Admiralty interfering to prevent the abuse of its process.

B Even if this were made out I should be unwilling to give effect to what I cannot but think very technical and artificial reasoning. But I do not think it is made out. The two claims arose out of one and the same accident. They are determined in one and the same court, and they depend on one and the same question, namely, were both or only one of the parties to blame? That question is determined once for all between the same parties, and the amount of the damage is also determined by the same court, and between the same parties. Even if the course of pleading had always been as it appears latterly to have been to condemn each separately and order the damages to be assessed separately, I should still say that they were in substance at least, not distinct and separate actions. But as I have pointed out, I think there can have been no settled form before *Hay v. Le Neve* (5). I think the forms produced were all comparatively modern. No practical consequences resulted from these forms, and consequently nothing called upon the courts to consider to what consequences they led. In *The Seringapatam* (7) where the *Seringapatam* and the *Harriet* had come into collision, and the owners of the *Harriet*, which had gone to the bottom, refused to give bail to the action against them by the *Seringapatam*, DR. LUSHINGTON decided, I cannot but think erroneously, that he had no power to stay the action by the owners of the *Harriet* till they gave bail in the action against them. Whether he was right or not is not, since the Admiralty Court Act, 1861, material, but he so thought, and that looks as if he thought them distinct actions. But when the *Seringapatam* dropped its action against the *Harriet*, and the *Harriet* proceeded against the *Seringapatam*, and finally judgment was given that both were to blame, and that judgment was affirmed on appeal, the question was raised in a very practical shape. The counsel for the owners of the *Harriet* argued that the Court of Appeal had in effect, though not in express terms, said that the owners of the *Harriet* should receive a clear moiety of the damage. DR. LUSHINGTON took a course which could not be justified on the ground that the court was preventing an abuse of its process, on any other ground than that taken by SIR GEORGE JESSEL, M.R., in *Chapman v. Royal Netherlands Co.* (9)—that they were not independent actions, and that the substance was that the balance only should be paid.

G I have only to add that, while I think that the Chancery Division in *Chapman v. Royal Netherlands Co.* (9), and the Admiralty Division in the present case, must conduct the limitation action brought under the Merchant Shipping Act, 1854, s. 514, according to the procedure as altered by the various subsequent Acts, those Acts make no difference in the substance of what they are to do. They ought to make exactly the same declarations, and do the same things which the Court of Session following their own procedure ought to have done if the limitation action had been brought in that court. I began by saying what was the question intended to be decided in this House. I doubt if it is raised, I doubt if the appeal is not premature, but I do not think that your Lordships should on that account refrain from deciding it. If the House adopts the view which I take of the law, I think the proper order would be to adopt that of the Master of the Rolls in the former case, and declare "that the defendants, the owners of the *Voorwaarts*, are entitled to prove for the moiety of the loss and damage sustained by them, less a moiety of the damage sustained by the steamship *Khedive*, and to be paid in respect of such balance *pari passu* with the other claimants out of the fund in court," and with the declaration to remit the action to the Admiralty Division to do what is just in the action. I have had the opportunity of perusing the opinion of LORD BRAMWELL, who

takes the opposite view. I have read it very attentively, but it has not changed my opinion. A

LORD WATSON.—I have only to state my entire concurrence in the opinions which have just been delivered.

LORD BRAMWELL.—I entirely agree that the question is: What was the practice or what is the practice or law of the Court of Admiralty in proceedings in that court where both ships are held to be to blame? If I had had to form my own opinion upon that matter unassisted and unbiased by the opinions of my noble and learned friends who have addressed your Lordships, I confess that I should have come to a different conclusion from that to which they have come, because I should, upon an examination of the practice and what I may call the necessity of the case, have come to the conclusion that there were separate decrees in each case for the damages, or a moiety of the damages, sustained by each ship, and that the fact that the balance was afterwards ascertained, was a mere matter of arrangement and convenience for the avoidance of what I may call a sort of circuitry of proceeding, that is to say, a payment by one ship and repayment by the other. B C

I must say that at the present moment it seems to me extremely difficult to say that that must not of necessity be the law; because what is to happen if proceedings are brought by the owners of one ship in one court and by the owners of the other ship in another court in another country? or, if the owners of the ship sued in this country do not think fit to bring their cross-action or to make their counterclaim, I cannot see what is to happen in such a case as that; and I can foresee great difficulties from the opinions which have just been expressed in your Lordships' House in the case of actions which may be brought in the common law courts in this country. I must acknowledge that I had written a long opinion in support of the views which I am now expressing, but it is not my intention to trouble your Lordships with that opinion, for I really have not confidence enough in my own opinion, in a matter of this description, to differ from the opinions which have been expressed by my noble and learned friends who have already spoken. It is not a question of principle; it is not a question of reason; but it is a question of what was the law of the Court of Admiralty; because, undoubtedly, what was the law formerly is the law still, for the Judicature Act has not changed the law in that respect. I, therefore, will not trouble your Lordships with the opinion which I should have expressed, for I feel bound to give up my own judgment in a case of this description, yielding to the opinions of my noble and learned friends. D E F G

THE EARL OF SELBORNE, L.C.—The order which I should propose to your Lordships and move for the purpose of giving effect to the opinions which have been expressed by the majority of your Lordships upon this appeal is to reverse the order appealed from, and to affirm the judgment of the Admiralty Division dated April 5, 1881, with the following declaration: That the defendants, the owners of the steam vessel *Voorwarts* are entitled to prove against the fund paid into court under that judgment for a moiety of the loss and damage sustained by them, less a moiety of the loss and damage sustained by the steam vessel *Khedive*, and to be paid in respect of the balance due to them after such deduction *pari passu* with the other claimants out of such fund. It will be for your Lordships to consider what ought to be done with regard to the costs in the court below and here. With respect to that question, I venture to point out to your Lordships that this case comes before the House not under the ordinary circumstances which make it fit to apply the rule that the costs should follow the event, but under these circumstances, that in another case—namely, *Chapman v. Royal Netherlands Steam Navigation Co.* (9), between other parties, a decision had been pronounced by the Court of Appeal reversing the judgment of the Master of the Rolls, which it was inevitably necessary for the court below to follow unless it was reversed by this House. The point also was one which all your Lordships felt to be a point of H I

A difficulty involving an abstruse matter of law. Taking all these circumstances into account, and I may add quite consistently, as it seems to me, with the principle of the rule which we are applying, I would submit to your Lordships that no costs should be given either in the Court of Appeal or of this appeal.

Appeal allowed.

B Solicitors: *Clarkson, Greenwell & Wyles; Freshfields & Williams.*

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

C

BRUNSDEN v. HUMPHREY

D [COURT OF APPEAL (Lord Coleridge, C.J., Sir Baliol Brett, M.R., and Bowen, L.J.), February 12, July 12, 1884]

[*Reported 14 Q.B.D. 141; 53 L.J.Q.B. 476; 51 L.T. 529; 49 J.P. 4; 32 W.R. 944*]

Estoppel—Res judicata—Two actions arising out of the same incident—Different causes of action—Damage to property—Personal injury.

E A person cannot in different actions recover successive amounts of damages for the same cause of action. When he first brings the action he must recover all the damages to which he is entitled in respect of that cause of action. One test whether one action is in respect of the same cause of action as another action is whether the same evidence would prove the plaintiff's case in both actions; another test is whether the two actions are in respect of the infringement of different rights.

F Per BOWEN, L.J.: The real test is not whether the plaintiff had the opportunity of recovering in the first action what he claims to recover in the second.

G The plaintiff sued the defendant in the county court to recover damages for injury done to his cab in a collision caused by the negligence of the defendant's servant, and obtained judgment and an award of damages. Afterwards the plaintiff sued the defendant in the High Court to recover damages for personal injury which he had suffered in the same collision.

H **Held:** by SIR BALIOL BRETT, M.R., and BOWEN, L.J. (LORD COLERIDGE, C.J., dissenting on the facts) that the damage to the cab and the personal injury suffered by the plaintiff constituted two distinct causes of action, and, therefore, the judgment recovered in the county court was no bar to the subsequent action in the High Court in which the plaintiff was entitled to recover.

Notes. Considered: *Serrao v. Noel* (1885), 15 Q.B.D. 549; *MacDougall v. Knight* (1890), 25 Q.B.D. 1; *Midland Railway v. Martin* (1893), 62 L.J.Q.B. 517. Applied: *Furness, Withy & Co., Ltd. v. Hall* (1909), 25 T.L.R. 233. Considered: *Wilson v. United Counties Bank*, [1918–19] All E.R.Rep. 1035; *Ord v. Ord*, [1923] All E.R.Rep. 206; *The Koursk*, [1924] All E.R.Rep. 168; *Debenham's, Ltd. v. Perkins*, [1925] All E.R.Rep. 234. Applied: *Conquer v. Boot*, [1928] All E.R.Rep. 120. Considered: *Workington Harbour and Dock Board v. Trade Indemnity Co.*, [1937] 3 All E.R. 139; *Marginson v. Blackburn Borough Council*, [1938] 2 All E.R. 539. Explained and Distinguished: *Derrick v. Williams*, [1939] 2 All E.R. 559. Considered: *E.E. and Brian Smith (1928), Ltd. v. Wheatsheaf Mills, Ltd.*, [1939] 2 All E.R. 251; *Townsend v. Bishop*, [1939] 1 All E.R. 805; *Greenhalgh v. Mallard*, [1947] 2 All E.R. 255. Referred to: *Edmonds v. Robinson* (1885), 29 Ch.D. 170; *Darley Main Colliery Co. v. Mitchell* (1886), 11 App. Cas. 127; *London v. London*

Road Car Co. (1888), 4 T.L.R. 448; *James v. Joseph Evans & Co., Ltd.* (1897), 77 L.T. 78; *Rose v. Buckett* (1901), 84 L.T. 670; *M. Isaacs & Sons, Ltd. v. Salbstein*, [1916-17] All E.R.Rep. 386; *Goldrei, Foucard & Son v. Sinclair and Russian Chamber of Commerce in London*, [1916-17] All E.R.Rep. 898; *Rowntree & Sons, Ltd. v. Frederick Allen & Sons (Poplar), Ltd.* (1935), 41 Com. Cas. 90; *Rose v. Ford*, [1937] 3 All E.R. 359; *British and French Trust Corp. v. New Brunswick Rail. Co.*, [1937] 4 All E.R. 516; *Lord v. Pacific Steam Navigation Co., Ltd., The Oropesa*, [1943] 1 All E.R. 211; *H. E. Daniels, Ltd. v. Carmel Exporters and Importers, Ltd.*, [1953] 2 All E.R. 401.

As to res judicata, see 15 HALSBURY'S LAWS (3rd Edn.) 184 et seq.; and for cases see 21 DIGEST (Repl.) 225 et seq.

Cases referred to :

- (1) *Ferrer's Case* (1599), 6 Co. Rep. 7a; 77 E.R. 263; sub nom. *Ferrers v. Arden*, Cro. Eliz. 668; 21 Digest (Repl.) 274, 480. C
- (2) *Sparry's Case* (1590), 5 Co. Rep. 61.
- (3) *Higgins' Case* (1605), 6 Co. Rep. 446; 77 E.R. 320; 12 Digest (Repl.) 584, 4513.
- (4) *Hudson v. Lee* (1589), 4 Co. Rep. 43a; 1 Leon. 318; Moore, K.B. 268; 76 E.R. 989; 21 Digest (Repl.) 282, 540. D
- (5) *Bird v. Randall* (1762), 3 Burr. 1345; 1 Wm. Bl. 387; 97 E.R. 866; 34 Digest (Repl.) 214, 1508.
- (6) *Phillips v. Berryman* (1783), 3 Doug.K.B. 286; 99 E.R. 658; 18 Digest (Repl.) 381, 1318.
- (7) *Kitchen v. Campbell* (1772), 3 Wils. 304; 95 E.R. 1069; sub nom. *Hitchin v. Campbell*, 2 Wm. Bl. 779, 827; 21 Digest (Repl.) 282, 536. E
- (8) *Martin v. Kennedy*, *Banning v. Perry* (1800), 2 Bos. & P. 69; 126 E.R. 1161; 1 Digest (Repl.) 18, 137.
- (9) *Seddon v. Tutop* (1796), 6 Term Rep. 607; 101 E.R. 729; 21 Digest (Repl.) 285, 553.
- (10) *Thorpe v. Cooper* (1828), 5 Bing. 116; 2 Y. & J. 445; 2 Moo. & P. 245; 130 E.R. 1004, Ex. Ch.; 2 Digest (Repl.) 667, 1853. F
- (11) *Ferrer v. Beale* (1701), 1 Ld. Raym. 339, 692; 91 E.R. 1361; sub nom. *Fetter v. Beale*, Holt, K.B. 12; 1 Salk. 11; sub nom. *Fitter v. Veal*, 12 Mod. Rep. 542; 21 Digest (Repl.) 282, 541.
- (12) *Embrey v. Owen* (1851), 6 Exch. 353; 20 L.J.Ex. 212; 17 L.T.O.S. 79; 15 Jur. 633; 155 E.R. 579; 1 Digest (Repl.) 30, 236.
- (13) *Williams v. Morland* (1824), 2 B. & C. 910; 4 Dow. & Ry.K.B. 583; 2 L.J.O.S.K.B. 191; 107 E.R. 620; 36 Digest (Repl.) 252, 36. G
- (14) *Fay v. Prentice* (1845), 1 C.B. 828; 14 L.J.C.P. 298; 5 L.T.O.S. 216; 9 Jur. 876; 135 E.R. 769; 36 Digest (Repl.) 254, 54.
- (15) *Nelson v. Couch* (1863), 15 C.B.N.S. 99; 2 New Rep. 395; 33 L.J.C.P. 46; 8 L.T. 577; 10 Jur.N.S. 366; 11 W.R. 964; 1 Mar.L.C. 348; 143 E.R. 721; 21 Digest (Repl.) 274, 486. H
- (16) *Hodsoll v. Stallebrass* (1840), 11 Ad. & El. 301; 8 Dowl. 482; 3 Per. & Dav. 200; L.J.Q.B. 132; 113 E.R. 429; 34 Digest (Repl.) 228, 1663.
- (17) *Mitchell v. Darley Main Colliery Co.* (1884), 14 Q.B.D. 125; 53 L.J.Q.B. 471; 52 L.T. 675; 48 J.P. 823, C.A.; affirmed sub nom. *Darley Main Colliery Co. v. Mitchell* (1886), 11 App. Cas. 127; 55 L.J.Q.B. 529; 54 L.T. 882; 51 J.P. 148; 2 T.L.R. 301, H.L.; 17 Digest (Repl.) 85, 62. I
- (18) *Lamb v. Walker* (1878), 3 Q.B.D. 389; 47 L.J.Q.B. 451; 38 L.T. 643; 42 J.P. 532; 26 W.R. 775, D.C.; 17 Digest (Repl.) 87, 77.

Also referred to in argument :

Greathead v. Bromley (1798), 7 Term Rep. 455; 101 E.R. 1073; 21 Digest (Repl.) 245, 312.

Earl of Bandon v. Becher (1835), 3 Cl. & Fin. 479; 9 Bl.N.S. 582; 6 E.R. 1517, H.L.; 21 Digest (Repl.) 307, 679.

- A *Markham v. Middleton* (1745), 2 Stra. 1259; 98 E.R. 1167; 17 Digest (Repl.) 190, 863.
Bonomi v. Backhouse (1859), E.B. & E. 646; 28 L.J.Q.B. 378, Ex. Ch.; affirmed sub nom. *Backhouse v. Bonomi* (1861), 9 H.L.Cas. 503; 34 L.J.Q.B. 181; 4 L.T. 754; 7 Jur.N.S. 809; 9 W.R. 769; 11 E.R. 825, H.L.; 17 Digest (Repl.) 87, 75.
- B *Lee v. Lancashire and Yorkshire Rail. Co.* (1871), 6 Ch. App. 527; 25 L.T. 77; 35 J.P. 726; 19 W.R. 729, L.J.J.; 12 Digest (Repl.) 558, 4225.
Read v. Great Eastern Rail. Co. (1868), L.R. 3 Q.B. 555; 9 B. & S. 714; 37 L.J.Q.B. 278; 18 L.T. 822; 33 J.P. 199; 16 W.R. 1040; 36 Digest (Repl.) 216, 1142.
- C *Nicklin v. Williams* (1854), 10 Exch. 259; 23 L.J.Ex. 335; 24 L.T.O.S. 61; 2 C.L.R. 1304; 156 E.R. 440; 17 Digest (Repl.) 86, 74.
Wright v. London General Omnibus Co. (1877), 2 Q.B.D. 281; 46 L.J.Q.B. 429; 36 L.T. 590; 41 J.P. 486; 25 W.R. 647, D.C.; 36 Digest (Repl.) 110, 554.

Appeal by the plaintiff from a decision of a Divisional Court (POLLOCK, B., and LOPES, J.) making absolute a rule nisi to enter judgment for the defendant in an action tried by GROVE, J., and a jury.

- D The plaintiff was a cab driver, and while he was driving his cab a two-horse van driven by the defendant's servant came into collision with the cab, and the plaintiff was thrown from the box. The plaintiff sued the defendant in the Whitechapel County Court to recover the amount of the damage done to the cab. The particulars were as follows:

- E For carelessly driving a van into a cab £4 3s. 0d.

	£	s.	d.
Repairing woodwork	1	8	0
Painting	1	5	0
Three weeks' hire of cab	1	10	0

- F £4 3 0

The defendant paid the amount claimed, and costs, into court. Afterwards the plaintiff discovered that he had sustained more serious personal injury owing to the collision than he had at first been aware of, and he wrote to the defendant asking for compensation. His request was refused, and he commenced the present

- G action in the High Court to recover damages for the injury which he had suffered by being thrown from the box of the cab in the collision. At the trial before GROVE, J., the jury found a verdict for the plaintiff for £350 damages. A rule was obtained calling on the plaintiff to show cause why there should not be a new trial or judgment entered for the defendant, on the ground of misdirection by the learned judge in not holding that the proceedings in the county court were a bar to the present action. On July 5, 1883, the Divisional Court (POLLOCK, B., and LOPES, J.) made the rule absolute to enter judgment for the defendant, and from that decision the plaintiff appealed.

- Waddy, Q.C.*, and *Crispe* for the plaintiff.
Murphy, Q.C., and *Hannen* for the defendant.

- I *Cur. adv. vult.*

July 12, 1884. The following judgments were read.

SIR BALIOL BRETT, M.R.—It was urged on behalf of the defendant that the plaintiff could not succeed in the second action because he had already recovered damages in respect of the collision, and no person can sue twice for the same cause of action. Upon the other side it was said that the two injuries, although one part of the cause of action was common to both, were in reality two different causes of action, and no rule exists against bringing separate actions for two

separate and distinct causes of action. It was admitted that it may be oppressive A
to bring several actions, but it was said that if they were brought oppressively the
court would have power to stop them, but that in this case, where there was an
undeveloped injury, an action is brought bona fide and is not oppressive. Therefore
the question is whether the causes of action are the same, because the law is that
a person cannot in different actions recover successive amounts of damages for
the same cause of action, but he must when he first brings the action recover all B
the damages to which he is entitled in respect of that cause of action.

When this rule is applied to damages which are or must be known to the plaintiff
at the time of the first action, I have always thought it a good rule; but when
applied to cases where the damage is not known at the time of the first action,
but develops itself afterwards, and when the claim is made bona fide for ulterior
damages, and could not in fact have been made at the time of the first action C
because the further damage was not known, I have always been of opinion that it
is a harsh rule, and if it were to be established now for the first time it could not
have my concurrence. It is based upon the maxim that it is for the benefit of
the State that the litigation of individuals should come to an end. To my mind,
that is one of those maxims which appear to be the less true the more one looks
into them. It cannot matter to the State, and the maxim is never vouched except D
in cases where the subsequent litigation would be just if it were not for the
maxim. In these cases of undeveloped injury the maxim is not only untrue, but
also unjust as between individuals. However, the rule exists, and I have not the
smallest intention of cavilling at it. It must remain, although the subsequent
injuries are unknown and cannot be known. Nevertheless, in cases where there
has already been a trial, one is to suppose that which is not the truth, viz., that E
the first jury tried the case when the subsequent damage or injury could not be
known to them, and that they have in contemplation of law given damages for
the prospective injury.

The question is whether the cause of action in this case is the same as that in
the former action. The cause of action alleged is an injury to the plaintiff's
person by reason of the negligent driving of the defendant's servant. The existence F
of that negligence and the collision alone do not give any cause of action. Sup-
posing that by negligent driving the wheel of a cart is run against a carriage and
there is no injury caused, the owner of the carriage could not succeed in an action
for nominal damages; such an action would not lie. The cause of action in such
a case is the negligence which causes appreciable injury to the vehicle. There
must be both the negligence and the appreciable injury. Therefore, in the first G
action the cause of action was the negligent driving and the appreciable injury to
the plaintiff's cab. Suppose that in the days of strict pleading the plaintiff had
relied upon that cause of action, and had pleaded it, he could not have given
evidence of the personal injury. The cause of action in such a case is injury to
property. That is the cause of action, and is in respect of a right of property.
Now the plaintiff brings an action in which he says that he has been injured in H
his person. That is a different right. He has a perfect right by law to have his per-
son unmolested by the negligence of another man's servant. The mere fact of the
defendant's vehicle having touched or shaken the person of the plaintiff would
give no cause of action if no appreciable damage had been caused. Therefore, it
is clear that the cause of action is the negligent driving and the injury to the
plaintiff's person; that is, the injury to the right to have his person unmolested. I
That is a distinct cause of action, and, therefore, the plaintiff is entitled to maintain
the second action.

That in itself seems to me to be sufficient reasoning upon which to found a
decision that the two causes of action are different. But different tests have been
applied by judges at different times. They are not grounds of judgments, but
tests by which to determine sometimes, but not always, whether the causes of
action are the same or different. A very good, though not always a very accurate,
test is to see whether the same sort of evidence would prove both cases. It is

A plain that, where damage to a vehicle is in question, persons who know about vehicles should be called to show what the injury was, but in the case of injury to the person doctors are called to show what was the external or internal damage to the person. The cases would be tried with two different sets of witnesses. In my opinion that is only a test, and not always an accurate one, but here it is sufficient to show that the causes of action are different. Therefore, in my opinion, we are not called upon in this case to apply the maxim I have mentioned, which for my part I think the law ought never to apply except in cases where it has already been determined that it must apply. It ought not to be stretched, and it is not applicable in this case. Therefore I am of opinion that the plaintiff is entitled to recover the sum awarded to him by the jury. Two different actions may be brought for different causes of action, but not to recover damages for the same cause of action. It follows that the judgment of the Divisional Court cannot be supported, and this appeal ought to be allowed.

BOWEN, L.J.—The plaintiff has recovered a verdict and £350 damages for personal injuries sustained by him through the negligence of the defendant's servants in driving a van, which had come into collision with the plaintiff's cab, thrown the plaintiff from his box, and seriously injured him in his legs. Previously to bringing the action the plaintiff had sued the defendant in the county court for damages done to his cab in the collision, and the particulars delivered under this plaintiff had been confined to the damages which the cab had sustained. The defendant in the county court action paid £4 3s. into court together with 6s. costs, upon which the plaintiff had discontinued the county court plaint. The present action was brought in the High Court for personal injuries, of the importance and extent of which the plaintiff alleged that he had been ignorant at the time of the county court proceedings. On a motion for a new trial the court below have entered a verdict for the defendant, on the ground that the recovery in the county court of damages in respect of the cab is a bar to any further action for injury to the plaintiff's person.

The rule of the ancient common law is that where one is barred in any action real or personal by judgment, demurrer, confession, or verdict, he is barred as to that or the like action of the like nature for the same thing for ever. LORD COKE, in a note to *Ferrer's Case* (1) said (6 Co. Rep. at p. 9a):

"It has been well said, 'interest republicæ ut sit finis litium,' otherwise 'great oppression might be done under colour and pretence of law.'"

See also *Sparry's Case* (2); *Higgins' Case* (3); YEAR BOOK, 12 Edw. 4, p. 13, 9. Accordingly in *Hudson v. Lee* (4) it was held to be a good plea in bar to an appeal of maihem that the appellant had recovered damages in an action for trespass brought for the same assault, battery, and wounding. So in *Bird v. Randall* (5) it was decided to be an answer to an action for seducing a man's servant from his service that penalties had previously been recovered by the master in satisfaction of the injury done him. So too in *Phillips v. Berryman* (6) a recovery in replevin was held to be a good bar to an action on the Statute of Marlbridge for an excessive distress on the ground that the plaintiff had already had his remedy, and that a recovery in one personal action is a bar to all other personal actions on the same subject.

The principle is frequently stated in the form of another legal proverb: *Nemo debet bis vexari pro eadem causa*. It is a well-settled rule of law that damages resulting from one and the same cause of action must be assessed and recovered once for all. The difficulty in each instance arises upon the application of this rule, How far is the cause which is being litigated afresh the same cause in substance with that which has been the subject of the previous suit? DE GREY, C.J., in *Hitchin v. Campbell* (7) said (2 Wm. Bl. at p. 831):

"The principal consideration is whether it be precisely the same cause of action in both, appearing by proper averments in a plea, or by proper facts

stated in a special verdict, or a Special Case. One great criterion of this identity is that the same evidence will maintain both actions :” A

see per LORD ELDON in *Martin v. Kennedy* (8). GROSE, J., in *Seddon v. Tutop* (9) said that the question was not whether the sum demanded might have been recovered in the former action, but the only inquiry was whether the same cause of action had been litigated and considered in the former action. Accordingly,

“though a declaration contain counts under which the plaintiff’s whole demand might be recovered, yet, if no attempt has been made to give evidence of some of the claims, they may be recovered in another action.” B

Thorpe v. Cooper (10) (5 Bing. at p. 129). It is evident, therefore, that the application of the rule depends, not upon any technical considerations of identity of cause of action, but upon matters of substance. C

I have now to consider the application of the above doctrine to the present action; and the question to be decided is whether the damage done by the negligent driving of the defendant’s servant to the plaintiff’s cab is in substance the same cause of action as the damage caused by such negligence to the plaintiff’s person. Nobody can doubt that, if the plaintiff had recovered any damages for injuries to his person, he could not have maintained a further action for fresh bodily injuries caused by the same act of negligence, merely because they had been discovered or developed subsequently: see *Ferrer v. Beale* (11). The court in that case said (1 Ld. Raym. at pp. 339, 340): D

“The jury have in the former action considered the nature of the wound and given damages for all the damage that it had done to the plaintiff.” E

This authority, however, leaves still open the point we now have to determine—whether the cause of action arising from damage to the plaintiff’s cab is in substance identical with that which accrues in consequence of the damage caused to his person.

In order clearly to elucidate this question, let me assume for the sake of argument that the damage had been caused by some act of the defendant himself, and not merely an act of his servant. According to the old distinctions of forms of actions, which still have a historical value as throwing light upon the principles and definitions of the common law, the form of action upon such an hypothesis would have been trespass to the person for the personal injury—trespass to goods for the damage to the vehicle. Injury would have been done to the plaintiff in respect of two absolute and independent rights, the distinction between which is inveterate both in the English and the Roman law. Everyone in this country has an absolute right to security for his person. Everybody has, further, an absolute right to have the enjoyment of his goods and chattels unmeddled with by others. In the hypothetical case I am assuming both these rights would have been injured, and, though the two injuries might have been combined in one suit, could it have been said that the subject-matter of each grievance was the same? F

Applying the test of identity furnished by DE GREY, C.J., in *Hitchin v. Campbell* (7), the first matter that is obvious is that the same evidence would not have supported an action for trespass to the person and an action for trespass to the goods. In the one case the identity of the man injured and the character of his injuries would be in issue, and justifications might conceivably be pleaded as to the assault which would have nothing to do with the damage done to the goods and chattels. In the other case the plaintiff’s title to the goods might have been in issue, in addition to the question of the damage done to them. Different provisions of the Statute of Limitations might possibly have applied in each case. And, finally, the damage in one case might have been directly due to the wrongful act complained of; in the other case it might not. G

There is no authority, so far as I know, in the books for the proposition that the recovery in an action for a trespass to the person would be a bar to the maintenance of an action for any trespass to goods committed at the same time. In H

- A the present instance, as the defendant himself was not driving, but his servant, trespass would not have lain under the old law, and the plaintiff's remedy would have been in an action on the case for negligence, based on the negligent management by the servant of his master's horses, a negligence for which in the eye of the law the master or employer is responsible. What is the gist of such an action on the case for negligence? If the whole of the plaintiff's case were to be stated,
- B and the entire story told, it seems to me that it would have comprised two separate or distinct grievances, narrated, it is true, in one statement of case. Actions for the negligent management of any animal, or any personal or movable chattel, such as a ship or machine or instrument, are all based upon the same principle, viz., that a person who contrary to his duty conducts himself negligently in the management of that which contains in itself an element of danger to others, is
- C liable for all injury caused by his want of care or skill. Such an action is based upon the union of the negligence and the injuries caused thereby, which in such an instance will as a rule involve, and have been accompanied by, specific damage. Without remounting to the Roman law, or discussing the refinements of scholastic jurisprudence and the various uses that have been made either by judges or juridical writers of the terms "injuria" and "damnum," it is sufficient to say that
- D the gist of an action for negligence seems to me to be the harm to person or property negligently perpetrated.

In a certain class of cases the mere violation of a legal right imports a damage. PARKE, B., in *Embrey v. Owen* (12) said (6 Exch. at p. 368):

- E "Actual perceptible damage is not indispensable as the foundation of an action; it is sufficient to show the violation of a right, in which case the law will presume damage."

But this principle is not as a rule applicable to actions for negligence which are not brought to establish a bare right, but to recover compensation for substantial injury. LITLEDALE, J., in *Williams v. Morland* (13) said (2 B. & C. at p. 916):

- F "Generally speaking there must be a temporal loss or damage accruing from the wrongful act of another, in order to entitle a party to maintain an action on the case:"

- see *Fay v. Prentice* (14) (1 C.B. at p. 835) per MAULE, J. This leads me to consider whether, in the case of an accident caused by negligent driving, in which both the goods and the person of the plaintiff are injured, there is one cause of action only, or two causes of action which are severable and distinct. This is a
- G very difficult question to answer, and I feel great doubt and hesitation in differing from the judgment of the court below, and from the great authority of the present Chief Justice of England. According to the popular use of language the defendant's servant has done one act and one only—the driving of the one vehicle negligently against the other. But the rule of law which I am discussing is not framed with reference to loose popular expressions of the sort, but for the sake of preventing an
- H abuse of substantial justice. Two separate kinds of injury were in fact inflicted, and two wrongs done. The mere negligent driving in itself, if accompanied by no injury to the plaintiff, was not actionable at all, for it was not a wrongful act at all till a wrong arose out of the damage which it caused. One wrong was done as soon as the plaintiff's enjoyment of his property was substantially interfered with. A further wrong arose as soon as the driving also caused injury to the plaintiff's
- I person.

Both causes of action, in one sense, may be said to be founded upon one act of the defendant's servant, but they are not on that account identical causes of action. The wrong consists in the damage done without lawful excuse, not the act of driving, which if no damage had ensued, would have been legally unimportant. It certainly would appear unsatisfactory to hold that the damage done in a carriage accident to a man's portmanteau was the same injury as the damage done to his spine, or that an action under Lord Campbell's Act by the widow and children of a person who had been killed in a railway collision is barred

by proof that the plaintiff recovered in his lifetime for the damage done to his luggage. It may be said that it would be convenient to force persons to sue for all their grievances at once, and not to split their demands; but there is no positive law (except so far as the County Court Acts have from a very early date dealt with the matter) against splitting demands which are essentially separable (see *Seddon v. Tutop* (9)), although the High Court has inherent power to prevent vexation or oppression, and by staying proceedings, or by apportioning the costs, would have always ample means of preventing any injustice arising out of the reckless use of legal procedure.

In the present case the plaintiff's particulars in the county court were confined to the damage done to his cab; the injury to his person, therefore, was neither litigated nor considered in the county court. The real test is not, I think, whether the plaintiff had the opportunity of recovering in the first action what he claims to recover in the second: see *Seddon v. Tutop* (9). With all respect I do not see how it can be said that *Nelson v. Couch* (15) so decides. That case establishes only the converse rule, viz., that the maxim *nemo debet bis vexari* cannot apply where in the first action the plaintiff had no such opportunity of satisfying his claim. The language of COLERIDGE, J., and the other members of the court in *Hodsoll v. Stallebrass* (16) must, I think, be read by the light of the special circumstances of that case, and so read is not inconsistent with the view at which I have here arrived. I am in no way departing from the language of this authority in holding, as I do in the present instance, that the damage for which the plaintiff is now suing accrues from a different injury, and, therefore, a different wrong, from that for which he recovered damages in the county court. The view at which I have arrived is in conformity with the reasoning of the judgment recently pronounced by this court in *Mitchell v. Darley Main Colliery Co.* (17), where it was held (overruling *Lamb v. Walker* (18)), that each fresh subsidence of soil in the case of withdrawal of support gave rise to a fresh cause of action. Nor do I feel called upon to extend the application of the sound and valuable principle of law that none shall be vexed twice for the same cause of action to a case to which it has never yet been applied, and to which it can only be applied by pursuing analogy to lengths which would involve practical injustice. The present case is one in which I am conscious that lawyers of great authority do differ and will differ. But on the whole, in my opinion, the judgment of the Court of Queen's Bench ought to be reversed, and the judgment entered at the trial for the plaintiff be restored, with costs to the plaintiff, including the costs below and of this appeal.

LORD COLERIDGE, C.J.—In this case I am, with much regret, unable to concur in the judgment of my brother BOWEN, to which I understand the Master of the Rolls to assent. I should have been glad, in the face of this difference of opinion, to have given reasons at length for my inability to agree in the judgment. But the plaintiff very naturally presses for judgment, and I am unable to do more than shortly to express my dissent. It appears to me that whether the negligence of the servant or the impact of the vehicle which the servant drove be the technical cause of action, equally the cause is one and the same. That the injury done to the plaintiff is injury done to him, at one and the same moment, by one and the same act, in respect of different rights—i.e., his person and his goods—I do not in the least deny; but it seems to me a subtlety not warranted by law to hold that a man cannot bring two actions if he is injured in his arm and in his leg, but can bring two if, besides his arm and leg being injured, his trousers, which contain his leg, and his coatsleeve, which contains his arm, have been torn. The consequences of holding this are so serious, and may be very probably so oppressive, that I at least must respectfully dissent from a judgment which establishes it. I think the court below was right, and that this appeal should be dismissed.

Appeal allowed.

Solicitors: *Noon & Clarke; Arkcoll & Cockell.*

[Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.]

A

MERSEY STEEL AND IRON CO., LTD. v. NAYLOR,
BENZON & CO.

[HOUSE OF LORDS (the Earl of Selborne, L.C., Lord Blackburn, Lord Watson, Lord Bramwell and Lord FitzGerald), March 27, 28, 1884]

B

[Reported 9 App. Cas. 434; 53 L.J.Q.B. 497; 51 L.T. 637;
32 W.R. 989]

Contract—Release—Repudiation by other party—Conduct not amounting to absolute refusal to perform contract.

Company—Winding-up—Proof of debt—Unliquidated damages—Application of bankruptcy rule.

C

The respondents agreed to purchase from the appellant company a quantity of steel to be delivered on board ship in five monthly instalments, payment to be made within three days after the receipt of the shipping documents. After a portion of the first instalment had been delivered, but before payment, a petition was presented to wind-up the appellant company, and the respondents wrote that they were advised that they could not safely pay for the steel delivered while the petition was pending. The appellant company replied that they would treat the refusal to pay as a repudiation of the contract. The liquidator, after some further correspondence, refused to make any further deliveries, and brought this action for the price of what had been delivered.

D

Held: to determine whether one party to a contract was relieved from its future performance by the conduct of the other the circumstances of the case and the conduct of the other party must be examined to see whether that conduct amounted to a renunciation, an absolute refusal, to perform the contract such as would amount to rescission if he had the power to rescind, and in the present case the respondents had not been guilty of such conduct; moreover, the contract was for the sale and purchase of the total quantity of steel mentioned therein and not for a number of individual deliveries, and so, in the absence of express words, the payment by the respondents forthwith for one delivery was not a condition precedent to the delivery of the next instalment; therefore, the appellants were not released from the contract, and were liable to the respondents for its breach.

E

F

Held, further: the effect of s. 10 of the Supreme Court of Judicature Act, 1875 [see now the Company's Act, 1948, s. 317] was to import into the rules relating to the winding-up of companies the provision in the Bankruptcy Act, 1869 [see now Bankruptcy Act, 1914, s. 30 (1)] that a demand in the nature of unliquidated damages was provable in bankruptcy provided that it arose by reason of a contract, and, therefore, the respondents could prove in the winding-up of the appellant company for the damages for the breach of contract.

G

H

Notes. Considered: *Société Générale de Paris v. Milders* (1883), 49 L.T. 55. Distinguished: *Eberle's Hotels and Restaurant Co. v. Jonas* (1887), 18 Q.B.D. 459. Considered: *Dickinson v. Fanshaw* (1892), 8 T.L.R. 271; *Booth v. Bowron* (1892), 8 T.L.R. 641; *Rhymney Rail. Co. v. Brecon and Merthyr Tydfil Rail. Co.*, [1900-3] All E.R.Rep. 582; *Ebbw Vale Steel, Iron and Coal Co. v. Balina Iron and Tinplate Co.* (1901), 6 Com. Cas. 33; *Payzu, Ltd. v. Saunders*, [1919] 2 K.B. 581; *Martin v. Stout*, [1925] A.C. 359; *Guy-Pell v. Foster*, [1930] All E.R.Rep. 790; *Maple Flock Co. v. Universal Furniture Products (Wembley), Ltd.*, [1933] All E.R.Rep. 15; *Chadros Bros. v. Boswell*, [1936] 3 All E.R. 179; *Household Machines, Ltd. v. Cosmos Exporters, Ltd.* [1946] 2 All E.R. 622; *Thornton Hall and Partners v. Wembley Electrical Appliances, Ltd.*, [1947] 2 All E.R. 630. Referred to: *Sovereign Life Assurance Co. v. Dodd*, [1892] 1 Q.B. 405; *Gueret v. Audouy* (1893), 62 L.J.Q.B. 633; *Christie v. Taunton, Delmard, Lane & Co., Re Taunton, Delmard, Lane & Co.*, [1893] 2 Ch. 175; *Re Hett, Maylor & Co., Ltd.* (1894), 10 T.L.R. 412; *Re Auriferous Properties*, [1898] 2 Ch. 428; *Cornwall v. Henson*, [1900] 2 Ch. 298;

I

Re Daintrey, Ex parte Mant and Mant, [1895-9] All E.R.Rep. 657; *Millar's Karri and Jarrah Co. v. Weddel, Turner & Co.* (1908), 100 L.T. 128; *Biddell Bros. v. Clemens, Horst Co.* (1910), 103 L.T. 661; *Dennis v. Tunnard and Moore* (1911), 56 Sol. Jo. 162; *Veithardt and Hall v. Rylands* (1917), 116 L.T. 706; *Ertel Bieber v. Rio Tinto Co., Ltd.*, [1918-19] All E.R.Rep. 127; *Morris v. Baron*, [1918] A.C. 1; *Bradley v. Newsum, Sons & Co., Ltd.*, [1918-19] All E.R.Rep. 625; *Bank Line, Ltd. v. Arthur Capel & Co.*, [1918-19] All E.R.Rep. 504; *Re Lavey, Ex parte The Trustee*, [1920] 1 K.B. 674; *Tyldesley U.D.C. v. Leigh R.D.C.* (1925), L.G.R. 243; *Re City Life Assurance Co., Ltd.*, [1925] All E.R.Rep. 453; *Re Fenton (No. 1), Ex parte Fenton Textile Association, Ltd.*, [1930] All E.R.Rep. 15; *Robert A. Munro & Co., Ltd. v. Meyer*, [1930] All E.R.Rep. 241; *Telsen Electric Co. v. Eastick & Sons*, [1936] 3 All E.R. 266; *De Jetley Marks v. Greenwood*, [1936] 1 All E.R. 863; *Re an Arbitration between Compagnie Primera de Navigazona de Panama and Compania Arrendataria de Monopolio de Petroleos S.A., The Yolanda*, [1939] 4 All E.R. 81; *Smyth & Co. v. Bailey Son & Co.*, [1940] 3 All E.R. 60; *Heyman v. Darwins, Ltd.*, [1942] 1 All E.R. 337; *Thorpe v. Fasey*, [1949] 2 All E.R. 393; *James Shaffer, Ltd. v. Findlay Durham and Brodie*, [1953] 1 W.L.R. 106; *J. Spurling, Ltd. v. Bradshaw*, [1956] 2 All E.R. 121; *White and Carter (Councils), Ltd. v. McGregor*, [1961] 3 All E.R. 1178.

As to repudiation of a contract, see 8 HALSBURY'S LAWS (3rd Edn.) 203-205, and for cases see 12 DIGEST (Repl.) 151-153. As to the application of bankruptcy rules in companies winding-up, see 6 HALSBURY'S LAWS (3rd Edn.) 658-661, and for cases see 10 DIGEST (Repl.) 982 et seq. For Bankruptcy Act, 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 321 et seq., and for Companies Act, 1948, see *ibid.*, vol. 3, p. 452 et seq.

Cases referred to :

- (1) *Freeth v. Burr* (1874), L.R. 9 C.P. 208; 43 L.J.C.P. 91; 29 L.T. 773; 22 W.R. 370; 12 Digest (Repl.) 378, 2970.
- (2) *Withers v. Reynolds* (1831), 2 B. & Ad. 882; 1 L.J.K.B. 30; 109 E.R. 1370; 89 Digest 423, 554.
- (3) *Hochster v. De la Tour* (1853), 2 E. & B. 678; 22 L.J.Q.B. 455; 22 L.T.O.S. 171; 17 Jur. 972; 1 W.R. 469; 1 C.L.R. 846; 118 E.R. 922; 12 Digest (Repl.) 377, 2960.
- (4) *Pordage v. Cole* (1669), 1 Wms. Saund. 319; 1 Lev. 274; 2 Keb. 542; T.Raym. 183; 1 Sid. 423; 85 E.R. 449; 12 Digest (Repl.) 472, 3520.
- (5) *Hoare v. Rennie* (1859), 5 H. & N. 19; 29 L.J.Ex. 73; 1 L.T. 104; 8 W.R. 80; 157 E.R. 1083; 89 Digest 572, 1766.
- (6) *Honck v. Muller* (1881), 7 Q.B.D. 92; 50 L.J.Q.B. 529; 45 L.T. 202; 29 W.R. 880, C.A.; 12 Digest (Repl.) 342, 2647.

Also referred to in argument :

- Graves v. Legg* (1854), 9 Exch. 709; 23 L.J.Ex. 228; 23 L.T.O.S. 254; 2 C.L.R. 1266; 156 E.R. 804; 12 Digest (Repl.) 473, 3531.
- Coddington v. Paleologo* (1867), L.R. 2 Exch. 193; 36 L.J.Ex. 73; 15 L.T. 581; 15 W.R. 961; 89 Digest 536, 1467.
- Bradford v. Williams* (1872), L.R. 7 Exch. 259; 41 L.J.Ex. 164; 26 L.T. 641; 20 W.R. 782; 1 Asp.M.L.C. 813; 12 Digest (Repl.) 383, 2995.
- Reuter v. Sala* (1879), 4 C.P.D. 239; 48 L.J.Q.B. 492; 40 L.T. 476; 27 W.R. 631; 4 Asp.M.L.C. 121, C.A.; 12 Digest (Repl.) 849, 2701.
- Boone v. Eyre* (1779), 1 Hy. Bl. 273, n.; 1 Wms. Saund. 320c; 2 Wm. Bl. 1312; 126 E.R. 160; 12 Digest (Repl.) 472, 3526.
- Re Withernsea Brickworks* (1880), 16 Ch.D. 337; 50 L.J.Ch. 185; 43 L.T. 713; 29 W.R. 178, C.A.; 10 Digest (Repl.) 1018, 7007.
- Re Albion Steel and Wire Co.* (1878), 7 Ch.D. 547; 47 L.J.Ch. 229; 38 L.T. 207; 42 J.P. 279; 26 W.R. 348; 10 Digest (Repl.) 993, 6831.
- Thomas v. Patent Lionite Co.* (1881), 17 Ch.D. 250; 50 L.J.Ch. 544; 44 L.T. 892; 29 W.R. 596, C.A.; 10 Digest (Repl.) 1022, 7037.

A *Re Compagnie Générale de Bellegarde, Campbell's Case* (1876), 4 Ch.D. 470; 85 L.T. 900; 25 W.R. 299; 9 Digest (Repl.) 517, 3403.

Appeal from a decision of the Court of Appeal (SIR GEORGE JESSEL, M.R., LINDLEY and BOWEN, L.JJ.) reported 9 Q.B.D. 648, reversing a decision of LORD COLERIDGE, C.J., in a case tried before him without a jury.

B *Cohen, Q.C.*, and *French (C. Russell, Q.C., with them)* for the appellants.
Sir Farrer Herschell, Q.C., and *Bigham, Q.C.*, for the respondents.

THE EARL OF SELBORNE, L.C.—In this case I will deal first with the last point which has been argued, and it appears to me that it lies within a very narrow compass.

The Supreme Court of Judicature Act, 1875, provided by s. 10 that :

C "... in the winding-up of any company . . . whose assets may prove to be insufficient for the payment of its debts and liabilities the same rules shall prevail and be observed . . . as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt."

D I cannot help pausing to observe upon what is a little remarkable in that enactment. It is not the rules that *were* in force when the Act of 1875 was passed, but the rules which "*may be* in force for the time being"; marking very strongly the principle on which the legislature in this enactment proceeded, namely, that they treated the cases as in *pari materia*, governed by the principles which govern the law of insolvency or bankruptcy, and that it was safe not only to apply the then existing rules upon that subject, but to apply them with any future addition or alteration which in legislation as to bankruptcy might be thought fit. Among
 E the rules which are to be imported from bankruptcy there are included the rules "as to debts and liabilities provable." The first section in that division of the Bankruptcy Act, 1869, which is under the sub-heading: "Payment of debts and distribution of assets," is one which, following a series of earlier statutes, makes demands in the nature of unliquidated damages, arising by reason of contract, provable in bankruptcy, and similar demands which do not so arise, and which are
 F not of that nature, not provable [Bankruptcy Act, 1914, s. 30 (1)]. The Act defines what are to be proved, all debts and liabilities and obligations, except certain things which are excepted. There are two or three sections dealing with special matters, and we then come to s. 39 [Bankruptcy Act, 1914, s. 31] which occurs under the same division of the statute :

G "Where there have been mutual credits, mutual debts, or other mutual dealings between the bankrupt and any other person proving or claiming to prove a debt under his bankruptcy, an account shall be taken of what is due from one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of such account, and no more, shall be claimed or paid on either side respectively."

H Your Lordships observe that it is not that it *may be*, it is not a thing which is optional, but it is a positive, absolute, rule for the purpose of proof in bankruptcy, and nothing can be proved according to that rule in such cases except the balance of the account. That only is regarded as the claim which it is competent for the creditor to make when he comes in to prove under the bankruptcy. That being
 I so, how is it possible to say that this is not a rule, both within the general spirit and intention of the section, and within the express words "as to debts and liabilities provable?"

Upon the other point, I do not think it desirable to lay down larger rules than the case may require, or than former authorities may have laid down for my guidance, or to go into possible cases differing from the one with which we have to deal. I am content to take the rule as stated by LORD COLERIDGE, C.J., in *Freeth v. Burr* (1), which is in substance that you must look at the actual circumstances of the case in order to see whether one party to a contract is relieved from

its future performance by the conduct of the other; you must examine what that conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part. Nothing more is necessary in the present case than to look at the conduct of the parties, and see whether anything of that kind has taken place here. A

Before doing so, however, I must say one or two words in order to show why I cannot adopt the argument of counsel for the appellants so far as it represented the payment by the respondents for the iron delivered as a condition precedent, and coming within the rules of law applicable to conditions precedent. If it were so, there would be an end of the case; but to me it is plain beyond the possibility of controversy that, upon the proper construction of this contract, it is not, and cannot be, a condition precedent. The contract is for the purchase of five thousand tons of steel blooms of the company's manufacture; therefore, it is one contract for the purchase of that quantity of steel blooms. No doubt, there are subsidiary terms in the contract as to the time of delivery: "Delivery one thousand tons monthly commencing January next;" and as to the time of payment, "Payment nett cash within three days after receipt of shipping documents." That, however, does not split up the contract into as many contracts as there shall be deliveries for the purpose, of so many distinct quantities of iron. It is quite consistent with the natural meaning of the contract that it is to be one contract for the purchase of that quantity of iron, to be delivered at those times, and in that manner, and for which payment is so to be made. It is perfectly clear that no particular payment can be a condition precedent of the entire contract, because the delivery under the contract was most certainly to precede payment, and that being so, I do not see how, without express words, it can possibly be made a condition precedent to the subsequent fulfilment of the unfulfilled part of the contract by the delivery of the undelivered steel. B C D E

Quite consistently with that view it appears to me, according to the authorities and according to sound reason and principle, that the parties might have so conducted themselves as to release each other from the contract, and that one party might have so conducted himself as to leave it at the option of the other party to relieve himself from a future performance of the contract. The question is whether the facts here justify that conclusion? The facts relied upon, without reading all the evidence, are these. The company at the time when the money was about to become payable for the steel actually delivered fell into difficulties, and a petition was presented against them. Section 153 of the Companies Act, 1862, appeared to the advisers of the purchasers to admit of the construction that, until in those circumstances the petition was disposed of by an order for the company to be wound-up or otherwise, there would be no one who could receive, and could give a good discharge for, the amount due. There is not, upon the letters and documents, the slightest ground for supposing either that the purchasers could not pay, or that they were unwilling to pay, the amount due; but they acted as they did evidently bona fide, because they doubted, on the advice of their solicitor, whether that section of the Act, as long as the petition was pending, did not make it impossible for them to obtain the discharge to which they had an unquestionable right. Therefore the case which I put during the argument is analogous to that which according to the advice they received they supposed to exist, namely, the case of a man who has died between delivery and the time when payment ought to be made, he being the only person to whom payment is due, and until there is a legal personal representative of that person no receipt can be given for the money. F G H I

By the Act of 1862, in the event of a winding-up order being made, it would date from the time when the petition was presented; and this section, which no doubt, according to its true construction, only deals with alienations of the property of the appellant company, was supposed by the solicitor of the purchasers to make it questionable whether the payment of a debt due to the company—to the persons who, if there had been no petition, would have had a right to

A receive it—might not be held, in the event of a winding-up order being made, to be a payment of the property of the company to a wrong person, and, therefore, an alienation. I cannot ascribe to their conduct, under these circumstances, the character of a renunciation of the contract, a repudiation of the contract, a refusal to fulfil the contract. It is just the reverse. The purchasers were desirous of fulfilling the contract; they were advised that there was a difficulty in the way, B and they expressed anxiety that that difficulty should be as soon as possible removed, by means which were suggested to them, and which they pointed out to the solicitors of the company.

The appellant company evidently took up the attitude of treating the default as one which released them from all further obligation. On Feb. 10, which was before the winding-up order was made, and while that state of things still continued, the C company by their secretary wrote to say that they thought (being so far correct, and thinking rightly) that the objection was not well founded in law; and they added:

“We shall therefore consider your refusal to pay for the goods already delivered as a breach of contract on your part, and as releasing us from any further obligations on our part.”

D I think that they were wrong in that conclusion; and that there is no principle deducible from any of the authorities which supports that view of such—I hardly like to call it a refusal—of such a demur, such a delay or postponement, under those circumstances. The appellant company, until they were wound-up never receded from that position; it appears to me to be clear that the liquidator adopted E it, and never departed from it, and that the repudiation of the contract on insufficient grounds on the part of the company, which had taken place while the petition was pending, and before the winding-up order was made, was adhered to after the winding-up order was made on the part of the liquidator. On the other hand, it seems to me that, fairly and reasonably considered, the conduct of the respondents was justifiable. Upon Feb. 17, 1881, after the making of the winding-up order, F they state that there are instalments which ought to have been delivered, but which had not been delivered, in respect of which they would have a claim for damages, and that they apprehend that they would have a right to deduct those damages from any payments then due from them; and according to the view I have expressed regarding the effect of s. 10 of the Act of 1875—in which view I believe your Lordships agree—that was the right way of looking at the matter. The respondents go G on to say that they are prepared to accept all deliveries which the liquidator may make under the contract, and to pay everything due, only requesting that those payments may be considered as made upon the understanding, in substance, that the right to the set-off which exists in law for the damages shall not be prejudiced—a perfectly reasonable defensible, and justifiable proposal.

H In my judgment, they have not in any portion of the proceeding acted so as to show an intention to renounce or to repudiate the contract, or to fail in its performance on their part. Therefore I think that the judgment of the court below is right, and that this appeal should be dismissed with costs, and I so move your Lordships.

LORD BLACKBURN.—I am of the same opinion. On the effect of s. 10 of the I Act of 1875 I will only say that I perfectly agree with what has been said by the Lord Chancellor.

As to the other point, I have no doubt that *Withers v. Reynolds* (2) correctly lays down the law to this extent, that where there is a contract which is to be performed in future, if one of the parties has said to the other in effect: “If you go on and perform your side of the contract, I will not perform mine” (in *Withers v. Reynolds* (2) it was: “You may bring your straw, but I will not pay you upon delivery as under the contract I ought to do. I will always keep one bundle of straw in hand so as to have a check upon you”), that in effect amounts to saying:

"I will not perform the contract." In that case the other party may say: "You have given me distinct notice that you will not perform the contract. I will not wait until you have broken it, but I will treat you as having put an end to the contract, and if necessary will sue you for damages, but at all events I will not go on with the contract." That was settled in *Hochster v. De la Tour* (3) in the Queen's Bench, and has never been doubted since; because there is a breach of the contract although the time indicated in the contract has not arrived. That is the law as laid down in *Withers v. Reynolds* (2).

That is, I will not say the only ground of defence, but a sufficient ground of defence. In *Freeth v. Burr* (1) it was also so laid down; and LORD COLERIDGE here thinks the facts were such as to bring the case within that principle. I will not at this time of the day go through them, but when the facts are looked at it is to me clear that that is not so. So far from the respondents saying that when the iron was brought in future they would not pay for it, they were always anxious to get it, and for a very good reason, that the price had risen high above the contract price. There was a statement that, for reasons which they thought sufficient, they were not willing to pay for the iron at present; and if that statement had been an absolute refusal to pay: "Because we have power to do wrong we will refuse to pay the money that we ought to pay," I will not say that it might not have been evidence to go to the jury for them to say whether it would not amount to a refusal to go on with the contract in future, for a man might reasonably so consider it. But there is nothing of that kind here. Theirs was a bona fide statement, and a very plausible statement. I will not say more. I refrain from weighing its value at this moment; but, as I said before, it prevents the case from coming within the authority of *Withers v. Reynolds* (2) and *Freeth v. Burr* (1), and, consequently, as I understand it, LORD COLERIDGE made a mistake in the ground on which he went.

The rule of law, as I always understood it, is that, where there is a contract in which there are two parties, each side having to do something (it is so laid down in the notes to *Pordage v. Cole* (4)), if the failure by one party to perform one part of it goes to the root of the contract, goes to the foundation of the whole, it is a good defence for the other party to say: "I am not going on to perform my part of it when that which is the root of the whole and the substantial consideration for my performance is defeated by your misconduct." But counsel for the appellants contended that whenever there was a breach of a material part of the contract it necessarily went to the root of the matter. I cannot agree with that. I quite agree that when there were a certain number of tons of the article delivered, it was a material part of the contract that the purchasers were to pay, but it was not a part of the contract that went to the root of the consideration in the matter. There was a delay in fulfilling the obligation to pay the money, it may have been with or without good reason (if that would have made any difference), but it did not go to the root or essence of the contract, nor do I think that there is any sound principle upon which it could do so. I repeatedly asked counsel whether or not he could find any authority which justified him in saying that every breach of a contract, or even a breach which involved in it the non-payment of money which there was an obligation to pay, must be considered to go to the root of the contract, and he produced no such authority.

There are many cases in which the breach may do so; it depends on the construction of the contract. With regard to *Hoare v. Rennie* (5) it has been said that POLLOCK, C.B., there went so far as to say that it was the essence and substance of the contract that the whole of the 166 tons of iron, and no less, should be delivered. If it was so, it would follow that, when in the present case the January shipment had not been made, and the company could only deliver part of the quantity, it went to the essence of the contract. The question depends upon whether the whole, and no less, is the essence of it. And again in *Honck v. Muller* (6), it is expressly and pointedly shown that that was the ground taken, and BRAMWELL, L.J., stated that in his opinion the contract of the one party was to deliver and of the other to take 2,000 tons of iron, and that, inasmuch as it was to

A be by three instalments and the first was gone and there never could be more than two-thirds of the quantity, the thing bargained for being the whole quantity of iron and no less, the defendant was not bound to deliver two-thirds when the plaintiff required the two-thirds only. Supposing that that was the true construction of the contract, I think that that would be the right conclusion. BRETT, L.J., seems, if I understand him rightly, to have thought that that was not the true construction of the contract—whether it was or not I do not express any opinion, except to point out that, whatever be the construction of other contracts, there is not in my mind the slightest pretext for saying that such is the construction of this contract, and, that being so, these cases have really no bearing upon the matter.

C The circumstances being as I have said, the contract not being such as to make this payment a condition precedent, or to make punctual payment for one lot of iron which had been delivered a matter causing the contract to deliver other iron afterwards to be a dependent contract, being of opinion that that is not the meaning of the contract, I think that the decision of the Court of Appeal was right.

D LORD WATSON.—I am of the same opinion. I think it would be impossible for your Lordships to sustain the appeal unless your Lordships are prepared to hold that any departure whatever from the terms of the contract by one of the parties must be sufficient to entitle the other to set it aside. I think the correspondence shows that the delay in making payment of that part of the contract price which ought to have been paid on Feb. 5 was due to these two causes—in the first place, a very natural desire on the part of the purchasers to see that they were safe against being called upon to make a second payment of the price; and in the second place, an obvious desire on the part of the sellers to get rid of the contract altogether. E There was no controversy as to the terms of the contract. There was no unwillingness on the part of the respondents to pay the price due under the contract, except for the circumstance that there had been a change in the constitution of the company, because they had gone into liquidation on Feb. 2, and the respondents' firm were advised by their solicitor that they were not in safety to pay until the liquidator was appointed. That brings us down to Feb. 15. At that date the F company had given notice on Feb. 10 of their resolution to repudiate the contract in consequence of the failure of the respondents to pay, and to that repudiation the liquidator I think consistently adhered. In these circumstances it appears to me that the judgment appealed from must be affirmed.

G LORD BRAMWELL.—I am of the same opinion. LORD COLERIDGE says that the defendants, the present respondents, positively refused to pay for the iron already delivered, and for all which might be subsequently delivered. Whether, if they had positively refused to pay for that already delivered, it would have given any justification to the company or the liquidator for refusing to go on with the contract, it is not necessary for me to say at the present moment. I do not say that it would not; but, if they had positively refused to pay for all which might be subsequently H delivered, it would undoubtedly be an answer upon the authority of *Withers v. Reynolds* (2) and the reasoning which you have heard. But I really cannot, with great submission to the noble lord, find any evidence of that, and counsel for the appellants did not attempt to prove it, but he set up a new ground, which was that the payment of the debt due was a condition precedent to the further performance of the agreement, with which I cannot agree.

I I have one other word to say. I cannot tell why *Honck v. Muller* (6) and *Houré v. Rennie* (5) should be brought forward upon this occasion. I do not think that I said in *Honck v. Muller* (6) what in this case SIR GEORGE JESSEL, M.R., supposed me to have said, namely, that "in no case where the contract has been part performed could one party rely on the refusal of the other to go on." If I did say so, I recall it, because I do not think so; it depends on the nature of the contract and the circumstances of the case. What I was busy upon in that case was in showing that there had been no performance at all there, and that in truth what the plaintiff was seeking to do was to make the defendant accept the performance

of something entirely different from what had been agreed upon, and I think in that opinion I was right. But what has that to do with this case? Suppose I was wrong, what then? Suppose *Honck v. Muller* (6) was wrongly decided, how does it bear upon this case? Not in the least. Nor indeed does *Hoare v. Rennie* (5), which, in my opinion, was decided upon the considerations which I have mentioned, and which I think should be supported.

LORD FITZGERALD.—I concur.

Appeal dismissed.

Solicitors: *W. W. Wynne & Son*, for *Simpson & North*, Liverpool; *Clements*.

[Reported by C. E. MALDEN, Esq., Barrister-at-Law.]

Re GERMAN DATE COFFEE CO., LTD.

[COURT OF APPEAL (Sir George Jessel, M.R., Baggallay and Lindley, L.JJ.), February 24, 1882]

[Reported 20 Ch.D. 169; 51 L.J.Ch. 564; 46 L.T. 327; 30 W.R. 717]

Company—Winding-up—"Just and equitable"—Substratum of company gone—Petition within twelve months of incorporation.

Where it is proved that it is impossible for a company to carry out the objects of the company as stated in the memorandum of association, so that the whole substratum of the company is gone, the court will order, as being just and equitable, the company to be wound-up, even though the year in which it has to commence its business has not expired.

Company—Memorandum of association—General words—Construction—Ancillary to main object of company.

Where there are general words in the memorandum of association of a company, those words must be read, not widely, but as being ancillary to the main object of the company as stated in the memorandum.

Per BAGGALLAY, L.J.: Care must be taken to construe general words in a memorandum of association so as not to make them a trap for unwary people. General words, construed literally, may mean anything under the sun, but they must be taken in connection with that shown by the context to be the dominant or main object or objects of the company.

Notes. Considered: *Re Bristol Joint Stock Bank* (1890), 44 Ch.D. 703; *Pedler v. Road Block Gold Mines of India*, [1905] 2 Ch. 427. Explained and Distinguished: *Re Kitson & Co.*, [1946] 1 All E.R. 435. Considered: *Re Eastern Telegraph Co.*, [1947] 2 All E.R. 104. Referred to: *Re International Cable Co.* (1890), 2 Meg. 183; *Re Coolgardie Consolidated Gold Mines* (1897), 76 L.T. 269; *Stephens v. Mysore Reefs (Kangundy) Mining Co.*, [1902] 1 Ch. 745; *Butler v. Northern Territories Mines of Australia* (1906), 96 L.T. 41; *Re Anglo Cuban Oil, Bitumen and Asphalt Co.*, [1917] 1 Ch. 477; *Cotman v. Brougham*, [1918-19] All E.R. Rep. 265.

As to the contents of a memorandum of association and the grounds for winding-up a company as being just and equitable, see 6 HALSBURY'S LAWS (3rd Edn.) 116, 117, 531-535; and for cases see 9 DIGEST (Repl.) 80-88 and 10 DIGEST (Repl.) 856 et seq. For the Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 452.

Cases referred to:

(1) *Baring v. Dix* (1786), 1 Cox, Eq. Cas. 213; 29 E.R. 1134; 36 Digest (Repl.) 617, 1773.

- A (2) *Re Suburban Hotel Co.* (1867), 2 Ch. App. 737; 36 L.J.Ch. 710; 17 L.T. 22; 15 W.R. 1096, L.J.J.; 10 Digest (Repl.) 856, 5639.

Also referred to in argument :

Re Haven Gold Mining Co. (1882), 20 Ch.D. 151; 51 L.J.Ch. 242; 46 L.T. 322; 30 W.R. 389, C.A.; 10 Digest (Repl.) 858, 5647.

- B *Re Langham Skating Rink Co.* (1877), 5 Ch.D. 669; 46 L.J.Ch. 345; 36 L.T. 605, C.A.; 10 Digest (Repl.) 884, 5861.

Appeal by the German Date Coffee Co., Ltd., from a decision of KAY, J., ordering that the company should be wound-up.

Ince, Q.C., and *H. B. Buckley* for the company.

Romer, Q.C., and *A. Beddall* for the petitioners were not called on to argue.

- C *Freeman* for shareholders opposing the petition.

Whitehorn, Q.C., and *C. Tennant* for shareholders supporting the petition.

- SIR GEORGE JESSEL, M.R.**—This company, in my opinion, was formed, as the directors stated in their prospectus, “for the purpose of purchasing and working Henley’s German patent at Frankfort, to manufacture a partial substitute for coffee from the date fruit.” Of course, I do not use the prospectus for the purpose of interpreting the memorandum of association; I only use it to show that my construction is probably correct, because it is the construction adopted by the chairman and directors of the company after the incorporation of the company and before they issued the prospectus inviting the public to come in. The company is stated to be registered for several objects. The first object is to acquire a German patent granted to one Henley for manufacturing from dates a substitute for coffee. The second object is to make and use the said invention or any improvement. The second object only extends to any improvement or modification of the said invention. The third object is to adopt and carry out an agreement dated Feb. 16, 1881. This is an agreement for the sale of the German patent. The fourth object is to manufacture and sell the preparations which are the subject of the said invention. That is pure tautology. Nobody has been able to suggest that there is anything there which is not included in cl. 1 and 2. The fifth object is to grant licences. The sixth is to apply for and obtain patents for improvements or extensions of the said invention, and so on. The seventh is to acquire and purchase, or otherwise to use, exercise, and vend any other inventions for the above-mentioned or cognate purpose. All those are merely ancillary provisions. Then G there is the eighth object, which I read to be this, to import all descriptions of produce in connection with the above-mentioned purpose, or otherwise, for the purposes of the company. It never can mean to import and export food produce generally. That would be making the company a company for an entirely new and distinct purpose. But whether it is or is not the correct meaning, that object is merely ancillary. There are other provisions which do not apply to the subject-matter, although the twelfth is certainly an independent purpose.

- H That being so, it appears to me that this memorandum, when fairly read, and notwithstanding the rather loose use of general words, is simply to buy this patent, and to work it, either with or without improvements. That is the substance of the whole thing. I have no reason to doubt that the framers of the memorandum and articles believed that they would obtain the German patent. They were a little too sanguine, for they said, “for which a patent has or will be granted by the empire of Germany.” But they cannot complain, if, like those of other prophets, their prophecies are sometimes not verified by the result. It turned out that the German empire would not grant the patent. When that happened, what ought to have taken place? The answer would be: “The company cannot carry on business, and must be wound-up”; and that is exactly what KAY, J., ordered.

I There is an interim matter which ought not to be forgotten. A large number—in fact the majority—of the applicants for shares had their names taken off on the ground of deception. They understood from the prospectus that there was a patent

when there was not. The number of shareholders left is very small, the holders of something like 13,000 shares in all—a very different company from what was proposed. It turns out that the company have done this quite bona fide, in anticipation of the granting of the German patent. They have established in Germany a factory for the manufacture of this substance called date coffee, and they say they have sold a good deal of it, and are doing a prosperous trade. They have also entered into an agreement with an English company called the “Date Coffee Co.,” by which that company has agreed not to compete with this company in Germany. A B

That being so, it seems to me, as the learned judge of the court below said, that the whole substratum of the company is gone. Its business was not to make a substitute for coffee from dates, but to work a German patented invention in Germany, to work it under the monopoly granted by the German government to the patentee, and not to enter into any such business generally. Therefore, the shareholders have a right to say—and the minority of the shareholders have a right to say: “We did not enter into partnership on these terms.” It is exactly like *Baring v. Dix* (1). It was a general partnership, not to make a substitute for coffee from dates, but to work a particular patent; and as that particular patent does not exist, and cannot now exist, they are entitled to say the company ought to be wound-up. It appears to me the learned judge in the court below has arrived at the right conclusion, and that this appeal ought to be dismissed. If the full effect of the general words were allowed, the company might carry on any business whatever. C D

BAGGALLAY, L.J.—I am of the same opinion. It appears to me that the principle involved in the decision in *Re Suburban Hotel Co.* (2) by LORD CAIRNS amounts to this, that, if you have proof of the impossibility of carrying on the business contemplated by the company at the time of its formation, that is a sufficient ground for winding-up the company. That gives rise in the present case to the question whether there was an impossibility in carrying out the objects of the company at the time the company was formed. I cannot entertain any doubt, having regard to the memorandum of association—and the view I take from a consideration of the memorandum is verified by the surrounding circumstances—that the real contemplated object was to carry out the manufacture of German date coffee to be manufactured from dates in Germany under a patent that was actually granted or was about to be granted. The contemplation of all the parties was that the granting of the letters patent in Germany for the working of this invention was the contemplated object of the company. E F G

No doubt in this case, and in many other cases, you have a variety of general words added, which, if they were to be construed by themselves, would give rise to giving power to carry on almost any business which might possibly be suggested. That has been guarded within certain limits, and those limits are, that the other objects must be regarded as ancillary to the purpose of the scheme for which the company was formed. It appears to me, from the memorandum of association, that the purpose of the company was the manufacturing of this coffee by virtue of a patent already obtained or to be obtained, and also any improvement that might be made by the patentee, or the company themselves, in connection with that particular patent. Is there an utter impossibility in carrying on the business of the company? It appears from the evidence that there is. There is this very strong evidence that the actual obtaining of these letters patent was contemplated by all the parties who took shares—that the holders of more than one quarter of the shares of the company, of 27,000 shares, directly they found it was not true that the patent had been already obtained (although possibly at that period it was not clear it might not be obtained) retired from the company. It appears to me, beyond all question, that there is an impossibility in carrying on the business of the company, and I think that the order appealed from is quite correct. I feel bound to add that I entirely agree with the learned judge in his enunciation of the law applicable to the case, and his criticisms. H I

A **LINDLEY, L.J.**—I am of the same opinion. The first question we have to consider is: What is the fair construction of the memorandum of association? It is required by the Companies Act, 1862, that the memorandum shall state what the objects of the company are [see now Companies Act, 1948, s. 2 (1) (c)]. In construing this memorandum of association, or any other memorandum of association in which there are general words, care must be taken to construe those general words so as not to make them a trap for unwary people. General words, construed literally, may mean anything under the sun, but they must be taken in connection with that shown by the context to be the dominant or main object or objects of the company. It will not do, under general words, to turn a company for manufacturing one thing into a company for importing something else, however general the words are. Taking that as the governing principle, it appears to me to be plain, beyond all reasonable dispute, that the real object of this company, which is called "The German Date Coffee Co., Ltd.," was to manufacture a substitute for coffee in Germany under a patent which is valid according to German law. All the rest is subordinate to that main object, and that is what the people subscribe their money for, although the words are general. I attach great importance to an observation made by counsel for the company as to the circumstance that this petition was presented less than a year after the formation of the company. Therefore, we ought to be careful in considering what ought to be done under those circumstances, because the Act of Parliament gives the company a year to see whether it can get to work or not. The language of s. 79 (2) of the Companies Act, 1862, is that a company may be wound-up by the court "whenever the company does not commence its business within a year from its incorporation, or suspends its business for the space of a whole year" [see now Companies Act, 1948, s. 222 (c)]. That, I understand, is to give the company time. Supposing that there was no evidence which was tolerably conclusive to show that the company had failed within a year, the company would be entitled by statute to a year. The shareholders would be entitled to it. But where we have to deal with a case in which it is apparent, within a year, that the whole thing is abortive—that the company cannot acquire that which it was intended to acquire, and cannot carry out the object for which it was formed—the Act of Parliament does not require you to wait a year, and the case is then brought fairly within the words of the fifth paragraph of the same subsection: "whenever the court is of opinion that it is just and equitable that the company should be wound-up" [s. 222 (f) of the Act of 1948]. I proceed now to the next head—whether the petition, having been presented within the year, the evidence shows that the objects for which the company was formed cannot be attained. To my mind, the evidence is overwhelming. The company have tried to get this patent and have failed, and the only point which appears to me to require any further investigation is that there is even now an application to the government for a patent. I have looked at that a little closely, and my opinion is there is nothing in it at all. It appears to me, therefore, that the judgment appealed from is perfectly correct, that the facts warrant the judgment pronounced, and that the appeal ought to be dismissed with costs.

Appeal dismissed.

Solicitors: *John Tucker; Longcroft & Myers; Richard Reece; Nye & Greenwood.*

[*Reported by FRANK EVANS, ESQ., Barrister-at-Law.*]

GANDY v. GANDY

[COURT OF APPEAL (Sir George Jessel, M.R., Cotton and Lindley, L.JJ.), April 18, 1882]

[Reported 7 P.D. 168; 51 L.J.P. 41; 46 L.T. 607; 30 W.R. 673]

Judicial Separation—Permanent alimony—Deed of separation—Power to vary sum provided by deed.

The husband's adultery with one K. was condoned by his wife, but, differences between them having subsequently arisen, the parties separated, each party by the separation deed covenanting not to take any steps to compel the other party to resume cohabitation and that neither party would molest or interfere with the other, and the husband covenanted to pay for the wife's benefit an annuity of £252. The husband afterwards renewed his adulterous connection with K., and on the ground of this adultery the wife obtained a decree for judicial separation. On an application by the wife for an inquiry as to the husband's means with a view to obtaining an order for the payment of a larger sum by way of permanent alimony,

Held: in the case of a judicial separation the court had no power to set aside or vary a separation deed, which, therefore, remained binding on the parties, and in the present case, the husband's conduct not being such as to disentitle him from relying on the deed, the court could not order the payment of a larger sum by way of permanent alimony than that provided by the deed.

Notes. This case was criticised—rather strongly by some of the Law Lords—in *Hyman v. Hyman*, [1929] All E.R.Rep. 245, where it was held that a wife could not by her covenant in a deed of separation preclude the court from exercising its jurisdiction to make provision for her on the dissolution of her marriage, but, as was pointed out in that case, the two cases are distinguishable, *Hyman v. Hyman* being a case of divorce and *Gandy v. Gandy* being one of judicial separation.

Applied: *Rose v. Rose* (1883), ante p. 194. Distinguished: *Wood v. Wood* (1887), 57 L.J.Ch. 1; *Wilkinson v. Wilkinson* (1893), 69 L.T. 459. Considered and Explained: *Bishop v. Bishop*, *Judkins v. Judkins*, [1897] P. 138. Criticised: *Hyman v. Hyman*, [1929] All E.R.Rep. 245. Considered: *Lambert v. Lambert*, [1936] 3 All E.R. 20. Referred to: *Fearon v. Aylesford* (1884) post; *Tress v. Tress* (1887), 12 P.D. 128; *Kunski v. Kunski and Josephs* (1907), 23 T.L.R. 615; *Thompson v. Thompson*, [1916] P. 165; *Williams v. Williams*, [1921] P. 131; *Tulip v. Tulip*, [1951] 2 All E.R. 91.

As to permanent alimony, see 12 HALSBURY'S LAWS (3rd Edn.) 427-430; and for cases see 27 DIGEST (Repl.) 602 et seq. For the Matrimonial Causes Act, 1950, see 29 HALSBURY'S STATUTES (2nd Edn.) 388.

Cases referred to:

- (1) *Besant v. Wood* (1879), 12 Ch.D. 605; 40 L.T. 445; 23 Sol. Jo. 443; 27 Digest (Repl.) 236, 1894.
- (2) *Morrall v. Morall* (1881), post; 6 P.D. 98; 50 L.J.P. 62; 47 L.T. 50; 29 W.R. 897; 27 Digest (Repl.) 615, 5756.

Also referred to in argument:

- Evans v. Carrington* (1860), 2 De G.F. & J. 481; 30 L.J.Ch. 364; 4 L.T. 65; 25 J.P. 195; 7 Jur.N.S. 197; 45 E.R. 707, L.C.; 27 Digest (Repl.) 222, 1774.
- Jee v. Thurlow* (1824), 2 B. & C. 547; 4 Dow. & Ry.K.B. 11; 2 L.J.O.S.K.B. 81; 107 E.R. 487; 27 Digest (Repl.) 220, 1753.
- Williams v. Baily* (1866), L.R. 2 Eq. 731; 27 Digest (Repl.) 377, 3109.
- Kendall v. Webster* (1862), 1 H. & C. 440; 31 L.J.Ex. 492; 158 E.R. 957; 27 Digest (Repl.) 223, 1783.

A *Goslin v. Clark* (1862), 12 C.B.N.S. 681; 31 L.J.C.P. 330; 6 L.T. 824; 9 Jur.N.S. 520; 142 E.R. 1310; 27 Digest (Repl.) 229, 1836.

Appeal by the husband, Maurice Gandy, from an order made by SIR JAMES HANNEN, P., in a suit for judicial separation directing that the husband's means should be ascertained for the purpose of fixing the permanent alimony to which the wife, Elizabeth Gandy, claimed to be entitled.

B The wife and the husband were married at Liverpool on Nov. 11, 1854. There were five children of the marriage, three of whom, a son and two daughters, were under age at the date of the filing of the petition. Some time before the year 1879 the husband committed adultery with one Anne Kelly. The wife discovered the adultery, and consulted a solicitor as to taking proceedings for a divorce or judicial separation, but ultimately condoned the adultery and lived with the husband for some time. Differences, however, arose between them, and the parties separated.

C By a deed of separation, dated June 26, 1879, and made between the husband, of the first part, the wife, of the second part, and two trustees, of the third part, after reciting that unhappy differences had arisen and that the husband and wife had agreed to live separately from each other for the future and to enter into the covenants therein as contained, the husband covenanted with the trustees that his wife might at all times thereafter live separate from him, freed from his control and authority, and that he would not compel her to live with him or take any steps for that purpose, and would not in anywise molest or interfere with her, and, further, that any real and personal property to which the wife should become entitled should be held by her for her separate use as if the husband were dead.

D The husband also covenanted during the continuance of the deed, and if the wife should survive him, then during her life (subject to the due performance of the covenants therein contained), to pay to the trustees for the use of the wife and her daughters other than the two youngest daughters the annual sum of £252 by monthly payments of £21 in advance. It was further provided that he would pay to the trustees all the expenses connected with the maintenance and education of the two youngest daughters, provided that the trustees should permit the said daughters to go to such school as the husband should direct, and that the wife should not be entitled to the custody of those children, but that they should live at such reasonable and proper place or places as the husband should direct, and should be maintained and educated at his expense, the wife having all reasonable access to and intercourse with them. The husband was also to have the custody and control of the son. The trustees covenanted to indemnify the husband from his wife's debts and liabilities or those of her daughters (except the expenses connected with the maintenance and education of the two youngest daughters) or otherwise from all annoyance or molestation on the part of the wife or her daughters, and also that the wife, or any person on her behalf, should not at any time thereafter commence or prosecute any suit or other proceeding for compelling the husband to allow her any support, maintenance, or alimony, except as aforesaid, or to cohabit or live with her.

E After the execution of this deed the husband again committed adultery with Anne Kelly, and in December, 1880, the wife filed a petition for a judicial separation, on the ground of the adultery committed after the execution of the deed. On July 30, 1881, the case was tried before SIR JAMES HANNEN, P., without a jury, and his Lordship found that the adultery had been committed, decreed a judicial separation, and ordered that the wife should have the custody of the youngest children. The husband made no default in payment of the sums covenanted to be paid by the separation deed. It was admitted that at the date of the decree the husband was in possession of a much larger income than at the date of the separation deed. After the trial the wife applied for an order that the husband's means should be ascertained by the registrar with a view to fixing the permanent alimony to which she would be entitled. The registrar refused to inquire into the husband's means, and ordered a sum for permanent alimony equal to the annual sum which

the husband had covenanted to pay. The wife took out a summons in chambers A to rescind the registrar's order. The summons was heard by the President on Dec. 20, 1881, when he made the order from which the husband appealed.

W. F. Robinson, Q.C., and C. A. Middleton for the husband.

Inderwick, Q.C., and T. C. Tatham for the wife.

SIR GEORGE JESSEL, M.R.—This case raises a point which is at once novel B and important. There was a separation deed entered into between the husband and wife after the husband had committed adultery to the knowledge of the wife, and had thereby caused quarrels which led to acts of legal cruelty by the husband towards the wife. The origin of the separation was the adultery of the husband and by the separation deed the husband, not then having made so large a fortune C as he afterwards made, agreed, after making provision for the maintenance of the children, to allow his wife £252 a year, while she agreed not to commence or prosecute any suit or other proceeding for compelling her husband to allow her any support, maintenance, or alimony, except as aforesaid, or to cohabit or live with her.

At a subsequent period the husband renewed his intercourse with the woman with whom he had previously had intercourse, and the wife instituted a suit for D judicial separation and obtained a decree. She was entitled to institute this suit, because, as she said, she was deprived by the deed of the custody of her two younger daughters, who were to be maintained by the husband and kept at school, and she claimed the right to their custody and succeeded in obtaining it. Probably, considering the two younger children were girls, and that the mother was free E from blame, it would have been impossible to interfere so as to prevent her from commencing and continuing her suit to a successful conclusion, having regard to her rights with respect to those children, and having regard to the benefit of the children themselves. But the husband remained liable under the deed, and is still liable to the maintenance of those younger children.

There is another motive, which, to my mind, is very plain, for the institution of these proceedings. It appears that the husband was the author of an invention, F which turned out to be very successful, and by which he made a very considerable fortune. It appears to me obvious that the fact of this accession of fortune was also an inducement to the institution of this suit for judicial separation on the part of the wife, and, after arrangements had been made as to the custody and maintenance of the children, an application was made for further alimony on the part of the wife, which application was granted in substance, though not in form, by the G order appealed from. I say "in substance," because the case was argued merely on the question whether the court should be put in possession of the facts as regards the husband's fortune before coming to a conclusion, but it was argued on the assumption, which, of course, was well known to all parties to be the fact, that the husband's fortune had become considerably larger than it was before, and that, H if the wife succeeded in the application as to the means of the husband, she would succeed in the application for an increase of alimony. On that footing the learned judge of the court below decided that, by reason of the subsequent adultery of the husband, the wife was entitled to obtain a larger sum in the shape of alimony than the £252 allotted to her by the deed.

The question is whether that was a right exercise of the discretion on the part of the learned judge of the court below, having regard to the facts I have mentioned. I The first point to be considered in this matter is that the contract made by the deed of separation cannot be affected by the subsequent adultery of the husband. He is liable under the covenant whether he commits adultery or not, and, in fact, he would be liable under the covenant even if the wife had committed adultery. That is settled law. The legislature has not thought fit, in the case of judicial separation, to give the same powers to the court that it has given in the case of dissolution of marriage. In the case of dissolution of marriage the court has had conferred upon it the right to vary, not only post-nuptial, but ante-nuptial settle-

A ments, and, therefore, to deal with them in any way which it may be thought just and expedient to do. But in the case of judicial separation, there being no such power, the deed remains binding. The wife is entitled to the annuity secured her by the deed; the husband is liable to pay the annuity. It is impossible, therefore, for the court to allot such alimony as it may think just, because, in the case of its thinking that the amount of alimony should be less than the annuity secured by the deed, it has no power of setting aside the deed, and no power to stop an action brought by the trustees upon the covenant in the deed.

B It is, therefore, a case where the ordinary powers of the court cannot be exercised except in one direction, namely, by increasing the amount of alimony. That being so, we must consider whether the contract can be interfered with by the court in the exercise of a discretion except when one of the parties to the contract has so acted as to disentitle him to rely upon the contract at all. I am not saying there may not be such a case; on the contrary I can quite conceive such a case. But unless you come to that, why should the court interfere with the contract at all? I see the learned judge put it upon the ground of public policy. I have explained more than once—and especially in *Besant v. Wood* (1), that there is no reason more dangerous to give than, and no reason on which such difference of opinion exists as, that of public policy. He has said:

“If you do not allow the wife to ask for increased alimony in such a case as this, you allow the husband to commit adultery with impunity.”

I am by no means prepared to say that is right. It is not impunity simply because he is not obliged to pay more money. I do not consider that is the only punishment for adultery, if the word “punishment” should be used in connection with it. No doubt he may be, to some extent, relieved from that liability; but this is a contract by which he is compelled to pay an amount having regard to his then state of fortune, and that may be much larger than it afterwards becomes, for his fortune may diminish.

F It does appear to me a very strong thing to say that, by his committing an act which does not affect the wife, either directly or indirectly, her rights to participate in his fortune should be altered. In the present case, how is the position of the wife affected at all? She was separated *de facto* et *de jure* before the institution of the suit. Her maintenance was the same whether her husband did or did not live with another woman. Her rights, in every respect, remained unaltered. It might be said, no doubt, that, in one sense, her position was affected, inasmuch as it was less probable that he would return to cohabitation. But people who execute deeds of separation of this kind are not presumed to assume that the return to cohabitation is very probable. It does not appear to me, looking at what occurred before the separation, considering the age and respective positions of the parties, and considering what the husband has done since, that you can say he is in such a position as to have forfeited all his rights, leaving him subject to all the liabilities under the deed. It seems to me that, having regard to the relative positions of the husband and wife, there has not been such misconduct on the part of the husband so affecting the position of the wife as to entitle her to repudiate the contract she entered into. Therefore, the contract is still binding, and the appeal must be allowed.

I **COTTON, L.J.**—In this case there has been an application by the wife under which she has obtained a reference to ascertain what is the income of her husband, for the purpose, avowedly, of obtaining maintenance otherwise than under the deed of separation.

I do not intend to give any opinion whether a court of equity would, under the circumstances, have enforced this covenant against the wife, because it appears to me not to be necessary to decide it, though I am far from saying that a court of equity would not, in former days, have interfered by injunction to restrain such an application by the wife as this. But the learned judge seems to have decided

the matter on principles that would lead to the conclusion that the deed was bad altogether at law (which it is not), because, he said, this deed must be read subject to an implied condition that it should be operative so long as the parties should live chastely, and that to hold that the husband was right would be to say that this deed contemplated and allowed adultery on his part. I cannot agree with such a conclusion. The question has been whether, under the circumstances, the misconduct of the husband is such misconduct towards the wife as, having regard to the circumstances known to her at the time the deed was entered into, entitles her to say that this covenant is not to be regarded as an obstacle in the way of the application for alimony. Whether you are to take it that the application is made under the statute to give her such allowance as is just, or independently of the statute, the question is the same.

In my opinion, unless the conduct of the husband has been such since the deed as entirely to prevent him from using the deed in answer to the application of the wife, it must be taken into account, whichever way you look on it, in ascertaining—even if the application were not restrained by a court of equity—what allowance is just to be made. Here, however, the deed did not contemplate or provide for future adultery, but the conduct of the husband towards the wife is of the same character and nature as that of which she was aware when she entered into the deed. It is not suggested that there was any misrepresentation to her which would induce her to take this £252 as an allowance. It is said, and it seems to me to have some bearing on the case, that she has two children with her whom she had not before. But that is not so. The husband still remains liable, by the covenant, to provide for the two younger children, and they are still left at the school pointed out by him. The wife is only to have them during the holidays, leaving her husband still liable for their maintenance and making due provision for them.

In my opinion, the conduct of the husband since the deed is not such as, having regard to what was known to the wife at the time she entered into the deed, to disentitle him from relying on this deed. I put it that way, because I quite agree with the Master of the Rolls that we ought not to say—and I do not entertain the opinion—that there can be no misconduct on the part of the husband such as would disentitle him to set up a deed of separation of this kind when the wife is making an application for increased allowance. *Morrall v. Morrall* (2), one of the cases referred to by the learned judge as leading to the conclusion at which he arrived, is an instance. There there was a deed of separation, with a provision as to what maintenance the wife was to have. She subsequently ascertained that the husband was living in incestuous adultery, a fact hitherto unknown—that is to say, there had been no incestuous adultery at the time the deed of separation was entered into. That may well be such a circumstance, such gross future misconduct, misconduct of a nature so entirely different from that for which the parties were providing when they entered into the deed of separation, as to prevent the husband from in any way relying on the deed, or rendering it just that the wife should disregard the bargain she made for maintenance in this application to the court for allowance by way of alimony to be made to her. Here, in my opinion, the circumstances are not such as to entitle the wife to disregard her bargain.

LINDLEY, L.J.—The question we have to consider can be put somewhat in this shape—whether there has been any sufficient reason given for holding the wife discharged from her covenant not to sue for further alimony. *Prima facie*, she is bound by that. She is bound by it in all the courts at law, in the Divorce Court, and in this court, whatever difficulty there may be about specific performance or injunction. It is a perfectly good covenant. The order appealed from does not give effect to that covenant, but sets it aside, and the question is whether, under the circumstances, that is right.

The statutory power of dealing with this question of alimony is given by s. 17 of the Matrimonial Causes Act, 1857 [see now Matrimonial Causes Act, 1950, s. 20 (2)]. This being only a suit for judicial separation, the power of the Divorce

- A Court over the deed is much less than it would be if this were a suit for divorce. It is a much more restricted jurisdiction and power, and it appears to me that other cases, of which *Morrall v. Morrall* (2) is one, where the Divorce Court had power to deal, in cases of divorce, with separation deeds, and to set them aside, are rather misleading when they are sought to be applied in a case where the court has no such extensive jurisdiction. Section 17 enables the court, on the application
- B of the wife, to make any order for alimony which "shall be deemed just." The word "just" must be taken to mean "just under the circumstances in each particular case"; one of the most important circumstances in any case is the bargain between the parties, and, if the parties have agreed that a certain sum shall be sufficient, *prima facie* that is just, and *prima facie* the court cannot either exceed or diminish it. I doubt very much, too, whether in any circumstances the court
- C could, under the language of the section, say that to order less than £252 was just. I do not think the section goes that length. If that is so, the analogy between the statutory power of dealing with alimony under s. 17 and the statutory power of dealing with separation deeds on the dissolution of a marriage fails altogether. It is limited in one direction and not in another, if s. 17 is to be read in the way it appears to me to have been read by the learned President of the court below. It
- D strikes me that, on the whole, the case is reduced simply to this, whether there has been, on the part of the husband, no misconduct towards the wife except adultery with another woman, and no apparent reason whatever, now that we understand the position of the children, for this lady to seek judicial separation as a means of getting further alimony, and whether, under those circumstances, the mere fact of the adultery is sufficient to deprive the husband of the benefit of the stipulation as to alimony. I do not think it is, and, therefore, I agree with the other members
- E of the court that the order appealed from must be discharged.

Solicitors: *Gregory, Rowcliffes & Co.* for Stone, *Fletcher & Hull*, Liverpool; *W. & A. Ranken Ford*.

[*Reported by FRANK EVANS, Esq., Barrister-at-Law.*]

COLLINS v. STIMSON

[QUEEN'S BENCH DIVISION (Pollock, B., and Lopes, J.), May 22, 1888]

[Reported 11 Q.B.D. 142; 52 L.J.Q.B. 440; 48 L.T. 828;
47 J.P. 489; 31 W.R. 920]*Bankruptcy—Property available for distribution—Sale of land—Deposit—Forfeiture—Fraudulent payment by bankrupt—Right of trustee to follow money.*

A bankrupt, having fraudulently realised the greater part of his property available for distribution, opened an account with the proceeds at a bank. Having entered into a contract for the purchase of some houses under an assumed name, he paid a deposit to the defendant, an auctioneer, by means of a cheque drawn on the bank, but the purchase was not completed. The defendant and the vendor acted throughout bona fide and without knowledge of the bankruptcy or of the bankrupt's fraudulent conduct. On a claim by the trustee in bankruptcy to recover the deposit from the defendant,

Held: the trustee was not entitled to recover the deposit since it had become forfeited to the vendor on the non-completion of the contract.

Notes. Considered: *Howe v. Smith* (1884), ante p. 201; *Jennings' Trustee v. King*, [1952] 2 All E.R. 608. Referred to: *Bishop v. Taylor and Harris* (1891), 60 L.J.Q.B. 556; *Chillingworth Esche*, [1923] 1 Ch. 576; *Re Diplock's Estate*, *Diplock v. Wintle*, [1947] 1 All E.R. 522.

As to remedies under an uncompleted contract for sale of land, see 34 HALSBURY'S LAWS (3rd Edn.) 320 et seq.; and for cases see 40 DIGEST (Repl.) 235 et seq.

Cases referred to:

- (1) *Taylor v. Plumer* (1815), 3 M. & S. 562; 2 Rose, 457; 105 E.R. 721; 35 Digest (Repl.) 182, 6.
- (2) *Re Hallett's Estate*, *Knatchbull v. Hallett* (1880), 13 Ch.D. 696; sub nom. *Re Hallett's Estate*, *Knatchbull v. Hallett*, *Cotterell v. Hallett*, 49 L.J.Ch. 415; 42 L.T. 421; 28 W.R. 732, C.A.; 35 Digest (Repl.) 183, 10.

Also referred to in argument:

- Re Strachan, Ex parte Cooke* (1876), 4 Ch.D. 123; 46 L.J.Bey. 52; 35 L.T. 649; 41 J.P. 180; 25 W.R. 171, C.A.; 43 Digest 1018, 4588.
- Re Vanlohe, Ex parte Dewhurst* (1871), 7 Ch. App. 185; 41 L.J.Bey. 18; 25 L.T. 731; 20 W.R. 172, L.J.J.; 5 Digest (Repl.) 789, 6697.

Case Stated by order of HAWKINS, J., under the Common Law Procedure Act. 1860.

James Chisholm Wilson, of Swindon, was adjudicated a bankrupt by the county court of Wiltshire, on Sept. 20, 1882, and the plaintiff, Collins, was, on Oct. 4, 1882, appointed the trustee of his estate. On Aug. 26, 1882, Wilson, having secretly realised the greater part of his available property and effects, absconded from Swindon, taking with him a large sum of money in bank notes and gold, the proceeds of such realisation, and opened an account at the London and South Western Bank (Clapham Branch). While in London, Wilson, on Oct. 10, 1882, in the assumed name of John Watson, and purporting to act for and as the agent of Miss Mercy Tomkinson, but in fact (although unknown to the defendant, Stimson, an auctioneer, or the vendor) acting on his behalf, entered into an agreement in writing with the vendor for the purchase from him of house property at Wandsworth, Surrey, for £950. At the same time Wilson paid to the defendant £95, being a deposit of 10 per cent. on the purchase money, this sum being paid to the defendant as stakeholder under the agreement. This payment was made by Wilson by means of a cheque, signed in the name of John Watson, on the Clapham Branch of the London and South Western Bank, which was duly paid by them. Neither the defendant nor the vendor knew, nor had they or either of them any reasonable means of knowing, at the time of the agreement being entered into nor at the time

A of the payment of the deposit, that the person representing himself as John Watson was in fact one and the same as Wilson; nor that Watson was a bankrupt, nor that he had secretly realised any of his available property, nor that he had absconded with a sum of money in bank notes or gold, which were the proceeds of the secret realisation; nor that the sum of money so paid by John Watson was part of the same, nor that he was contracting on his own account and not on behalf of Miss Tomkinson. The defendant and the vendor acted throughout bona fide in the ordinary course of business. The purchase of the property not having been completed in accordance with the agreement, the vendor, on Jan. 2, 1883, commenced an action against Miss Tomkinson for specific performance of the agreement, which was discontinued on his learning the true facts. The plaintiff, as trustee in Wilson's bankruptcy, brought the present action to recover the deposit paid by C Wilson to the defendant, and the vendor interpleaded, claiming to be entitled to the deposit as the contract of sale had not been completed.

Lamaison for the plaintiff.

Temple Cooke for the vendor.

D **POLLOCK, B.**—I have come to the conclusion that the defendant is entitled to judgment. The facts of the case show that Wilson was an absconding debtor who had realised and taken away with him a large sum of money available for distribution among his creditors. It also appears that subsequently Wilson, while at large, was introduced to the defendant under the assumed name of Watson, and entered into an agreement with the vendor for the sale and purchase of certain houses of which the vendor was the owner, and who was carrying out the transaction through E the agency of the defendant, an auctioneer.

The law is well understood that the auctioneer on the completion of a sale, whether by auction or private contract, acts as agent for both parties, that is, represents the interests of both parties, and cannot part with the money paid to him without regard to the interests of both parties: *SUGDEN, VENDORS AND PURCHASERS*, (14th Edn.), pp. 42–43. In the present case, the actual purchaser, Watson or Wilson, who had paid to the defendant the 10 per cent. deposit money, could not carry out the contract, and the defendant, on being sued for this money, paid it F into court. The question is, whether the plaintiff, the trustee in bankruptcy of Wilson, can follow this specific sum of £88 5s. 10d. on the ground that it is money belonging to the estate of the bankrupt.

G The case was very clearly argued by counsel for the plaintiff, and, as far as his argument goes, I am quite with him. I think this case is within the principle of *Taylor v. Plumer* (1), and that the money is sufficiently earmarked so as to be followed by this court, acting on the common law doctrine. Under the more refined doctrine of equity, explained in *Re Hallett's Estate, Knatchbull v. Hallett* (2), I agree that the trustee could follow it. That doctrine goes to the extent of saying H that, if the contract had been completed, the fruit of the contract could have been followed. In that case, *SIR GEORGE JESSEL, M.R.*, said (13 Ch.D. at p. 711):

I "I have only to advert to one other point, and that is this—supposing, instead of being invested in the purchase of land or goods, the moneys were simply mixed with other moneys of the trustee, using the term again in its full sense as including every person in a fiduciary relation, does it make any difference according to the modern doctrine of equity? I say none. It would be very remarkable if it were to do so. Supposing the trust money was 1,000 sovereigns, and the trustee put them into a bag, and by mistake, or accident, or otherwise, dropped a sovereign of his own into the bag. Could anybody suppose that a judge in equity would find any difficulty in saying that the cestui que trust has a right to take 1,000 sovereigns out of that bag? I do not like to call it a charge of 1,000 sovereigns on the 1,001 sovereigns, but that is the effect of it. I have no doubt of it. It would make no difference if, instead of one sovereign, it was another 1,000 sovereigns; but if instead of putting it

into his bag, or after putting it into his bag, he carries the bag to his bankers, what then? According to law, the bankers are his debtors for the total amount; but if you lend the trust money to a third person, you can follow it. If, in the case supposed the trustee had lent the £1,000 to a man without security, you could follow the debt, and take it from the debtor. If he lent it on a promissory note, you could take the promissory note; or the bond if it were a bond."

This would apply to the present case if this money had been deposited in a clear and unmistakable manner with the bankrupt's bankers, or had been put on loan, or if the property had been a mere chattel, as a horse left with a livery stable keeper, and the plaintiff would be entitled to take it.

The bankrupt entered into this contract, one of the conditions of which was, that if he, the bankrupt, did not carry it out, he should forfeit the deposit money. Can anyone say that such forfeited money could be recalled, as though it were money merely paid into a banker's? I think not. This was a perfectly good contract, and it was an essential part of it that the deposit money should be forfeited under certain conditions; the bankrupt has so neglected or failed to complete. It is admitted on the part of the plaintiff that, had there been a good consideration on the part of the bankrupt, he could not have got the deposit money back, and it is argued on behalf of the defendant that his position could not be altered to his disadvantage. This condition of forfeiture is of the essence of the contract. This makes the case an exception to the general rule, and there is evidently no case which would enable us to show that money burdened with such a condition could be so recovered as is here sought to be done. I am of opinion that judgment must be for the defendant.

LOPES, J.—The question is whether the plaintiff, the trustee in bankruptcy, can recover this sum of money. It is perfectly clear that the money could be followed under ordinary circumstances. But this money placed on deposit was the price paid for the contract. In consequence of entering into this contract, the vendor was induced to alter his position, and incur certain expenses. I cannot distinguish this contract from the purchase of a horse or an ordinary chattel by a bankrupt, in which case the purchase money clearly could not be followed by his trustee in bankruptcy. I think that the defendant is entitled to keep this money.

Judgment for the defendant.

Solicitors: *Crafter & Burton; J. Davis Peard.*

[*Reported by W. P. EVERSLEY, Esq., Barrister-at-Law.*]

A

SAYERS v. COLLYER

[COURT OF APPEAL (Baggallay, Bowen and Fry, L.JJ.), November 6, 8, 1884]

[Reported 28 Ch.D. 103; 54 L.J.Ch. 1; 51 L.T. 723; 49 J.P. 244;
33 W.R. 91; 1 T.L.R. 45]

B

Sale of Land—Restrictive covenant—Building estate—Land sold subject to covenant—Breach—Defence—Alteration of character of neighbourhood—Acquiescence by plaintiff.

C

A building estate was laid out in lots, which were sold to different purchasers, each of whom covenanted with the vendor and with the owners of the other lots not to build a shop on his land, or to use his house as a shop, or to carry on any trade therein. The plaintiff, purchaser of one of the lots, who occupied his house as a private residence, brought an action against the defendant, purchaser of another lot, to restrain him from using his house as a beershop with an off-licence. The defendant had, to the knowledge of the plaintiff, so used his house for three years before the action was commenced, and the plaintiff had for some time bought beer from his shop. In an action for an injunction to restrain the defendant from using his house as a beer shop, evidence was given that several other houses built on other lots had for some time been used as shops, and that many of the houses adjoining the plaintiff's house were occupied, not by a single tenant, but each by two families at weekly rents.

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Held: the mere alteration of the character of the neighbourhood was not sufficient ground of itself to refuse the plaintiff relief as there was no evidence that the alteration was caused by his conduct, but there was such an amount of acquiescence on the part of the plaintiff as to bar him from enforcing his rights.

Duke of Bedford v. British Museum Trustees (1) (1822), 2 My. & K. 552, distinguished.

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Notes. The Chancery Amendment Act, 1858 (Lord Cairns' Act), remained in force notwithstanding the passing of the Supreme Court of Judicature Act, 1873. Section 2 of the 1858 Act gave the court of Chancery power, in all cases in which it had jurisdiction to entertain an application for an injunction against a breach of any covenant, contract or agreement, or against the commission or continuance of any wrongful act or an application for specific performance, to award damages to the party injured, either in addition to or in substitution for an injunction or specific performance. This section was repealed by the Statute Law Revision and Civil Procedure Act, 1883, s. 3, Sched. (repealed), but by s. 5 of the 1883 Act the repeal did not affect the jurisdiction established by the repealed enactment. A similar saving was contained in s. 1 of the Statute Law Revision Act, 1898, which repealed the Statute Law Revision and Civil Procedure Act, 1883, s. 5. By the combined

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effect of the foregoing savings and of the Supreme Court of Judicature Act, 1873, s. 16 (repealed and replaced by the Supreme Court of Judicature (Consolidation) Act, 1925, s. 18), which vested the jurisdiction of the court of Chancery in the High Court, the jurisdiction conferred by the Chancery Amendment Act, 1858, s. 2, remains in force. Since the Judicature Acts, the High Court has power to award damages to a party who has been injured, either in addition to, or in substitution for an injunction. It is therefore no longer necessary in such a case to resort to s. 2 of the 1858 Act.

I

Distinguished: *Northumberland v. Bowman* (1887), 56 L.T. 773. Considered: *Meredith v. Wilson* (1893), 69 L.T. 336; *Knight v. Simmonds*, [1896] 2 Ch. 294; *Osborne v. Bradley*, [1900-3] All E.R.Rep. 541; *Re R.*, [1906] 1 Ch. 730; *Leeds Industrial Co-operative Society v. Slack*, [1924] All E.R.Rep. 259. Applied: *Coplovitch v. Williams* (1929), 73 Sol. Jo. 484. Referred to: *Dreyfus v. Peruvian Guano Co.* (1889), 42 Ch.D. 66; *Goddard v. Midland Railway* (1891), 8 T.L.R. 126; *Yates v. Kyffin-Taylor and Wark*, [1899] W.N. 145; *Alexander v. Mansions*

Proprietary (1900), 16 T.L.R. 431; *Cowper v. Laidler*, [1903] 2 Ch. 337; *Elliston v. Reacher* (1908), 77 L.J.Ch. 617; *Pulleyne v. France* (1912), 57 Sol. Jo. 173; *Sobey v. Sainsbury*, [1913] 2 Ch. 513; *Alliance Economic Investment Co. v. Berton*, [1923] All E.R.Rep. 539; *Kelly v. Battershell*, [1949] 2 All E.R. 830.

As to acquiescence as a ground for refusal to grant an injunction, see 21 HALSBURY'S LAWS (3rd Edn.) 360, 361. As to damages as additional or alternative relief, see *ibid.*, pp. 349, 350. For cases see 28 DIGEST (Repl.) 789 et seq.

Case referred to:

- (1) *Duke of Bedford v. British Museum Trustees* (1822), 2 My. & K. 552; 1 Coop. temp. Cott. 90, n.; 2 L.J.Ch. 129; 39 E.R. 1055, L.C.; 40 Digest (Repl.) 360, 2887.

Also referred to in argument:

Western v. MacDermott (1866), 2 Ch. App. 72; 36 L.J.Ch. 76; 15 L.T. 641; 31 J.P. 73; 15 W.R. 265, L.C.; 28 Digest (Repl.) 807, 558.

Werderman v. Société Générale D'Électricité (1881), 19 Ch.D. 246; 45 L.T. 514; 30 W.R. 33, C.A.; 9 Digest (Repl.) 681, 4494.

London, Chatham and Dover Rail. Co. v. Bull (1882), 47 L.T. 413; 28 Digest (Repl.) 800, 491.

Fullwood v. Fullwood (1878), 9 Ch.D. 176; 47 L.J.Ch. 459; 26 W.R. 435; sub nom. *Fulwood v. Fulwood*, 38 L.T. 380; 28 Digest (Repl.) 768, 214.

Lec v. Haley (1869), 5 Ch. App. 155; 39 L.J.Ch. 284; 22 L.T. 251; 34 J.P. 228; 18 W.R. 242, L.J.; 20 Digest (Repl.) 563, 2652.

German v. Chapman (1877), 7 Ch.D. 271; 47 L.J.Ch. 250; 37 L.T. 685; 42 J.P. 358; 26 W.R. 149, C.A.; 28 Digest (Repl.) 807, 553.

Kemp v. Sober (1851), 1 Sim.N.S. 517; 20 L.J.Ch. 602; 17 L.T.O.S. 117; 15 Jur. 458; 61 E.R. 200; affirmed (1852), 19 L.T.O.S. 308, L.C.; 40 Digest (Repl.) 352, 2835.

Roper v. Williams (1822), Turn. & R. 18; 37 E.R. 999, L.C.; 28 Digest (Repl.) 806, 550.

Lord Manners v. Johnson (1875), 1 Ch.D. 673; 45 L.J.Ch. 404; 40 J.P. 345; 24 W.R. 481; 28 Digest (Repl.) 825, 687.

Imperial Gas, Light & Coke Co. v. Broadbent (1859), 7 H.L.Cas. 600; 29 L.J.Ch. 377; 34 L.T.O.S. 1; 23 J.P. 675; 5 Jur.N.S. 1319; 11 E.R. 239, H.L.; 28 Digest (Repl.) 768, 211.

Barret v. Blaggrave (1800), 5 Ves. 555; 31 E.R. 735, L.C.; on appeal (1801), 6 Ves. 104, L.C.; 31 Digest (Repl.) 173, 3062.

Eastwood v. Lever (1863), 4 De G.J. & Sm. 114; 3 New Rep. 232; 33 L.J.Ch. 355; 9 L.T. 615; 28 J.P. 212; 12 W.R. 195; 46 E.R. 859, L.J.J.; 28 Digest (Repl.) 794, 430.

Duke of Leeds v. Earl of Amherst (1846), 2 Ph. 117; 16 L.J.Ch. 5; 10 Jur. 956; 41 E.R. 886, L.C.; 28 Digest (Repl.) 803, 516.

Gaskin v. Balls (1879), 13 Ch.D. 324; 28 W.R. 552, C.A.; 28 Digest (Repl.) 742, 31.

Peck v. Matthews (1867), L.R. 3 Eq. 515; 16 L.T. 199; 15 W.R. 689; 28 Digest (Repl.) 808, 563.

National Provincial Plate Glass Insurance Co. v. Prudential Assurance Co. (1877), 6 Ch.D. 757; 46 L.J.Ch. 871; 37 L.T. 91; 26 W.R. 26; 28 Digest (Repl.) 794, 433.

Earl Zetland v. Hislop (1882), 7 App. Cas. 427, H.L.; 31 Digest (Repl.) 172, 3061.

Tulk v. Moxyhay (1848), 2 Ph. 774; 1 H. & Tw. 105; 18 L.J.Ch. 83; 13 L.T.O.S. 21; 13 Jur. 89; 41 E.R. 1143, L.C.; 40 Digest (Repl.) 842, 2774.

Catt v. Tourle (1869), 4 Ch. App. 654; 38 L.J.Ch. 665; 21 L.T. 188; 33 J.P. 659; 17 W.R. 939, L.J.J.; 40 Digest (Repl.) 359, 2879.

Doherty v. Allman (1878), 3 App. Cas. 709; 39 L.T. 129; 26 W.R. 513, H.L.; 28 Digest (Repl.) 740, 14.

A **Appeal** from a decision of PEARSON, J., reported 24 Ch.D. 180, at the trial of an action for an injunction, damages, and costs for the breach of a restrictive covenant in conveyance of plots of land on a building estate.

At the beginning of the year 1874 the British Land Company purchased a considerable quantity of land at Leytonstone, in Essex, and, after selling part of it by auction in March, 1874, proceeded to divide the remainder into building plots, and
B dispose of the same by private sales to different persons, the conveyances being in each case taken subject, by reference, to certain stipulations appearing on the margin of a lithographed plan of the entire property, and affecting the different plots in such manner as was deemed necessary, the plots being for this purpose formed into a number of blocks or groups, according to their relative situations. One of these blocks, comprising plots Nos. 424 to 445 inclusive, was in this manner
C rendered subject, upon the sale of any part thereof, to the following stipulation, among others:

"Trades, etc., prohibited. No building shall be erected or used as a shop . . . nor shall any trade or manufacture be carried on or made upon any lot."

After one or two mesne assurances plot No. 440 became vested in the plaintiff
D Sayers, and plot No. 445, about 98 feet distant from No. 440, became vested, in April, 1879, in the defendant, whose immediate predecessor had bought it in April, 1878, direct from the company, the conveyance upon this sale containing the following clause:

"And whereas the premises were sold to the purchaser subject to the stipulations specified in sched. 2 which refer to the said lithographed plan, now, therefore, the vendors (as to so much of the land to which the said stipulations relate as remains vested in them) for themselves and their assigns, and the purchaser (as to the land hereby conveyed) for himself, his heirs, executors, administrators, and assigns, do respectively covenant and grant with and to each other, and as to the purchaser also with and to the owners or owner of any
F other land to which the benefit of the said stipulations is attached, and their, his, or her respective heirs or assigns, that the convenantors respectively, and their respective heirs and assigns, will henceforth observe, perform, and comply with the said stipulations so far as the same relate either to the rights or to the duties of the purchaser, his heirs or assigns, in respect of the land hereby conveyed, and that nothing shall ever be erected, fixed, placed, or done upon the
G land as and to which they respectively covenant in breach, or violation, or contrary to the fair meaning of the said stipulation, but this covenant is not to be held personally binding upon either the vendors, or the purchaser, or any other person, except in respect of breaches committed or continued during their, his, or her joint or sole seisin of or title to the land upon or in respect of which such breaches shall have been committed."

H The defendant's predecessor, during his ownership of plot No. 445, built upon it a house, which the defendant himself, upon his purchasing the plot, was the first person to occupy. This house was, from the first, built to all appearance as a public-house, and not as a private residence. It was in fact bought as such by the defendant, who at once, in May, 1879, proceeded to take out an off-licence, and from that time forward continued to sell beer accordingly. It was not disputed
I that the defendant was aware throughout of the existence of the above-mentioned restrictions upon the mode of user of the house; nor, on the other hand, was it disputed that the plaintiff was throughout also aware that beer was being sold by the defendant. It appeared, indeed, that, although the plaintiff Sayers, according to his own statement, very early remonstrated with the defendant's managers against the sale of beer, he nevertheless took no active steps to stop such sale, but was in fact contented for about nine months to purchase his own beer from the defendant, and made no real objection to the defendant's conduct until the beginning of 1882. His explanation of this delay was, that soon after his purchase of his

plot he mortgaged it and parted with the deeds, and that until the mortgage was paid off and the deeds returned to him, he had no accurate knowledge of his rights. A

The defendant relied on the acquiescence of the plaintiff Sayers and also urged that the character of the neighbourhood had altered, and that it could no longer be considered as purely or essentially residential. There was evidence that several other houses, built on other plots, one immediately opposite the plaintiff's house, had been for some time used as shops, and many of the houses adjoining the plaintiff's house were occupied, not each by a single tenant, but by two families at weekly rents. B

The action was commenced on Mar. 2, 1882, the British Land Co. being made co-plaintiffs with Sayers and the claim being for an injunction, damages and costs. PEARSON, J., at the trial, held that the character of the property had become so changed that the original purposes of the covenant had failed, and that it would therefore be inequitable to enforce specific performance of the covenant. The plaintiffs appealed. C

Everitt, Q.C., and E. Ford for the plaintiff.

Cozens-Hardy, Q.C., and Farwell, for the defendant, were not called upon.

BAGGALLAY, L.J., stated the facts of the case, and continued: A number of cases have been cited in the course of the argument, but they are of very little importance for the decision of this case, except as enunciating the principles on which the court ought to act, for each case must be determined according to its peculiar circumstances. The authorities establish the principle that there may be such an amount of acquiescence as will bar the right of a covenantee to enforce his covenants. I mean acquiescence as distinguished from delay, for a much shorter period is sufficient to bar the enforcement of rights in the case of acquiescence than in a case of mere delay. D E

The question here is whether, in the circumstances of the present case, there has been such an amount of acquiescence as is sufficient to preclude the plaintiff from enforcing his covenant. In my opinion, the evidence does show such an amount of acquiescence as to bar the plaintiff from enforcing his rights. The sale of beer by the defendant began in 1879, only a few doors from the house where the plaintiff lived, and went on till the commencement of the action, and during some part of that period the plaintiff himself bought beer at the defendant's house. We can hardly imagine a stronger case of acquiescence than this. It was not a public-house in the ordinary sense of the words. The defendant sold beer to be drunk off the premises; people bought it and took it away to their own houses. PEARSON, J., appears to have held that the case fell under the doctrine of *Duke of Bedford v. British Museum Trustees* (1), the character of the neighbourhood having been changed. But I do not take quite the same view of the case. Within certain limits, no doubt, that authority has an application to the present case, but I do not decide it upon that ground; I prefer to base my decision on the ground of acquiescence on the part of the plaintiff. F G H

PEARSON, J., also thought that in consequence of the change of condition of the neighbourhood he ought not to grant the injunction, but that the court had a discretion under Lord Cairns' Act to grant damages instead of an injunction, and being of opinion that the plaintiff had sustained no substantial damage, he dismissed the action altogether. Various comments have been addressed to us on Lord Cairns' Act, and it has been contended that it is not applicable to cases where the damages are nominal only. I cannot accede to that view. If it were so held, the result would follow that, if a plaintiff had sustained damage to the extent of £20, the Act would apply, but if he had sustained only a farthing damages it would not apply, and the plaintiff would be entitled to an injunction. This is surely inconsistent with the purposes of the Act. I

Our attention was called to the fact that Lord Cairns' Act has been repealed since the former hearing of this case, being included in the schedule to the Statute Law Revision and Civil Procedure Act, 1883, but that Act contains words preserving the

A jurisdiction of the court notwithstanding the repeal. By s. 5 it is enacted that any jurisdiction or principle or rule of law or equity established or confirmed, or right or privilege acquired, by or under any enactment repealed by the Act, shall not be affected by the repeal. It is not, however, necessary to have recourse to Lord Cairns' Act, for it is clear that the court now has power to give damages as alternative relief. Before Lord Cairns' Act was passed a plaintiff who wished to enforce
B a restrictive covenant had two remedies: he might come into a court of equity for an injunction to restrain an infringement of his right, or he might have recourse to a court of common law to obtain damages, and Lord Cairns' Act gave the courts of equity the power of giving a plaintiff damages by way of alternative relief; but since the Judicature Acts each division of the court has ample power, apart from Lord Cairns' Act, to give either an injunction or damages. However, the ground
C of my decision is, that there has been such an amount of acquiescence in the present case as to bar the plaintiff from enforcing his covenant. The appeal will therefore be dismissed.

BOWEN, L.J.—I agree that the true ground for deciding this case is not the mere fact of an alteration in the proprietary character of the neighbourhood. *Duke of Bedford v. British Museum Trustees* (1) must not be misunderstood or misapplied. It is not an authority that contractual obligations disappear as circumstances change, but that a person who is entitled to the benefit of a restrictive covenant may by his conduct or omission put himself in such an altered relation to the person bound by it as makes it manifestly unjust to insist on its enforcement. It was decided, I take it, on equitable grounds. In such a case there is an equity
E against the plaintiff which bars his relief. In the present case we do not decide that a mere alteration in the character of the neighbourhood would be sufficient, because there is no evidence that such alteration was caused by the plaintiff; but the true ground of our decision is, that the plaintiff's conduct amounts to acquiescence. He has no right to come here for an injunction after the way he has behaved towards the defendant.

PEARSON, J., dealt with the case under Lord Cairns' Act. He held that it was a case in which he ought to refuse an injunction, but that he had a right under that Act to grant damages instead, and, as he assessed the damages at one farthing, he dismissed the action altogether. Counsel for the plaintiff complained bitterly of this treatment of the case by the learned judge; they said that the court elected to treat the case as one of damages, and then gave no damages at all, and they contended that the Act did not apply to such a case as that. But it is obvious that the Act applies with double force to cases where only nominal damages could be given. Otherwise this absurd result would follow, that if a plaintiff is entitled to substantial damages the court could refuse him an injunction; but if he had no real cause of complaint, and the damages could not be assessed even by a peppercorn, he would have a right to an injunction. In other words, as his damages decreased to zero his
H right to an injunction would correspondingly increase. That is so absurd a proposition that I cannot believe that it was intended by the legislature.

I think, therefore, that **PEARSON, J.**, was right in treating the case as coming under Lord Cairns' Act. I doubted at first whether he ought not to have given nominal damages and no costs. But my doubt has been removed by the consideration that the plaintiff would not be entitled to 40s. damages for breach of covenant, or to a certificate for costs, unless he had suffered tangible damages, or unless he was justified in bringing his action to ask for a declaration of title or to try a right. But here the plaintiff has suffered no material damage, and he has no right to bring an action and ask for a declaration of title against the present defendant. If he had not behaved to the defendant as he did, there would have been no reason why he should not have had his right declared by the court. But the acquiescence which disentitles him from an injunction also precludes him from obtaining a declaration of title, and makes it a frivolous action. I think, therefore, **PEARSON, J.**, was right in dismissing the action.

FRY, L.J.—I agree in what has been said on the first question. I agree that the rule in *Duke of Bedford v. British Museum Trustees* (1) is not applicable to this case. It applies where an alteration takes place through the acts or permission of the plaintiff Sayers or those under whom he claims, so that his enforcing his right becomes unreasonable. But I do not think it applies to cases where the change which has taken place was beyond the control of the plaintiff. Therefore I think, although we have not heard the defendant on the point, that the learned judge was not right in applying the principle of that case to the present. A
B

But I agree that the action must be dismissed on the ground of the acquiescence of the plaintiff. Acquiescence may either be an entire bar to all relief, or it may be a ground for inducing the court to act under the powers of Lord Cairns' Act. Although I do not differ from what has been said by **BAGGALLAY, L.J.**, I am inclined to prefer the other ground, and think that this is a case in which the plaintiff's acquiescence would have induced me to give damages instead of an injunction. C

It was argued that Lord Cairns' Act is not applicable to cases where nominal damages only could be given, but only to cases where the damages are substantial. It would be astounding if, as **BOWEN, L.J.**, said, the effect of the Act were to be that the right to an injunction increased as the right to damages decreased, and that the right to an injunction became absolute when the damages were zero. In my opinion, the Act applies to cases where the damages are merely nominal, and I am clearly of opinion that acquiescence is one of those circumstances which the court may well take into consideration in deciding whether it should give damages or an injunction, and that an amount of acquiescence less than what would be a bar to all remedy may operate on the discretion of the court, and induce it to give damages instead of an injunction. Therefore, without differing from the other lords justices, I prefer to rest my decision on that ground. D
E

Appeal dismissed.

Solicitors: *Clapham & Fitch; Stokes, Saunders & Stokes.*

[Reported by **FRANK EVANS, ESQ.**, Barrister-at-Law.]

Re SOUTHAM. Ex Parte LAMB

[COURT OF APPEAL (Sir George Jessel, M.R., Baggallay and Lush, L.JJ.), December 1, 1881]

[Reported 19 Ch.D. 169; 51 L.J.Ch. 207; 45 L.T. 639; 30 W.R. 126]

Time—"Forthwith"—*Construction according to circumstances of case.*

An order of a county court was made on July 12, 1881. Notice of appeal was entered on the last available day, Friday, Aug. 5. By r. 144 of the Bankruptcy Rules, 1870, the appellants were required to send a copy "forthwith" to the registrar of the court appealed from under the appropriate rules. At least three hours elapsed between the time when the notice of appeal was entered on Friday and the last post on that day, but it was not until the following day, Saturday, that the appellants' solicitor posted a copy of the notice to their country agents. The agents received it on the Monday, and delivered it the same day to the registrar. If the copy of the notice had been posted on Friday, it would have been delivered to the registrar on the Saturday.

Held: the word "forthwith" must be construed according to the circumstances of each case; the question in the present case was whether the appellants had been guilty of unreasonable delay; and, as the delay had not been explained, it was unreasonable.

Notes. Applied: *Re Lyon, Ex parte Lyon* (1882), 45 L.T. 768. Considered: *Re Vitoria, Ex parte Spanish Corpn., Ltd.*, [1891-4] All E.R.Rep. 222; *Re Muscovitch and Muscovitch, Ex parte Muscovitch v. Muscovitch, Bankrupts v. Official Receiver*, [1939] 1 All E.R. 135. Referred to: *Re Jones, Ex parte Williams* (1882), 46 L.T. 237; *Re Barley*, [1923] 1 Ch. 177.

As to construction of expressions limiting time, see 37 HALSBURY'S LAWS (3rd Edn.) 102-104; as to appeals from county courts in bankruptcy matters, see 2 HALSBURY'S LAWS (3rd Edn.) 582-583; and for cases see 42 DIGEST 952-953.

Cases referred to in argument:

Re Sillence, Ex parte Sillence (1877), 7 Ch.D. 238; 47 L.J.Bey. 87; 37 L.T. 676; 26 W.R. 129; 4 Digest (Repl.) 577, 5128.

Re Green, Ex parte Donnithorne (1879), 40 L.T. 660; 27 W.R. 824; 4 Digest (Repl.) 577, 5129.

Thomas v. Nokes (1868), L.R. 6 Eq. 521; 16 W.R. 995; 42 Digest 952, 247.

R. v. Price, Ex parte Heard (1854), 8 Moo.P.C.C. 203; 14 E.R. 78, P.C.; 14 Digest (Repl.) 172, 1364.

Tennant v. Bell (1846), 9 Q.B. 684; 2 New Mag. Cas. 33; 16 L.J.M.C. 31; 8 L.T.O.S. 136; 10 Jur. 946; 10 J.P.Jo. 756; 115 E.R. 1437; 38 Digest (Repl.) 710, 1457.

Spenceley v. Robinson (1825), 3 B. & C. 658; 5 Dow. & Ry.K.B. 572; 2 Dow. & Ry.M.C. 551; 107 E.R. 877; 38 Digest (Repl.) 710, 1456.

Hyde v. Watts (1843), 12 M. & W. 254; 1 Dow. & L. 479; 13 L.J.Ex. 41; 2 L.T.O.S. 151; 152 E.R. 1193; 12 Digest (Repl.) 345, 2676.

Costar v. Hetherington (1859), 1 E. & E. 802; 28 L.J.M.C. 198; 33 L.T.O.S. 105; 23 J.P. 663; 5 Jur.N.S. 985; 7 W.R. 413; 8 Cox, C.C. 175; 120 E.R. 1111; 33 Digest (Repl.) 235, 654.

Re Wood (1872), 7 Ch. App. 302; 41 L.J.Bey. 21; 26 L.T. 113; 20 W.R. 403, L.JJ.; 4 Digest (Repl.) 60, 519.

Appeal by the trustees in bankruptcy of T. W. Southam from a decision of BACON, C.J., dismissing an appeal (on the ground that it was out of time) by the trustees from an order of Manchester County Court refusing an application by them that the respondents should deliver up certain property claimed as part of the bankrupt's property.

The order in bankruptcy was made by the judge of the Manchester County Court on July 12, 1881. The trustees in bankruptcy appealed to the Chief Judge. A

Rule 143 of the Bankruptcy Rules, 1870, provided :

"An appeal against a decision or order of . . . a judge of a county court shall be entered with the registrar of appeals within and not later than twenty-one days from the said decision or order, by leaving with him a copy of the appeal notice of motion." B

By r. 144 :

"Upon entering an appeal a copy of the appeal notice shall be sent forthwith by the appellant to the registrar of the court appealed from, who shall forthwith file the same." C

The copy of the notice of appeal was entered on Friday, Aug. 5, which was the last of the twenty-one days allowed, but a copy was not posted to the solicitors of the trustees in Manchester till the evening of Aug. 6. It reached them on Monday, Aug. 8, following, and was on the same day left with the registrar of the Manchester County Court. BACON, C.J., held that the copy notice was not sent to the registrar "forthwith," and that the appeal was out of time. The trustees appealed. D

Winslow, Q.C., and *E. Cooper Willis* for the trustees.
Smyly for the respondents.

SIR GEORGE JESSEL, M.R.—I am of opinion that the word "forthwith" must be construed according to the circumstances of each case. A covenant to insure a man's life forthwith does not mean that the insurance is to be effected in an instant. In the present case the question we have to decide is, whether the trustees have been guilty of an unreasonable delay in sending a copy of the notice of appeal to the county court registrar. The trustees did not choose to enter their appeal till the very last day allowed for the purpose. They knew that, as it was a country case, they must send a copy of the notice to the registrar in the country. The meaning of the rule is, that an appellant must enter the appeal in the country as well as in London, so that a respondent may search in the country without coming to London or instructing his London agent to search. We do not know at what time on Friday the appeal was entered, or what was the exact time when the trustees might have sent it off on that day. All we do know is, that the country solicitors of the trustees did not get the notice till Monday morning. There was some delay, therefore, and under all the circumstances, that delay not being explained, I am of opinion that the rule has not been complied with. E F G

BAGGALLAY, L.J.—I am of the same opinion, and for the reasons expressed by the Master of the Rolls.

LUSH, L.J.—I agree that the word "forthwith" must be construed according to circumstances. We have not been told why the copy of the notice of appeal was not sent into the country by Friday night's post. The appeal notice was not sent within a reasonable time. The trustees lost at least three hours from the time when the office of the registrar of appeals closed till the last post. I think the decision of the Chief Judge was right and should be affirmed. H

Appeal dismissed. I

Solicitors : *Pritchard, Englefield & Co.* for *Storer & Lloyd*, Manchester; *Phelps, Sidgwick & Biddle* for *Sale & Co.*, Manchester.

[Reported by FRANK EVANS, ESQ., Barrister-at-Law.]

A
BUCKINGHAM v. SURREY AND HANTS CANAL CO.

[QUEEN'S BENCH DIVISION (Grove and Mathew, JJ.), June 21, 1882]

[Reported 46 L.T. 885; 46 J.P. 774]

B *Master and Servant—Contract of service—Termination—Appointment as "engineer . . . at a salary of £500 per annum"—Yearly hiring—No express or implied stipulation as to notice.*

A hiring "at a salary of £—— per annum" is prima facie a hiring for a year certain, and cannot be determined by either party before the end of the year unless the agreement of hiring is subject to some stipulation, either express or implied by custom, enabling either party to determine the contract by notice.

C The plaintiff was employed as engineer to the defendants at a salary of £500 a year, and was dismissed at a three months' notice.

Held: the plaintiff was entitled to recover salary for the unexpired portion of the year.

D **Notes.** Considered: *De Stempel v. Dunkels*, [1938] 1 All E.R. 238. Referred to: *Cayme v. Allan, Jones & Co.* (1919), 35 T.L.R. 453; *Adams v. Union Cinemas, Ltd.*, [1939] 3 All E.R. 136; *Fisher v. Dick & Co.*, [1938] 4 All E.R. 467; *Jackson v. Hayes Candy & Co.*, [1938] 4 All E.R. 587; *Vernon v. Findlay*, [1938] 4 All E.R. 311.

E As to duration and termination of contract of service, see 25 HALSBURY'S LAWS (3rd Edn.) 480 et seq.; and for cases see 34 DIGEST (Repl.) 55 et seq.

Cases referred to in argument:

Fawcett v. Cash (1834), 5 B. & Ad. 904; 3 Nev. & M.K.B. 177; 2 Nev. & M.M.C. 114; 3 L.J.K.B. 113; 110 E.R. 1026; 34 Digest (Repl.) 61, 334.F *Parker v. Ibbetson* (1858), 4 C.B.N.S. 346; 27 L.J.C.P. 236; 31 L.T.O.S. 101; 22 J.P. 659; 4 Jur.N.S. 536; 6 W.R. 519; 140 E.R. 1118; 34 Digest (Repl.) 119, 810.*Down v. Pinto* (1854), 9 Exch. 327; 2 C.L.R. 547; 23 L.J.Ex. 103; 22 L.T.O.S. 247; 2 W.R. 202; 156 E.R. 139; 34 Digest (Repl.) 59, 316.*Fairman v. Oakford* (1860), 5 H. & N. 635; 29 L.J.Ex. 459; 157 E.R. 1334; 34 Digest (Repl.) 62, 350.G **Action** by the plaintiff to recover the sum of £125 for a quarter's salary as consulting engineer to the defendants, a canal company, from May 23, 1881, to Aug. 23, 1881.

At a meeting of the directors of the company held on Aug. 23, 1880, the plaintiff was appointed the engineer by resolution to the following effect:

H "Resolved that Mr. J. Buckingham be appointed engineer to the company at a salary of £500 per annum."

I This resolution was confirmed at a subsequent meeting of the directors. The plaintiff entered the employment of the defendants, and on Feb. 23, 1881, he received a three months' notice to determine the engagement on May 23, 1881, which he refused to accept, and continued after its expiration to tender his services to the company, which were rejected. Thereupon he brought this action for the recovery of the quarter's salary from May 23, 1881, to Aug. 23, 1881. The defendants did not offer any evidence as to any custom, and HUDDLESTON, B., directed a verdict for the plaintiff on the ground that, in the absence of evidence to the contrary, the engagement was prima facie an engagement for a year certain. The defendants obtained a rule nisi for a new trial on the ground of misdirection.

*McIntyre, Q.C. (Hilbery with him), for the plaintiff.**Reginald Brown for the defendants.*

GROVE, J.—I am of opinion that this rule must be discharged. Here the evidence was that, by a resolution of the directors which was duly confirmed, the plaintiff was appointed engineer to the defendant company at a salary of £500 per annum. As a general rule, where the hiring is a yearly hiring, it cannot be put an end to by either party before the end of the year. This rule, however, is subject to an exception in cases in which the agreement of hiring is subject to some stipulation, either express or implied by custom, enabling either party to determine the contract by notice. At the conclusion of the plaintiff's case, no evidence was offered on behalf of the defendants of any custom to determine such a hiring as this by a three months' notice. It seems to me, therefore, that the judge was bound to direct the jury that in the absence of any such evidence the hiring was a hiring for a year. There is nothing to show that the plaintiff accepted the engagement upon any other terms than those expressed in the resolution. The plaintiff established a *prima facie* case of a yearly hiring, and, therefore, in the absence of any evidence of custom to rebut that *prima facie* case, I think the verdict ought to stand.

MATHEW, J.—I am of the same opinion.

Rule discharged.

Solicitors: *F. W. & H. Hilbery; Heritage & Co.*

[Reported by DUNLOP HILL, Esq., Barrister-at-Law.]

Re HUTTON. Ex Parte BENWELL

[COURT OF APPEAL (Sir Baliol Brett, M.R., Cotton and Lindley, L.JJ.), December 12, 1884]

[Reported 14 Q.B.D. 301; 54 L.J.Q.B. 53; 51 L.T. 677;
33 W.R. 242; 1 T.L.R. 148]

Bankruptcy—Property available for distribution—Income—Future income—Earnings of professional man.

The word "income" in s. 90 of the Bankruptcy Act, 1869 [now s. 51 (2) of the Bankruptcy Act, 1914], held to be construed ejusdem generis with "pay, half-pay, salary, emolument, or pension" in s. 89 of the Act [s. 51 (1) of the 1914 Act], i.e., something in the nature of salary, and not to include the future earnings of a professional man which arise from the exercise of his personal skill and knowledge.

Notes. The Bankruptcy Act, ss. 89 and 90, have been re-enacted by the Bankruptcy Act, 1914, s. 51: see 2 HALSBURY'S STATUTES (2nd Edn.) 387.

Followed: *Re Jones, Ex parte Lloyd*, [1891] 2 Q.B. 231. Distinguished: *Re Shine, Ex parte Shine*, [1891-4] All E.R.Rep. 789; *Re Rogers, Ex parte Collins* (1893), 68 L.J.Q.B. 178. Considered: *Re Roberts*, [1900] 1 Q.B. 122; *Affleck v. Hammond*, [1912] 3 K.B. 162; *Re Landay, Ex parte The Trustee v. Bankrupt*, [1934] All E.R.Rep. 130. Applied: *Re Cohen*, [1961] 1 All E.R. 646. Referred to: *Re Brindle, Ex parte Brindle* (1887), 56 L.T. 498; *Hollinshead v. Hazleton*, [1914-15] All E.R.Rep. 1117; *Re Tennant's Application*, [1956] 2 All E.R. 753.

As to appropriation of a bankrupt's salary or income, see 2 HALSBURY'S LAWS (3rd Edn.) 456; for cases see 5 DIGEST (Repl.) 994 et seq.

Cases referred to:

- (1) *Re Huggins, Ex parte Huggins* (1882), 21 Ch.D. 85; 51 L.J.Ch. 935; 47 L.T. 559; 30 W.R. 878, C.A.; 5 Digest (Repl.) 995, 8023.

- A (2) *Emden v. Carte* (1881), 17 Ch.D. 768; 51 L.J.Ch. 41; 44 L.T. 636, C.A.; 5 Digest (Repl.) 1045, 8452.

Also referred to in argument:

- Re Wicks, Ex parte Wicks* (1881), 17 Ch.D. 70; 50 L.J.Ch. 620; 44 L.T. 836; 29 W.R. 525, C.A.; 5 Digest (Repl.) 995, 8026.
- B *Wadling v. Oliphant* (1875), 1 Q.B.D. 145; 45 L.J.Q.B. 173; 33 L.T. 837; 24 W.R. 246; 5 Digest (Repl.) 784, 6654.
- Elliot v. Clayton* (1851), 16 Q.B. 581; 20 L.J.Q.B. 217; 17 L.T.O.S. 26; 15 Jur. 293; 117 E.R. 1002; 5 Digest (Repl.) 783, 6653.
- Crofton v. Poole* (1830), 1 B. & Ad. 568; 9 L.J.O.S.K.B. 59; 109 E.R. 898; 5 Digest (Repl.) 783, 6650.

- C **Appeal** by the trustee in bankruptcy from the refusal of Mr. Registrar PEPYS to make an order under the Bankruptcy Act, 1869, s. 90, for payment to the trustee of income, of which it was alleged the bankrupt was in receipt.

- The adjudication took place in January, 1880. The bankrupt was what is popularly termed a "bone-setter," and many persons resorted to him for surgical treatment in consequence of his high reputation for skill in dealing with certain kinds of injuries. He continued his practice after the adjudication, and it was alleged that his yearly earnings averaged £1,500. By the Bankruptcy Act, 1869:

- "Section 89. Where a bankrupt is or has been an officer of the army or navy, or an officer or clerk or otherwise employed or engaged in the civil service of the Crown, or is in the enjoyment of any pension or compensation granted by the Treasury, the trustee during the bankruptcy, and the registrar after the close of the bankruptcy, shall receive for distribution among the creditors so much of the bankrupt's pay, half-pay, salary, emolument, or pension, as the court, upon the application of the trustee, thinks just and reasonable, to be paid in such manner and at such times as the court, with the consent in writing of the chief officer of the department under which the pay, half-pay, salary, emolument, pension or compensation is enjoyed, directs.

- F Section 90. Where a bankrupt is in the receipt of a salary or income other than as aforesaid, the court, upon the application of the trustee, shall from time to time make such order as it thinks just for the payment of such salary or income, or of any part thereof, to the trustee during the bankruptcy, and to the registrar if necessary after the close of the bankruptcy, to be applied by him in such manner as the court may direct."

- G *Cooper Willis, Q.C.*, and *J. E. Palmer* for the trustee.
T. L. Wilkinson for the bankrupt.

- SIR BALIOL BRETT, M.R.**—The bankrupt in this case, Mr. Hutton, carries on business as a surgeon, not in the sense of being a member of the College of Surgeons, but as what is popularly called a bone-setter. In carrying on that business he exercises great and well-known skill. What he does is all done by means of his own personal skill and knowledge, and all the emolument which he receives is earned by means of his own personal skill and knowledge. He does not sell anything. It is not like such a case as, for instance, that of a cabinet-maker, who I no doubt adds very greatly to the value of the materials on which he works by the skill which he possesses, but who sells a cabinet, and not his own skill. We are asked to make an order, not dealing with anything in possession, or with anything to which the bankrupt is entitled under any contract, which in the phraseology of the law would be called a chose in action, but dealing with the proceeds of personal skill which has not yet been exercised—that is, with future income which he will or may earn.

It is said that he earns an average income of £1,500 a year, but there can be no certainty that he will continue to earn this in future. I am of opinion that what

may or may not be earned in the future is not property which passes to the trustee. A One might as well say that, if a father promises to his son that he will leave him something by his will, that could be dealt with as property if the son were to become bankrupt in his father's lifetime. Certain kinds of property are referred to in s. 89 of the Bankruptcy Act, 1869, and I think that s. 90 was intended to deal with something similar. In cases coming within s. 89 the bankrupt is entitled to receive the "pay, half-pay, salary, emolument, or pension" which is to be dealt with, and it seems to me that emolument in that section is something ejusdem generis with pay, half-pay, and salary. All these things are something which it is certain that the bankrupt will have, and, therefore, power is given to the court to deal with them for the benefit of the creditors. Section 90 goes further than s. 89, but I think that "salary, or income, other than as aforesaid," in s. 90, must be something of the same kind as the other matters referred to in the preceding section, according to the ordinary rule that where particular words are used in an Act of Parliament, and are followed by general words, these general words are only to be held to include that which is ejusdem generis with what is denoted by the particular words which have gone before. B C

If this be so, it follows that although "income," within the meaning of s. 90, is neither pay, half-pay, salary, emolument, nor pension, within the meaning of s. 89, still must be something which is in the nature of salary. Therefore, what we are really asked for is an order to deal with what Mr. Hutton will earn in the future, on the ground that it is an income of the same kind as a salary. It is only necessary to state the case to show that it is not anything of the kind. For these reasons I am of opinion that the case is not within s. 90, and that this appeal ought to be dismissed. D E

COTTON, L.J.—This is an appeal from the refusal of the registrar to make an order under s. 90 of the Bankruptcy Act, 1869. The trustee asks for an order dealing with future property which may or may not be earned, and we have to decide whether such a prospective order ought or ought not to be made. What the bankrupt had at the time of the bankruptcy was only his personal skill and knowledge, by means of which, if people consulted him, he would be enabled to earn money, and the capacity to earn money is not, in my opinion, property which passes to the trustee. There is nothing in the nature of property and there are none of the things described in s. 89, nor anything of a similar nature. I am, therefore, of opinion that s. 90 does not enable the court to make a future order. In cases which come within s. 89 there is a right to receive the pay, half-pay, salary, emolument, or pension, and I think that s. 90 deals with similar matters to those dealt with by s. 89. I agree with the Master of the Rolls in thinking that we ought not to apply the provisions of those sections to contingent and uncertain income, which may or may not be earned, for the court cannot force a man to go on with his practice and earn an income for the benefit of his creditors, if he does not wish to do so. I think, therefore, that the registrar was right. Apparently such an order as is now asked for has never been made under circumstances such as those of the present case. The income which the bankrupt earns is derived from his own skill in performing surgical operations, not from skill in making up materials. F G H

LINDLEY, L.J.—I am also of opinion that the present case does not come within s. 90. It is the case of a man earning fees by carrying on a profession or business, and his income is necessarily precarious, and is not like a pension or salary. We are asked to impound the future earnings of the bankrupt. If we were to make any such order it could be evaded, for he need not see patients or earn fees if he did not wish to do so. I am, therefore, of opinion that, under ss. 89 and 90, precarious income cannot be seized. It is said that there is authority the other way, and we are referred to *Ex parte Huggins* (1), where it was held that a government pension came within the provisions of s. 90. I think that case is an illustration of I

A what s. 90 was intended to meet. The decision in *Emden v. Carte* (2) does not, I think, touch the present point. For the reasons which I have given I am of opinion that the case is not brought within s. 90. It is certainly somewhat remarkable that this question now arises for the first time.

Appeal dismissed.

B Solicitors: *Thomas Durant, jun.; W. Maynard.*

[*Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.*]

C

G. v. M.

D [HOUSE OF LORDS (the Earl of Selborne, L.C., Lord Watson, Lord Bramwell, and Lord FitzGerald), March 2, 3, 5, 1885]

[*Reported 10 App. Cas. 171; 53 L.T. 398; 1 T.L.R. 326*]

Nullity—Incapacity of husband—Presumption—No consummation after three years—Estoppel—Approbation of marriage.

E In an action for nullity, if the parties have lived together for three years without consummation impotence on one side or the other will be presumed to be the cause, in the absence of other evidence, but this presumption may be rebutted by sufficient evidence. On the other hand, if permanent impotence is clearly proved by affirmative evidence, a decree may be pronounced though the parties have not cohabited for three years.

F The doctrine of "sincerity" in such an action does not go further than saying that there may be conduct on the part of the person seeking the remedy which ought to estop that person from having it, as, for instance, any act from which the inference ought to be drawn that during the antecedent time the party has, with a knowledge of the facts and of the law, approbated the marriage, or has taken advantages and derived benefits from the matrimonial relation which it would be unfair and inequitable to permit him or her, after having received

G them, to treat as if no such relation had ever existed. The husband and wife were married in November, 1877, and resided together until they finally separated in June, 1879. In 1883 the husband commenced proceedings for divorce on the ground of adultery, and the wife then instituted proceedings for a decree of nullity of marriage on the ground of the husband's impotence.

H **Held:** (i) the pendency of the proceedings for divorce was no bar to the action for nullity; (ii) the action was not brought after an unreasonable delay; (iii) a triennial cohabitation was not necessary before commencing the suit, there being sufficient affirmative evidence that the husband was impotent.

I **Notes.** Considered: *L. (otherwise B.) v. B.*, [1895] P. 274; *S. (otherwise G.) v. S.*, [1907] P. 224; *C. (otherwise H.) v. C.*, [1921] All E.R.Rep. 268; *T. v. T.* (1931), 47 T.L.R. 629. Followed: *Newbould v. A.-G.*, [1931] All E.R.Rep. 377. Considered: *Nash v. Nash*, [1940] 1 All E.R. 206; *J. (otherwise S.) v. J.*, [1947] 2 All E.R. 43. Applied: *Clifford v. Clifford*, [1948] 1 All E.R. 394. Considered: *Harthan v. Harthan*, [1948] 2 All E.R. 639; *R.E.L. (otherwise E.L.) v. E.L.*, [1949] P. 211; *W. v. W.*, [1952] 1 All E.R. 858; *Tindall v. Tindall*, [1953] 1 All E.R. 139. Followed: *G. v. G. (otherwise H.)*, [1960] 3 All E.R. 56. Applied: *Pettit v. Pettit*, [1962] 3 All E.R. 37. Referred to: *Inverclyde v. Inverclyde*, [1931] P. 29; *Dodworth v. Dale*, [1936] 2 All E.R. 440; *Clarke (otherwise Talbott) v. Clarke*, [1943] 2 All E.R. 540; *Baxter v. Baxter*, [1947] 2 All E.R. 886; *Slater*

v. *Slater*, [1953] 1 All E.R. 246; *Scott v. Scott (otherwise Fone)*, [1959] 1 All E.R. 531; *Morgan v. Morgan (otherwise Ransom)*, [1959] 1 All E.R. 539; *Bullock v. Bullock*, [1960] 2 All E.R. 307. A

As to delay and lack of sincerity in pursuing a petition of nullity of marriage, see 12 HALSBURY'S LAWS (3rd Edn.) 231; and for cases see 27 DIGEST (Repl.) 416 et seq.

Cases referred to :

- (1) *W. (falsely called R.) v. R.* (1876), 1 P.D. 405; sub nom. *Reynolds (otherwise Wilkins) v. Reynolds*, 45 L.J.P. 89; sub nom. *R. (falsely called W.) v. W.*, 25 W.R. 25; 27 Digest (Repl.) 418, 3474.
- (2) *Lewis (falsely called Hayward) v. Hayward* (1866), 35 L.J.P. & M. 105, H.L.; 27 Digest (Repl.) 277, 2223.
- (3) *U—n (falsely called F—s) v. F—s* (1853), 2 Rob. Eccl. 614; 163 E.R. 1432; 27 Digest (Repl.) 278, 2235. C
- (4) *N—r (falsely called M—e) v. M—e* (1853), 2 Rob. Eccl. 625; 163 E.R. 1435; sub nom. *A. (falsely called B.) v. B.*, 1 Ecc. & Ad. 12; sub nom. *Anon.*, 17 Jur. 628; 27 Digest (Repl.) 278, 2228.
- (5) *Castleden v. Castleden* (1861), 9 H.L.Cas. 186; 5 L.T. 164; 11 E.R. 701; sub nom. *Hall v. Castleden*, 8 Jur.N.S. 1; sub nom. *H— (falsely called C—) v. C—*, 31 L.J.P.M. & A. 103, H.L.; 27 Digest (Repl.) 417, 3468. D

Appeal from a decision of the majority of the Second Division of the Court of Session in Scotland (the Lord Justice Clerk (LORD MONCRIEFF), LORD YOUNG, and LORD CRAIGHILL, LORD RUTHERFORD CLARK dissenting), reversing a decision of the Lord Ordinary (LORD KINNEAR) in an action brought by the respondent (the wife) against the appellant (the husband) for a declaration of nullity of marriage by reason of his impotence. E

The appellant and respondent were married in Bombay in November, 1877, he being at that time 49 and she being 20. They resided together in India until December, 1878, and afterwards in Scotland until June, 1879, when they finally separated. It was admitted that the marriage had never been consummated, and that after the early part of February, 1878, the appellant had made no attempt to do so. In October, 1882, the respondent gave birth to a child of which it was admitted that the appellant was not the father, and in March, 1883, he commenced proceedings for a divorce on the ground of her adultery. In April, 1883, she commenced the present action. F

H. Davey, Q.C., Robert Wallace, and R. Lamb Wallace for the husband. G
Sir Farrer Herschell, Q.C., and Jameson (of the Scottish Bar) for the wife.

THE EARL OF SELBORNE, L.C.—In this painful case some questions of law, which are of importance in this sense, that if they could be established they would be important, have been argued as constituting a bar to the treatment of the question as one simply of fact depending upon the particular evidence in the particular case. My opinion is, that no law which can have that effect has been shown to exist in Scotland. H

The two points mainly insisted upon were derived, so far as they went, from the English, or partly from the English and partly from the canon law, authorities. And the first observation which I make is, that, if there be positive rules of law upon which an exception to the trial of an action of this kind upon its merits can be founded, they must be proved to exist and to be recognised as positive rules in the country in which the action is brought. Neither the doctrine which, in the language of some of the cases, may be described as the doctrine of "sincerity" on the part of the pursuer in an action of this kind, nor the doctrine of the necessity of triennial cohabitation, assuming those doctrines to exist and to be rules of positive law, in the sense suggested by the husband's counsel, in England, is proved to be recognised by the law of Scotland, or to be a rule of positive law in Scotland. from which country, this appeal comes to the House. I

A That might perhaps, be enough to dispose of all that has been said upon those subjects; because, although the law of Scotland and the law of England, so far as they proceed upon general principles of jurisprudence, are sufficiently alike to make it often useful to illustrate the one from the other when these principles are involved, yet that never can be said of positive rules of law, which may be described as being more or less of an arbitrary character. But it may not be improper to say
B one or two words with reference to the English authorities, because I think that those authorities themselves have probably been misunderstood.

It is, in my opinion, unfortunate that when an expression is used by a judge, however eminent, in explaining his view of a particular case, and the principles on which it ought to be dealt with, if that expression was not previously a vox signata, or technical term of law, it should be taken up by other judges as if it had either
C established or recognised a technical rule which did not otherwise exist. I asked counsel who was the first judge who used this word "sincerity" with regard to the subject in hand, and the answer was, that it was used by a judge of the greatest possible eminence in the ecclesiastical courts, no less a man than LORD STOWELL, who presided over those courts from 1788 till 1821. That would be a comparatively recent origin to which to ascribe a technical rule of law, and I cannot think that
D LORD STOWELL ever intended to lay down a technical rule of law which could rightly be interpreted, as in some very modern cases, or at least in one very modern case it has been interpreted (*W. v. R.* (1)) as meaning that a plaintiff bringing a suit of nullity of marriage must be actuated in his or her own mind so purely and simply by the purpose of obtaining relief from the grievance arising from the want of power said to be wanting in wife or husband as to have no secondary motive, or, in the words of the case to which I have referred, "no mixture of subsidiary motive."

With the greatest deference to any judge or judges who may have used such an expression, it appears to me that no such rule of positive law can be introduced in that manner by any judicial phraseology, except so far as it can be shown to be founded upon a just and intelligible principle. My own belief is, that to whatever criticism the phraseology of judges in those cases may be open (and I must say that the adoption of that particular phrase "sincerity" seems, as counsel said, to suggest a psychological question rather than one of law or fact, diving into the motives of a person's mind rather than trying whether a cause of action exists or not), I think I can perceive that the real basis of reasoning which underlies that phraseology is this, and nothing more than this, that there may be conduct on the part of the person seeking this remedy which ought to estop that person from having it; as,
G for instance, any act from which the inference ought to be drawn that during the antecedent time the party has, with a knowledge of the facts and of the law, approbated the marriage which he or she afterwards seeks to get rid of, or has taken advantages and derived benefits from the matrimonial relation which it would be unfair and inequitable to permit him or her, after having received them, to treat as if no such relation had ever existed.

That explanation can be referred to known principles of equitable, and I may say of general, jurisprudence. The circumstances which may justify it are various, and, in cases of this kind, many sorts of conduct might exist—taking pecuniary benefits for example, living for a long time together in the same house or family with the status and character of husband and wife, after knowledge of everything which it is material to know. I do not at all mean to say that there may not be
I other circumstances which would produce the same effect; but it appears to me that, in order to justify any such doctrine as that which has been insisted upon at the Bar, there must be a foundation of substantial justice, depending upon the acts and conduct of the party sought to be barred. Further than that, I do not think it necessary for the purpose of this case to go. Of course, where facts are in dispute, motive may be all-important; but that is not the case here.

If that be a true explanation of the doctrine, so far as it can be considered law in England (for into Scotland it never seems to have found its way at all), under the name of "sincerity," or under any name distinguishing it from "approbate and

reprobate" and the general principles of equity, then I say that if this case had to be tried by that doctrine, the circumstances would show that it was inapplicable; for this lady, during the time that she and the husband lived together, never took or had the benefit of conjugal rights. The spouses separated within two years of the marriage, and the husband has never contributed to maintain the wife. So far as appears he has had no property at all. He could not even keep up the policy, which he had contracted to keep up by the marriage contract, and she had to do it out of her proper moneys, she being the person who contributed the whole of the property of the pair, and from the month of June, 1879, she has resided with her own family and friends, he doing nothing whatever, and she deriving no other benefit whatever from the assumed marriage relation except that she passed by his name. The result is, that there is no single circumstance of conduct, except those which go into the merits and the evidence bearing upon the principal question of fact, which, on a reasonable view of this doctrine of "sincerity," can be alleged against her.

It is said, and it is no doubt perfectly true, that this lady has a motive for desiring to obtain the relief which she asks, different from and in addition to that which would have existed if those circumstances had not happened which give its peculiar character to this particular case. The peculiarity is this, that the husband began by suing his wife for a divorce on the ground of adultery, and the wife had to defend herself against the husband's suit. One manifest defence, if it was open to her, was that she was not his wife, and she pleaded that defence. Undoubtedly it is quite true that she had a motive for asserting her right to be rid of him as her reputed husband, and to have the marriage declared void and null; she had a motive arising out of the situation in which she had unfortunately placed herself. The success of his action against her, depending entirely upon the relation of husband and wife, would have been in several respects prejudicial to her. In the first place, there would have been the stigma of adultery. To some minds it may appear to be a mere question of degree whether a woman is guilty of adultery or of incontinence; but by the letter of the law of Scotland it appears not to be clear that it may not be something more in that country. At all events a person feeling that difference has a motive, which in itself is an intelligible and innocent motive, for defending herself against that charge in any way which is open to her by law.

But that is not the only motive; her fortune, or at least the whole income arising from it during her life, would have been forfeited, by the law of Scotland, by the husband's success in that suit. That again depended entirely upon her being his wife. If she was not his wife, what more reasonable than that she should be permitted to plead it in order to avoid such a forfeiture, to which, in that view, she was not liable? Again, she is unfortunately the mother of a child of which her nominal husband is not the father. The status of that child is a legitimate subject of care and consideration to her. If she is not the wife of the present appellant, there is a possibility, at all events, of her marrying the father of the child, and the child, according to the law of Scotland, would then have the status of legitimacy. That is impossible if she is at present the appellant's wife. Can anybody say that those are motives of a fraudulent character, of a dishonest character, of a character from which there is some moral estoppel, unless there is a legal estoppel by some positive rule of law, to prevent her from acting upon them and getting the truth declared that she is not this man's wife, if in truth she is not? It appears to me that there is the utmost "sincerity," in a reasonable sense of the word, in a suit brought under those circumstances. She has the most cogent motives for asking a competent court to declare the truth—motives of an innocent, and to some extent of a laudable kind. I do not of course mean to say that it was innocent to place herself in the unfortunate position in which she has placed herself as the mother of that child; but being in that position, it is perfectly innocent to desire that the true character of her relation to the appellant should be ascertained by law, which depends upon the question whether she is the appellant's wife or not.

A Therefore, in the absence of any trace or scintilla of authority whatever from any Scottish source to the effect that this lady's suit under these circumstances is barred, or that the merits of the case are not to be inquired into, I think it would be impossible for your Lordships to reverse, on that ground, a judgment of the Court of Session which has determined that they are to be inquired into, and that they are in the respondent's favour.

B With regard to the second subject on which a question of law was raised at the Bar, namely, that of time, I will merely observe that what I understand all the authorities to say upon the subject of time is that time, like any other circumstance of conduct, is a very material element in the investigation of a case which upon the facts is doubtful. Where there is a controversy of fact, delay in bringing forward the case increases, in proportion to the length of that delay, the burden of proof

C which is thrown upon the plaintiff. But that there is any definite or absolute bar arising from a certain amount of delay is a proposition which, I apprehend, cannot be established either by any Scottish or any English authorities.

On this head the main point which was argued I really think depended upon a misconstruction of a rule recognised undoubtedly in the English courts—that is to say, recognised in the sense which I myself place upon it, but, as far as appears,

D not even to that extent recognised in Scotland—namely, the rule which had a very early foundation in the civil law, according to which two years, afterwards changed by JUSTINIAN to three years, was a fixed term for the purpose of raising a certain presumption. In the canon law that rule, for the purpose of raising that presumption, was recognised, but subject to this, that it was to take effect when the matter to be presumed ("frigidity" is the language of the canon) could not be proved

E before: *Prius probari non possit*.

That rule has, under certain limitations and in a certain sense, been recognised in the English courts by various authorities. It was explained by DR. LUSHINGTON, in the cases before him to which I shall have occasion to refer, not to be an absolute rule, because, on the one hand, when a three years' cohabitation had taken place, the inference to be presumably drawn from the absence of consummation within that time was capable of being rebutted; and, on the other hand, the rule did not exclude evidence to explain the same thing before, nor did it in any way exclude one kind of evidence for that purpose more than another. But the rule itself, as I understand it, has not been recognised either in *Lewis v. Hayward* (2) in this House, or by any other authority, beyond this point, that when you have a husband or a wife seeking a decree of nullity propter impotentiam, if there be no more in the evidence than that they have lived three years together, living, as I understand the word "cohabitation," in the same house and with the ordinary opportunities of intercourse, no explanation being given to rebut the presumption, if during that time the ordinary results have not followed—if, in point of fact, there has been no consummation, and that is clearly proved—then, if that be the

F

G

H whole state of the evidence, inability of the one party or of the other will be supposed to be the cause. But, as I said, that may be rebutted by evidence sufficient for the purpose; and on the other hand, upon that mere state of the facts, a presumption will not be raised from the expiry of a less period of time. But it may be, as DR. LUSHINGTON has said, uncontradicted by any other authority, and, as it seems to me, supported by what appears on the very face of the canon law which

I has been referred to, that though no presumption can be raised from the mere absence of the fact within a less period than three years, yet evidence may be given from which the same inference may be drawn, only it is not drawn by a presumption from a certain length of time, but it may be drawn from positive evidence.

That is a reasonable state of the law if the triennial rule, which as to the exact time fixed may be called arbitrary, is in force at all. In Scotland it does not appear that it has been recognised within recent times; and I think that the decisions of DR. LUSHINGTON upon this subject in the two cases *U—n* (*falsely called*

F—s v. *F—s* (3) and *N—r* (*falsely called M—e*) v. *M—e* (4) are perfectly reasonable and perfectly satisfactory. Now upon these cases I propose to say no more than this: in the first of them Dr. LUSHINGTON says (2 Rob. Eccl. at p. 618):

"I am of opinion that a triennial cohabitation is not an absolutely binding rule. It is a convenient and fitting rule, and one not to be departed from on slight ground; still circumstances may arise, as in the present case, to justify the court in dispensing with it. I am not aware that there is any magic in three years. I conceive that the object of the rule is to provide that sufficient time may be afforded for ascertaining beyond a doubt the true condition of the party complained of. If the court can be satisfied by circumstances that the complaint of the promoter of the suit is well founded, it never ought to be driven, *sine gravissima causa*, after such cohabitation as is proved in this case [which was less than three years], to order a return."

And in the other case he entered further into the matter, and distinctly held, upon evidence in my judgment not stronger than that in the present case, not only that there was no obstacle to granting, but that he was obliged to grant, a decree in favour of the promoter of the suit.

That is all that I think it necessary to say upon the subject of the points of law which have been argued; because the last argument which counsel for the husband with ingenuity as well as zeal advanced, namely, the argument that the lapse of the wife had produced an alteration of status which rendered her no longer able to bring this action, seemed to turn upon the most transparent fallacy possible. He seemed to me to think that a woman who was not in a situation to ask for a restitution of conjugal rights was not in a situation to say that she was not a wife. Why? To say that she is not a wife and to ask for a restitution of conjugal rights are absolutely inconsistent and incompatible things; she cannot do both, and therefore it is quite clear that, in order to obtain a declaration that she is not the wife, she is not only not obliged to ask, but she is not in a position to ask, for a restitution of conjugal rights. [His LORDSHIP then discussed the evidence in the case, and concluded.] The whole result, I think, is this: if a jury had had to determine the case upon this evidence, and had found as the court below have found, would it have been possible to say that that was a verdict which they were not justified in coming to? I think not; and being of that opinion, I cannot give my voice for reversing the decision to the same effect of the Court of Session. I therefore move your Lordships to affirm the interlocutors appealed from, and to dismiss the appeal with costs.

LORD WATSON.—I am of opinion that the majority of the Second Division of the Court of Session were right in holding that they were not precluded from considering the effect of the evidence upon the merits of the case, and also that they were right in holding that upon the evidence the wife was entitled to a decree.

The first plea against any consideration of the merits of this case was rested upon the rule as to "sincerity," or, more correctly speaking, "insincerity." I agree with the observations which have been made upon the English cases bearing upon that matter by the Lord Chancellor. It appears to me that the expression is not a very happy one, and also that it has been used occasionally in circumstances which render it still more inappropriate. I think that, when these cases are dissected, they do show the existence of this rule in the law of England, that in a suit for nullity of marriage there may be facts and circumstances proved which so plainly imply on the part of the complaining spouse a recognition of the existence and validity of the marriage as to render it most inequitable and contrary to public policy that he or she should be permitted to go on to challenge it with effect. If that be, as I am inclined to think it is, the rule of the law of England, I have no hesitation in saying that it is a rule which prevails in Scotland also. But if the English rule goes further, if it goes to the extent to which it has been pleaded on the part of the husband in this case, I have just as little hesitation in saying that it has no place, and is of no authority, in the law of Scotland. What has been

A contended for at the Bar comes to this, that wherever circumstances arise, before the spouse complaining of the impotence of the other has raised an action for the purpose of having the nullity of the marriage declared, which render it a matter of legitimate interest that the nullity should be declared, if these circumstances are what is called collateral to the marriage, all suit is barred. It is said that the addition of a strong and legitimate motive to that already existing, instead of strengthening, as I should have thought, the title of the pursuer in such a case, is to have the effect of cutting it down altogether.

The second ground upon which it was maintained that it was incompetent to deal with the evidence in this case, is the triennial rule as established in the canon law. No doubt there is not much authority to show how far that rule has been followed in practice in the law of Scotland; but, seeing that it is to be found in the canon law, and is in itself not an unreasonable rule, and has been so recognised in the jurisprudence of England, I have no reason to suppose that the courts in Scotland would hesitate to adopt it where it is applicable. But what is that rule as declared and established by the canon law? It simply raises a legal presumption that where two persons after solemnising a marriage live together and cohabit for a period of three years, and the lady is able to show that she is *virgo intacta*, that state of things, in the absence of rebutting proof on the part of the husband, will entitle her to have the nullity of the marriage declared. But it is one thing to have a rule establishing a presumption, and quite another thing to have a rule of positive law excluding all other evidence than that which is derivable from such a presumption. The contention at your Lordships' Bar has practically been that in certain circumstances, where the impotence complained of is of a peculiar character, you cannot regard evidence establishing it, and that no party can have a remedy against it unless he or she comes to the court justified by that presumption, even although the evidence should be in itself amply sufficient to convince every reasonable mind that the complaint is well founded. I have heard no authority for that. I do not think that any one of the English cases comes up to it, and if they did, I, for one, should not be prepared to adopt it as part of the law of Scotland. [HIS LORDSHIP dealt shortly with the evidence, and concurred with the Lord Chancellor.]

LORD BRAMWELL considered the evidence and continued: Then I will just say one word as to the point which was made about the wife disqualifying herself by her incontinence with some other man. Suppose that she had bona fide believed that the husband was dead, and had married another man, and had had a child, that would be no answer in England—I do not know how it would be in Scotland—to an indictment for bigamy; the punishment would be small, but it would be no answer to the indictment, and the child would be a bastard. But there would be no moral guilt. Could it be pretended that in that case she would have disqualified herself? Then what is the difference? The only difference is that in this case there is the guilt of incontinence. There is a moral guilt, which would not have existed in the supposed case. One word as to this question of "sincerity." It is a most remarkable expression, a very curious word, and I am not at all sure that it has not resulted from this, that sincerity is a very important matter in ascertaining whether the spouse complained of is impotent or not; and sincerity has been dwelt upon for that purpose, till at last it has been taken to be a separate head of objection to the complaining party's proceedings. It seems to me very strange. What the complainant does in a suit of this sort is to come to the appropriate court for a declaration of the truth: "I say that this man is impotent, and was so at the time of the marriage, and I ask you to declare that fact." The very words of the summons are: "Declare the truth, that this man was impotent when he married me." The court say: "No, we will not"; or the argument is, that the court ought to say: "No, we will not; we know that it is true, but we will not say so." Why? In my opinion a man who has inflicted this cruel wrong upon a woman ought not to be heard to object to her complaining when she comes forward with her

complaint of this wrong that he has done her, unless, in some way or another, he can show that he sustains some injury from the double matter of her not having complained earlier, and of her complaining now. In such a case, I should indeed think that a law might be made (perhaps it exists for aught I know) that in some way or another the declaration of the truth should be accompanied by some compensation to him for the act of injury which, as I have indicated, might have been done to him. But supposing that there is such a rule or head of objection of want of sincerity—I do not know how to phrase it—in my opinion this case is not open to it. This woman comes here, driven by the conduct of the husband, for a reason which is, I think, perfectly intelligible. She puts up with the wrong which has been done to her by him until she is driven to bring this suit by his calling her an adulteress, and seeking a divorce from her, which divorce would be followed by a forfeiture of her property if he chose to insist upon it. I put it to counsel for the husband, supposing that, after a man and woman had lived together under these circumstances, he being clearly impotent, his regard for her, if he had any, had failed, and he had taken to beating and ill-using her, would it then have been open to the objection of insincerity if the woman had brought a suit for a declaration of nullity? Counsel argued that it would, and I do not see how he could argue otherwise. So that, supposing a woman was ill-used by having this gross injustice done to her, but, rather than complain of it, put up with it until her life was made intolerable by the misconduct of her husband, she could get no redress of it. I think it is impossible that that can be the law.

I will just add one word more about this matter. I really cannot understand how this husband can have done otherwise than welcome the suit which the wife has brought for the purpose of making her offence against chastity less grievous than it would have been if she had been his lawful and true wife. I cannot understand how he could have done otherwise than meet her eagerly, to have that decree pronounced which she was praying for, and atone to some extent for the wrong he had done her. It seems to me to have been a most cruel thing for him to have acted as he did. It is now twenty-five years since I delivered my opinion in *Castleden v. Castleden* (5). I think that I may claim credit for the possession of sufficient candour and sufficient self-denial to be able to say that, if I thought that judgment was wrong now, after twenty-five years, I could say, "Well, I was wrong then, but I know better now." But I have read it, and I will say that there is not one word which I uttered then which I would not repeat at the present moment; and it does seem to me that the judgment which was given in the Probate Court, and in this House (I say it with all submission), is a mixture of two things, either of which taken separately comes to nothing.

LORD FITZGERALD.—The procreation of children being the main object of marriage, the contract contains by implication, as an essential term, the capacity for consummation. There may be special circumstances in relation to the marriage of a character to deprive the parties, or one of them, of the right to be relieved on the ground of impotence. But there is no such special circumstance in the present case. The pursuer rests her case on the ordinary rule that she is entitled to be relieved if she can establish by reasonable and trustworthy evidence that the husband was at the time of the marriage impotent, and has remained so. The husband denies permanent impotence, and that is the real question now to be determined, and upon that question, from the beginning, I have held a very decided opinion. He further relies upon the supposed rule as to the necessity of triennial cohabitation, as to the want of promptness in instituting the suit, and as to insincerity, and the presence of a subsidiary motive.

I rest content entirely with the judgment of the Lord Chancellor as to these additional defences which the defendant seeks to raise; but I would add further that, even if the rule as to triennial cohabitation contended for by counsel for the husband existed in the law of Scotland, it would be totally inapplicable to the circumstances of the present case, and the special circumstances here would take it out of this

A rule if it existed. I can very well understand all these additional allegations coming in aid, and I take them in aid, upon the question of evidence. For instance, it was alleged that there was insincerity in this sense, that this lady had another motive besides a strong desire to be relieved from the tie of this marriage. She has the strongest of all motives, a motive so strong that I should be inclined to regard her evidence, if in its main features it was controverted, not alone with caution, but with suspicion. It is not only her eager desire to be relieved from this marriage tie, but further, she has to relieve herself from the charge of adultery; she has to protect her future, and to obtain a position which may enable her to relieve her child from the status of bastardy.

When all these circumstances are taken into account they would lead me to consider what has been so much contested in this case, not as indicating rules applicable to the special case before us, but as laying before us reasons why we should regard with caution the evidence given on behalf of the pursuer. Then the question, as I have thought from the beginning, and the only question in the case, is this: Is the evidence sufficient to establish a case of permanent impotence against the husband? There are certain statements of fact not controverted but admitted on both sides, and I take it that the Lord Ordinary was correct in saying that the real facts of the case, the real matters in proof, were not controverted, but there might be a great controversy as to what were the legitimate inferences to be deduced from the facts so proved. The question which we have to consider is, what is the reasonable inference to be deduced from the facts absolutely established? What are we to deduce, having regard to the ordinary experience of life, and applying common sense to the facts which are before us?

E Before dealing with these facts, I will, in a very few words, advert to one other matter which counsel for the husband brought before us. He relied upon the unwillingness of the pursuer to continue cohabitation. No doubt she did exhibit, after a certain period, the strongest unwillingness, and I would ask, how could it be expected to be otherwise? For two months she had submitted to what I should call treatment degrading in the highest degree, and she certainly would not have had the feelings of a woman if she had been willing that that treatment should continue. Again, it is said that she made no complaint; but is that statement well founded? Why, from the time of the abandonment of his marital rights by the husband her life has been a protest. Not only can it be said that there has been complaint, but through the whole of her married life there has been a protest against the condition into which she had fallen. [HIS LORDSHIP then discussed the evidence, and continued:] It is said that the pursuer ought sooner to have instituted the suit. I ventured to observe in the course of the case, and I repeat it now, that there is not one of us who cannot recall to memory the experience of some case in which a woman submitted to the worst of treatment, treatment degrading and humiliating, and allowed it to continue rather than permit her name to become the subject of a public scandal; and probably this lady would have submitted to much more if she had not been driven to her present course by the institution of the action for divorce. Upon these grounds I entirely concur in your Lordships' judgment.

Appeal dismissed.

Solicitors: *A. Beveridge for Beveridge, Sutherland & Smith, Leith; Stibbard, Gibson & Co. for Boyd, Jameson & Kelly, Leith.*

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

A

LILLEY v. DOUBLEDAY

[QUEEN'S BENCH DIVISION (Grove, Lindley and Stephen, JJ.), June 27, 1881]

[Reported 7 Q.B.D. 510; 51 L.J.Q.B. 310; 44 L.T. 814;
46 J.P. 708]

B

*Bailee—Liability—Storage—Contract to store goods in a particular place—
Goods removed to different place by bailee without owner's consent—
Destruction of goods.*

A person who has been entrusted with goods to put them in a particular place and moves them to another place without authority is liable for any loss or damage that occurs to the goods at the other place. The only exception to this principle is where the cause of destruction would have occurred in which-ever place the goods were put.

C

Notes. Followed: *Roberts v. McDougall* (1887), 3 T.L.R. 666; *Lampson v. London and India Dock Joint Co.* (1901), 17 T.L.R. 663. Approved: *Morrison & Co., Ltd. v. Shaw, Savill and Albion Co., Ltd.*, [1916-17] All E.R.Rep. 1068. Followed: *Shaw & Co. v. Symmons & Sons*, [1916-17] All E.R.Rep. 1093. Distinguished: *The Südmärk*, [1918] A.C. 475. Considered: *Gibaud v. Great Eastern Railway*, [1921] All E.R.Rep. 35. Applied: *Buerger v. Cunard Steamship Co.*, [1925] 2 K.B. 646. Followed: *Temple Steamship Co. v. Vsesojuznoje Objediheni Sovfracht* (1944), 170 L.T. 378. Referred to: *Lepla v. Rogers*, [1893] 1 Q.B. 31; *The Cap Palos*, [1921] All E.R.Rep. 249; *Neilson v. London and North Western Railway*, [1922] All E.R.Rep. 395; *The Refrigerant*, [1925] P. 130; *Tate and Lyle, Ltd. v. Hain Steamship Co.* (1934), 151 L.T. 249; *A/S. Rendal v. Arcos, Ltd.*, [1937] 3 All E.R. 577; *Bontex Knitting Works, Ltd. v. St. Johns Garage*, [1943] 2 All E.R. 690; *Vsesojuznoje Objediheni Sovfracht v. Temple Steamship Co.* (1945), 173 L.T. 373; *Edwards v. Newland*, [1950] 1 All E.R. 1072; *Alexander v. Railway Executive*, [1951] 2 All E.R. 442; *Yeoman Credit, Ltd. v. Apps*, [1961] 2 All E.R. 281.

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F

As to nature of a contract of bailment and obligations of a bailee, see 2 HALSBURY'S LAWS (3rd Edn.) 114 et seq.; and for cases see 3 DIGEST (Repl.) 81 et seq.

Cases referred to:

- (1) *Davis v. Garrett* (1880), 6 Bing. 716; L. & Welsb. 276; 4 Moo. & P. 540; 8 L.J.O.S.C.P. 253; 130 E.R. 1456; 8 Digest (Repl.) 14, 65.
- (2) *Parker v. James* (1814), 4 Camp. 112; 171 E.R. 37, N.P.; 41 Digest 555, 3814.
- (3) *Hadley v. Barendale* (1854), 9 Exch. 341; 23 L.J.Ex. 179; 23 L.T.O.S. 69; 18 Jur. 358; 2 W.R. 302; 2 C.L.R. 517; 156 E.R. 145; 8 Digest (Repl.) 151, 956.
- (4) *Hobbs v. London and South Western Rail. Co.* (1875), L.R. 10 Q.B. 111; 44 L.J.Q.B. 49; 32 L.T. 252; 39 J.P. 693; 23 W.R. 520; 8 Digest (Repl.) 106, 690.
- (5) *McMahon v. Field* (1881), 7 Q.B.D. 591; 50 L.J.Q.B. 552; 45 L.T. 381; 46 J.P. 245, C.A.; 17 Digest (Repl.) 120, 312.
- (6) *Burrows v. March Gas and Coke Co.* (1870), L.R. 5 Exch. 67; 39 L.J.Ex. 33; 22 L.T. 24; 18 W.R. 348; affirmed (1872), L.R. 7 Exch. 96; 41 L.J.Ex. 46; 26 L.T. 318; 36 J.P. 517; 20 W.R. 493, Ex. Ch.; 36 Digest (Repl.) 34, 156.

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H

I

Also referred to in argument:

Heald v. Carey (1852), 11 C.B. 977; 21 L.J.C.P. 97; 18 L.T.O.S. 64; 16 Jur. 197; 138 E.R. 762; 3 Digest (Repl.) 115, 354.
Fouldes v. Willoughby (1841), 8 M. & W. 540; 1 Dowl.N.S. 86; 10 L.J.Ex. 364; 5 Jur. 534; 151 E.R. 1153; 37 Digest 164, 69.
Syeds v. Hay (1791), 4 Term Rep. 260; 100 E.R. 1008; 41 Digest 557, 3829.

- A** *Fowler v. Hollins* (1872), L.R. 7 Q.B. 616; 41 L.J.Q.B. 277; 27 L.T. 168; affirmed sub nom. *Hollins v. Fowler* (1875), L.R. 7 H.L. 757; 44 L.J.Q.B. 169; 33 L.T. 73; 40 J.P. 53, H.L.; 43 Digest 471, 102.
British Columbia, etc., Saw Mill Co. v. Nettleship (1868), L.R. 3 C.P. 499; 37 L.J.C.P. 235; 18 L.T. 604; 16 W.R. 1046; 8 Digest (Repl.) 150, 951.
- B** *Horne v. Midland Rail. Co.* (1872), L.R. 7 C.P. 583; 41 L.J.C.P. 264; 27 L.T. 38; affirmed (1873), L.R. 8 C.P. 131; 42 L.J.C.P. 59; 28 L.T. 312; 21 W.R. 481, Ex. Ch.; 8 Digest (Repl.) 153, 964.
Morritt v. North Eastern Rail. Co. (1876), 1 Q.B.D. 302; 45 L.J.Q.B. 289; 34 L.T. 940; 24 W.R. 386, C.A.; 8 Digest (Repl.) 51, 319.
Glyn, Mills, Currie & Co. v. East and West India Dock Co. (1880), 6 Q.B.D. 475; 50 L.J.Q.B. 62; 43 L.T. 584; 4 Asp.M.L.C. 345; affirmed (1882), post p. 674, 7 App. Cas. 591; 52 L.J.Q.B. 146; 47 L.T. 309; 31 W.R. 201; 4 Asp.M.L.C. 580, H.L.; 41 Digest 393, 2362.
- C**

Action brought by the plaintiff against the defendant for damages for the loss of goods deposited with defendant which had been destroyed by fire.

- D** It was alleged in the statement of claim that the defendant agreed with the plaintiff that the defendant should remove from 319, Caledonian Road, Islington, certain goods and stock in trade of the plaintiff, and that the defendant should warehouse the same at his repository in Kingsland Road, and should insure the goods against loss or injury by fire; and in accordance with this agreement the goods were delivered to the defendant in ten cases to be so deposited at his repository and to be there safely kept and taken care of by the defendant for reward.
- E** Subsequently the plaintiff found the goods were not insured, and therefore relying upon the defendant's representation that they were in the defendant's repository, he insured the ten cases of goods on his own behalf, describing them as being upon the premises at Kingsland Road. At the time the defendant represented the ten cases to be at Kingsland Road, two had been removed to certain stables in Fanshaw Street, Hoxton, by the defendant, contrary to the agreement and without the
- F** knowledge or consent of the plaintiff. On or about Oct. 14, 1880, a fire occurred at the stable in Fanshaw Street, and the two cases of the plaintiff's goods were destroyed. The plaintiff further alleged that in consequence of the defendant's negligence and false representation the plaintiff lost the two cases of goods and the use and value of them, and had been unable to recover the value from the insurance office and claimed £300 damages.

- G** The defendant in his defence denied that it was agreed that he should warehouse the goods at Kingsland Road or in any particular repository, but contended that the goods were delivered to him upon the terms that he should be at liberty to warehouse them at any one or more of his repositories as might be feasible and convenient, and it was not feasible and convenient to warehouse all the goods in Kingsland Road, and therefore two cases were warehoused at the defendant's
- H** premises, as the plaintiff well knew. With regard to the agreement to insure alleged by the plaintiff, the defendant denied that any such was entered into between them, and said that the plaintiff asked him as a matter of favour to insure the goods, and he took steps to do so; but the plaintiff subsequently withdrew his request and authority, and expressly forbade the defendant to insure them, alleging that he, the plaintiff, had himself covered the goods by all necessary insurance
- I** against loss or injury by fire; and the plaintiff knew at the time that two of the cases of goods were at Fanshaw Street.

The jury found that the defendant had agreed to warehouse the goods at his repository in the Kingsland Road, and also that the plaintiff had not assented to their being removed to Fanshaw Street or elsewhere and the plaintiff moved for judgment.

Murphy, Q.C. (C. E. Jones with him), for the plaintiff.

Addison, Q.C. (Lyon and Dunlop Hill with him), for the defendant.

GROVE, J.—In this case, although everything has been said which could be said in support of the defendant's contention, I cannot agree with it. The first point is this. A person who has been entrusted with goods to put them in a particular place takes them to another place, and therefore he is responsible for the consequences, or rather for what has occurred at that place, and which in all probability would not have occurred had he put them in the other place. The only exception is that which was put by counsel for the defendant during the course of the argument, and that is where the cause of destruction is one which must take place at one place as much as another; as for instance, if a bailee, for hire, of a horse which happens to be diseased, having hired the horse for the express purpose of going to Greenwich goes to Richmond, and the horse dies and would have died from the disease in whatever direction he had gone of an equal distance, the bailee would not be liable. But if the owner of property gives another person authority to deal with it and points out the particular way, and such person chooses to deal with it in another way, he must take the risk of the consequences, whether the injury or destruction is caused by the act of a third party, or, as it is called in law, by the act of God.

I think that this view is fully supported by *Davis v. Garrett* (1). That was a case where the plaintiff had put on board the defendant's barge lime to be conveyed from the Medway to London. The master of the barge deviated unnecessarily from the usual course, and during the deviation a tempest wetted the lime, and the barge taking fire the whole was lost, and it was held that the defendant was liable, and the cause of loss sufficiently proximate to entitle the plaintiff to recover under a declaration alleging the defendant's duty to carry the lime without unnecessary deviation and averring a loss by unnecessary deviation. The second point held in that case is, that the law implies a duty on the owner of a vessel, whether a general ship or hired for the express purpose of the voyage, to proceed without unnecessary deviation in the usual course.

Counsel for the defendant argued that this was a case of a common carrier who is an insurer, but I find that it was not decided on that ground. In the judgment of **TINDAL, C.J.**, he says (6 Bing. at p. 723):

"But the objection taken is that there is no natural or necessary connection between the wrong of the master in taking the barge out of its proper course and the loss itself; for that the same loss might have been occasioned by the very same tempest if the barge had proceeded in her direct course."

Here the defendant's duty was to fulfil an express contract with the plaintiff, and if he gives him authority to put the goods in one place he has no right to take them to another. **TINDAL, C.J.**, goes on to say (*ibid.*):

"But if this argument were to prevail, the deviation of the master, which is undoubtedly a ground of action against the owner, would never, or only under very peculiar circumstances, entitle the plaintiff to recover. For if a ship is captured in the course of deviation no one can be certain that she might not have been captured if in her proper course. And yet in *Parker v. James* (2), where the ship was captured whilst in the act of deviation, no such ground of defence was even suggested. Or, again, if the ship strikes a rock or perishes by storm in the one course, no one can predicate that she might not equally have struck upon another rock, or met with the same or another storm if pursuing her right and ordinary voyage. The same answer might be attempted to an action against a defendant who had by mistake forwarded a parcel by the wrong conveyance, and a loss had thereby ensued; and yet the defendant in that case would undoubtedly be liable. But we think the real answer to the objection is, that no wrongdoer can be allowed to apportion or qualify his own wrong; and that as a loss has actually happened whilst his wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up as an answer to the action the bare possibility of a loss, if his wrongful act had never

A been done. It might admit of a different construction if he could show not only that the same loss might have happened, but that it must have happened if the act complained of had not been done; but there is no evidence to that extent in the present case."

B There was no fire in the Kingsland Road, and the defendant, without authority, or I may say in direct defiance of authority, and without asking the plaintiff, removed the goods to Fanshaw Street, therefore he must take the consequences. I do not give any opinion as to whether this amounted to a conversion or not, and it is not necessary to decide that and to go through all the cases counsel for the defendant has cited. It is undoubtedly, to my mind, a wrongful act, not authorised by the owner, and on that ground I think he cannot set up a defence which, as C TINDAL, C.J., says in *Davis v. Garrett* (1) (6 Bing. at p. 724), would "qualify his own wrong." I don't think *Hadley v. Baxendale* (3), and similar cases, are decided on the same ground. There was only one case which made an impression on my mind, and that was *Hobbs v. London and South Western Rail. Co.* (4). That case, I am told, has had some doubt thrown on it in a recent case in the Court of Appeal, *McMahon v. Field* (5). At all events I don't think that the former case is expressly in point. It does not seem to me that I should make the matter more clear by going into all the cases, and distinguishing them; and on the grounds I D have stated I think judgment should be entered for the plaintiff.

LINDLEY, J.—I am of the same opinion. The question is reduced to a very small point. The plaintiff gave his goods to the defendant to be warehoused at a particular place, and the defendant, for reasons good, bad, or indifferent, takes them E to another place. Counsel for the defendant says there is no cause of action, but that there was a breach of contract is very plain, and the question is what consequences must follow. Then he says that the damage was too remote, and no doubt that is an argument which requires attention, but *Hadley v. Baxendale* (3) and such cases are applicable to circumstances wholly different from these. I do F not say whether what was done here amounted to a conversion, as it is not necessary to decide that. I think the true measure of damages must be the value of the goods, and *Davis v. Garrett* (1) and *Burrows v. March Gas and Coke Co.* (6) seem to show this. In the latter case it was this: the defendant contracted to supply the plain- G tiff with a proper pipe to convey gas from the main outside to a meter inside his premises. Gas escaped from the pipe into the plaintiff's shop, and the servant of a gasfitter employed by the plaintiff and who happened to be at work in another room at the time of the escape, went into the shop upon hearing it with a view of finding out its cause. He was carrying a lighted candle, and immediately upon entering the shop an explosion took place, doing damage to the plaintiff's premises and stock; the jury found that there was a defect in the pipe when it was supplied by the defendants, and also that there was negligence on the part of the man who H carried a lighted candle into the shop. It was held that the plaintiffs were entitled to recover, and the defendants were not relieved from responsibility by the negligent act of the gasfitter's servant. In that case the damage was not considered too remote, nor do I think it is in this.

I STEPHEN, J.—My view of the case is so entirely the same as that expressed by my brothers GROVE and LINDLEY that I do not think it necessary to add much to what has been said. But it has seemed to me throughout that the case is reducible simply to this. You go and place my goods in a place where you have no authority to put them and they are destroyed, therefore you must pay for them. I do not think the question of contract makes any difference. Whether this was a conversion or not I do not express an opinion, as it is not necessary; and with regard to *Hadley v. Baxendale* (3), it appears to me that it is not a case in point. Cases of that kind are not applicable where the contracting party has dealt with the goods contrary to authority, but where he has failed to do what he has agreed to do. As I

have said, it is simply a case of the defendant having taken the plaintiff's goods to a place where he had no right to take them, therefore he must pay for their loss, and I think judgment must be entered for the plaintiff. A

Judgment for plaintiff.

Solicitors: *Phelps, Sidgwick, & Biddle; Marsden & Son.*

[Reported by H. D. BONSEY, Esq., Barrister-at-Law.] B

IN THE GOODS OF STEDHAM C

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir James Hannen, P.), April 26, May 10, 1881]

[Reported 6 P.D. 205; 50 L.J.P. 75; 45 L.T. 192; 45 J.P. 784;
29 W.R. 743] D

Will—Codicil—Revival—Codicil mistakenly drawn as codicil to previously revoked will.

In 1877 a testator made a will disposing of all his property. In 1878 he made a subsequent will, also disposing of all his property, and, therefore, by implication revoking the first will. In 1880 he executed a codicil, which by error was expressed to be a codicil to the 1877 will, and referred to provisions in that will not included in the later will. E

Held: the codicil must be taken to revive the earlier will, and, as the later will contained dispositions which had not been revoked, both wills and the codicil should be admitted to probate, leaving the effect to be determined, if necessary, by a court of construction. F

Notes. Applied: *In the Goods of Chilcott*, [1897] P. 223. Considered: *Goldie v. Adam*, [1938] P. 85. Referred to: *In the Goods of Turner* (1891), 64 L.T. 805; *In the Estate of Mardon*, [1944] 2 All E.R. 397.

As to revocation by a later instrument, see 39 HALSBURY'S LAWS (3rd Edn.) 890-894; as to revival, see *ibid.* 901-903; and for cases see 44 DIGEST 365-370. G

Cases referred to in argument:

In the Goods of Steele, *In the Goods of May*, *In the Goods of Wilson* (1868), L.R. 1 P. & D. 575; 37 L.J.P. & M. 68, 72; 19 L.T. 91; 32 J.P. 791; 17 W.R. 15; 44 Digest 366, 1995.

In the Goods of Ince (1877), 2 P.D. 111; 46 L.J.P. 30; 36 L.T. 519; 25 W.R. 396; sub nom. *In the Goods of Price*, 41 J.P. 425; 44 Digest 369, 2027. H

Probate Motion to determine which testamentary dispositions of John Stedham should be admitted to probate.

John Stedham, deceased, duly executed two wills and a codicil, the contents of which, so far as they are material to the present inquiry, are sufficiently set out in the judgment. I

R. A. Bayford applied for probate of the later of the two wills only with the codicil.

Cur. adv. vult.

May 10, 1881. **SIR JAMES HANNEN, P.**—The testator in this case made a will in May, 1877, by which, after making certain devises to each of his six children, he directed the residue of his real and personal estate to be sold and divided equally among those children. By another will, executed in February, 1878, he

- A directed the whole of his real and personal property to be sold and divided equally between his six children, but with the direction that, in the case of two of them, certain arrears of accrued rent should be deducted from their shares. In January, 1880, he proposed to make a codicil which should deprive these two children of any share in the property, which was to be divided into four shares instead of six. The solicitor who was instructed to prepare this codicil made it a codicil to the will of 1877 instead of a codicil to the will of 1878. I was asked to treat this as a mere mistake, and to allow probate of the codicil with the will of 1878; but I do not feel able to do so, since not only was there a mistake as to the date, but the mind of the solicitor, which constituted for the occasion the mind of the testator, was applied to the provisions of the will of 1877, which he moulded into what he conceived to be the intention of the testator at the time when the codicil was made. If I were to
- C allow probate of the codicil with the later will only, I should introduce nonsense into the two instruments, for the codicil refers to provisions in the will which would not be found there. It is always difficult to apply any principles of law to a blunder; but, after giving my best consideration to the matter, I have arrived at the conclusion that, since the codicil refers to the will of 1877, it must be taken to confirm it, and bring it into existence. It is, therefore, necessary that the earlier
- D will should be included in the probate, so that the codicil may have an interpretation put upon it; but since the will of 1878 contains the most important dispositions of the testator, and these have never been revoked, this will must also be admitted to probate, leaving the effect of all the instruments to be determined, if necessary, by a court of construction; but in order to prevent litigation, I may say that the interpretation I should put upon these three instruments is that the two children
- E have been entirely excluded from the testamentary dispositions of the testator, and the whole of the property is to be divided among the other four children.

Solicitor : *Sealy*.

[*Reported by W. JOHN DIXON, Esq.. Barrister-at-Law.*]

CUNDY v. LE COCQ

[QUEEN'S BENCH DIVISION (Stephen and Mathew, JJ.), May 26, 1884]

[Reported 13 Q.B.D. 207; 53 L.J.M.C. 125; 51 L.T. 265;
48 J.P. 599; 32 W.R. 769]*Licensing—Offence—Sale of liquor to drunken person—Absolute prohibition—Relevance of knowledge by licensee of customer's drunken state.*

By s. 13 of the Licensing Act, 1872: "If any licensed person permits drunkenness or any violent, quarrelsome, or riotous conduct to take place on his premises or sells any intoxicating liquor to any drunken person, he shall be liable to a penalty. . . ."

The effect of the section **held** to be that the sale of intoxicating liquor to a drunken person was absolutely prohibited, and it was no answer to a prosecution under the section to show that the licensee or his servants did not know or had not the means of knowing that the person to whom the liquor was sold was drunk.

Notes. The Licensing Act, 1872, s. 13, has been repealed. See now s. 136 of the Licensing Act, 1953, which prohibits the sale of intoxicating liquor to drunken persons in the same terms.

Considered: *Newman v. Jones* (1886), 17 Q.B.D. 132. Applied: *Bond v. Evans*, [1886-90] All E.R.Rep. 1035. Considered: *Somerset v. Wade*, [1891-4] All E.R.Rep. 1228; *Ferguson v. Weaving*, [1951] 1 All E.R. 412. Referred to: *Burrows v. Rhodes*, [1895-9] All E.R.Rep. 117; *Hobbs v. Winchester Corpn.*, [1910] 2 K.B. 471; *Grade v. D.P.P.*, [1942] 2 All E.R. 118.

As to selling intoxicating liquor to drunken persons, see 22 HALSBURY'S LAWS (3rd Edn.) 681; and for cases see 30 DIGEST (Repl.) 96. For the Licensing Act, 1953, s. 136, see 33 HALSBURY'S STATUTES (2nd Edn.) 266.

Cases referred to:

- (1) *R. v. Prince* (1875), L.R. 2 C.C.R. 154; 44 L.J.M.C. 122; 32 L.T. 700; 39 J.P. 676; 24 W.R. 76; 13 Cox, C.C. 138, C.C.R.; 14 Digest (Repl.) 52, 181.
- (2) *R. v. Bishop* (1880), 5 Q.B.D. 259; 49 L.J.M.C. 45; 42 L.T. 240; 44 J.P. 330; 28 W.R. 475; 14 Cox, C.C. 404, C.C.R.; 14 Digest (Repl.) 37, 77.

Also referred to in argument:

Somerset v. Hart (1884), 12 Q.B.D. 360; 53 L.J.M.C. 77; 48 J.P. 327; 32 W.R. 594, D.C.; 14 Digest (Repl.) 46, 136.

Mullins v. Collins (1874), L.R. 9 Q.B. 292; 43 L.J.M.C. 67; 29 L.T. 838; 38 J.P. 629; 22 W.R. 297; 30 Digest (Repl.) 103, 761.

Nichols v. Hall (1873), L.R. 8 C.P. 322; 42 L.J.M.C. 105; 28 L.T. 473; 37 J.P. 424; 21 W.R. 579; 14 Digest (Repl.) 37, 66.

R. v. Woodrow (1846), 15 M. & W. 404; 2 New Mag. Cas. 1; 2 New Sess. Cas. 346; 16 L.J.M.C. 122; 10 J.P. 791; 153 E.R. 907; 14 Digest (Repl.) 36, 57.

A.-G. v. Lockwood (1842), 9 M. & W. 378; affirmed sub nom. *Lockwood v. A.-G.*, 10 M. & W. 464; 152 E.R. 552, Ex. Ch.; 39 Digest 235, 103.

Hearne v. Garton (1859), 2 E. & E. 66; 28 L.J.M.C. 216; 33 L.T.O.S. 256; 23 J.P. 693; 5 Jur.N.S. 648; 7 W.R. 566; 121 E.R. 26; 14 Digest (Repl.) 37, 76.

Roberts v. Egerton (1874), L.R. 9 Q.B. 494; 43 L.J.M.C. 135; 30 L.T. 633; 38 J.P. 485; 22 W.R. 797, D.C.; 25 Digest (Repl.) 95, 191.

Fitzpatrick v. Kelly (1873), L.R. 8 Q.B. 337; 42 L.J.M.C. 132; 28 L.T. 553; 38 J.P. 55; 21 W.R. 681; 25 Digest (Repl.) 83, 104.

R. v. Forbes and Webb (1865), 10 Cox, C.C. 362; 14 Digest (Repl.) 51, 176.

Davies v. Harvey (1874), L.R. 9 Q.B. 433; 43 L.J.M.C. 121; 30 L.T. 629; 38 J.P. 661; 22 W.R. 733; 14 Digest (Repl.) 42, 100.

A Case Stated by the stipendiary magistrate sitting at West Ham.

On February 1, 1884, the defendant, a licensee, was charged under the Licensing Act, 1872, s. 13, with selling intoxicating liquor to a drunken person. It was proved that there had been a sale of intoxicating liquor, and that the person served was drunk, but it was also proved that neither the licensee nor his servants had noticed that the person served was drunk, and that the drunken person, while in the licensed premises, had been quiet in his demeanour and had done nothing to indicate insobriety, the evidence showing that there was no apparent indication of intoxication. Upon the evidence, it was contended for the licensee that there was nothing to show any knowledge or means of knowledge on the part of the licensee or his servants that the person served was drunk. The magistrate convicted the licensee, holding that the offence was complete on proof that a sale had taken place and that the person served was drunk, and that it was unnecessary to determine whether the licensee or his servants knew, or had the means of knowing, that the person served was drunk, or could, with ordinary care, have detected the drunkenness. The question for the opinion of the court was, whether the construction placed by the magistrate on the section was right, or whether in arriving at his decision it was necessary for him to consider whether or not the licensee or his servants knew or had the means of knowing, or whether they could with ordinary care have detected, that the person served was drunk.

Besley for the licensee.

R. S. Wright (*Danckwerts* with him) for the prosecutor.

STEPHEN, J.—I am of opinion that this conviction should be affirmed. The case turns upon the question whether the words of s. 13 of the Licensing Act, 1872—the section under which the conviction took place—taken in connection with the general scheme of the Act, should be read as implying that a licensed person, before he can be convicted under that section of selling intoxicating liquors, must know, or have reasonable means of knowing, that the person served was drunk, or whether the section amounts to an absolute prohibition against selling intoxicating liquor to a drunken person, even when the seller had no such knowledge. I am of opinion that the words of the statute amount to an absolute prohibition of the sale of intoxicating liquor to a drunken person, and that, if the person selling the liquor did not know, or had not the means of knowing, that the person served was drunk, this is no answer to the charge, but is merely a matter to be urged in mitigation of the penalties imposed by the section. I come to this conclusion, not only in consequence of the general object of the Act, which is an Act for the prevention of drunkenness, but also by a comparison of the sections dealing with “offences against public order.”

In some of these sections the word “knowingly” is introduced; for instance, by s. 14, a penalty is imposed upon a licensed person who “knowingly” permits his premises to be the habitual resort of prostitutes, and by s. 16 a penalty is imposed for “knowingly” harbouring a constable. In those cases knowledge is necessary to constitute the offence. But in the section we are now dealing with, the word “knowingly” does not occur, and I believe the object of omitting the word was to throw on the publican the duty of finding out whether the person served was drunk or not, the consequence being that, if a customer is drunk, the publican or his servants must find out that he is drunk, or take the consequences of serving him.

On the other side it has been urged that the maxim of the criminal law, that before a person can be convicted of a crime there must be a “guilty mind,” applies to this case. This maxim came into use in early times, when the criminal law was in an undefined state, for the guidance of those who administered that law, and in those times the maxim may have been of general application. A “guilty mind” is a necessary element in some crimes, but those crimes have now been defined, and the maxim has been superseded in consequence of the greater precision in the definitions of crimes, and now, the question whether a “guilty mind” is necessary

to constitute an offence turns upon the words of each particular statute. *R. v. Prince* (1) shows that a guilty knowledge is not always necessary to constitute an offence; and *R. v. Bishop* (2) is to the same effect. The object of this part of the Act is to preclude all disputes whether the publican or his servants knew, or had reasonable means of knowing, that the person served was drunk at the time, the duty being thrown on the publican to find out that the person so served was not drunk. I think, therefore, that this conviction was right.

MATHEW, J.—I am of the same opinion. The language of this section is perfectly clear. This section would be altogether useless if the construction of counsel for the licensee were to prevail. It can be no hardship on the publican to have to find out whether the customer is drunk or not. It seems to me that the word “knowingly” was purposely omitted here. I quite agree with my brother STEPHEN that this conviction should be affirmed.

Solicitors : *Peckham, Maitland & Peckham*; Solicitor to the Treasury.

[Reported by HENRY LEIGH, Esq., Barrister-at-Law.]

CORY & SONS v. BURR

[House of Lords (The Earl of Selborne, L.C., Lord Blackburn, Lord Bramwell and Lord FitzGerald), April 27, 30, 1888]

[Reported 8 App. Cas. 393; 52 L.J.Q.B. 657; 49 L.T. 78;
31 W.R. 894; 5 Asp.M.L.C. 109]

Insurance—Marine insurance—Excepted risks—Warranty free from capture and seizure—“Seizure”—No belligerent seizure—Seizure because of barratry of master—Smuggling.

In a time policy of marine insurance the ordinary perils, including “barratry of the master,” were insured against, and the subject-matter of the insurance was “warranted free from capture and seizure, and the consequences of any attempt thereat.” During the continuance of the policy the ship was seized and detained by the Spanish authorities in consequence of the barratrous act of the master in smuggling.

Held: (i) there was a seizure of the ship, since a “seizure” in such a warranty was not limited to a belligerent seizure; (ii) a warranty free from capture and seizure excepted losses arising out of and occasioned by capture and seizure, even if remotely occasioned by barratry; and (iii) accordingly, whether the loss was regarded as being occasioned by the act of barratry (per LORD BLACKBURN) or not (per LORD BRAMWELL and LORD FITZGERALD), the insurers were not liable.

Per LORD FITZGERALD: “Capture” would seem properly to include every act of seizing or taking by an enemy or belligerent. “Seizure” seems to be a larger term than “capture,” and goes beyond it, and may reasonably be interpreted to embrace every act of taking forcible possession, either by a lawful authority or by overpowering force.

Per LORD BLACKBURN: I do not think that in the case of barratry there is an exception to the general rule that in insurance you look to the proximate and not the remote cause; and per LORD BRAMWELL: I doubt whether such an exception exists.

Notes. Considered: *Cossman v. West*, *Cossman v. British America Assurance Co.*, [1886-90] All E.R.Rep. 957. Followed: *Robinson Gold Mining Co. v. Alliance*

- A** *Assurance Co.*, [1902] 2 K.B. 489. Applied: *Atlantic Maritime Co., Inc. v. Gibbon*, [1953] 2 All E.R. 1086. Referred to: *Miller v. Law Accident Insurance Co.*, [1900-3] All E.R.Rep. 588; *Becker, Gray & Co. v. London Assurance Corp.*, [1916-17] All E.R.Rep. 146; *British and Foreign Steamship Co., Ltd. v. R.*, [1918-19] All E.R.Rep. 676; *Adelaide Steamship Co. v. A.-G.*, [1925] All E.R.Rep. 65; *Forestal Land, Timber and Railways Co. v. Rickards, Middows, Ltd. v. Robertson, Howard Bros. & Co. v. Kahn*, [1940] 4 All E.R. 96.

As to capture and seizure, see 22 HALSBURY'S LAWS (3rd Edn.) 77-78; as to barratry, see *ibid.* 82-83; as to the proximate cause of loss, see *ibid.* 90-92; and for cases see 29 DIGEST (Repl.) 251-253.

Cases referred to:

- C** (1) *Kleinwort v. Shepard* (1859), 1 E. & E. 447; 28 L.J.Q.B. 147; 32 L.T.O.S. 313; 5 Jur.N.S. 863; 7 W.R. 227; 120 E.R. 977; 29 Digest (Repl.) 256, 1920.
- (2) *Powell v. Hyde* (1855), 5 E. & B. 607; 25 L.J.Q.B. 65; 26 L.T.O.S. 74; 2 Jur.N.S. 87; 4 W.R. 51; 119 E.R. 606; 29 Digest (Repl.) 252, 1889.
- D** (3) *Dean v. Hornby* (1854), 3 E. & B. 180; 2 C.L.R. 1519; 23 L.J.Q.B. 129; 22 L.T.O.S. 222; 18 Jur. 623; 2 W.R. 156; 118 E.R. 1108; 29 Digest (Repl.) 256, 1922.
- (4) *Earle v. Rowcroft* (1806), 8 East, 126; 103 E.R. 292; 29 Digest (Repl.) 257, 1927.
- (5) *Havelock v. Hancill* (1789), 3 Term Rep. 277; 100 E.R. 573; 29 Digest (Repl.) 253, 1946.
- E** (6) *Palmer v. Naylor* (1854), 10 Exch. 382; 2 C.L.R. 1202; 23 L.J.Ex. 323; 24 L.T.O.S. 83; 18 Jur. 961; 2 W.R. 621; 156 E.R. 492, Ex. Ch.; 29 Digest (Repl.) 256, 1919.
- (7) *Lockyer v. Offley* (1786), 1 Term Rep. 252; 99 E.R. 1079; 29 Digest (Repl.) 167, 1029.

Also referred to in argument:

- F** *Ionides v. Universal Marine Insurance Co.* (1863), 14 C.B.N.S. 259; 2 New Rep. 123; 32 L.J.C.P. 170; 8 L.T. 705; 10 Jur.N.S. 18; 11 W.R. 858; 1 Mar.L.C. 353; 143 E.R. 445; 29 Digest (Repl.) 268, 2029.
- Vallejo v. Wheeler* (1774), 1 Cowp. 143; Lofft, 631; 98 E.R. 1012; 29 Digest (Repl.) 257, 1925.
- G** *Roscow v. Corson* (1819), 8 Taunt. 684; 129 E.R. 550; 29 Digest (Repl.) 259, 1959.
- Heyman v. Parish* (1809), 2 Camp. 149, N.P.
- Arcangelo v. Thompson* (1811), 2 Camp. 620, N.P.; 29 Digest (Repl.) 259, 1958.
- Hahn v. Corbett* (1824), 2 Bing. 205; 9 Moore, C.P. 390; 3 L.J.O.S.C.P. 253; 130 E.R. 285; 29 Digest (Repl.) 238, 1792.
- Livie v. Janson* (1810), 12 East, 648; 104 E.R. 253; 29 Digest (Repl.) 292, 2213.
- Waters v. Merchants' Louisville Insurance Co.*, 11 Peters U.S.Rep. 213.
- H** *American Insurance Co. v. Durham*, 12 Wend.N.Y.Rep. 463; 15 Wend.N.Y.Rep. 9.
- Suckling v. Delafield*, 2 Caines, 222.

Appeal by the plaintiffs, owners of the steamship *Rosslyn*, from a decision of the Court of Appeal (LORD COLERIDGE, C.J., BRETT and COTTON, L.JJ.), reported 9 Q.B.D. 463, affirming a decision of the Queen's Bench Division (FIELD and CAVE, JJ.), reported 8 Q.B.D. 313, upon a Special Case that the defendant, the respondent to this appeal, was not liable under a time policy of insurance, of which he was one of the underwriters.

The policy enumerated the ordinary perils, including "barratry of the master," and the policy was "warranted free from capture and seizure, and the consequences of any attempt thereat." The captain had used the ship for smuggling. He had employed it for the purpose of carrying tobacco, and when he was off the coast of Spain, he caused the engines to be stopped to look out for the ship into which he had intended to tranship the tobacco in order that it might be smuggled. He proceeded dead slow while he was looking out for that vessel, and while he was doing

this two craft came alongside with Spanish revenue officers on board, who seized the ship and took her to Cadiz. The ship was taken into possession in order to obtain a sentence of confiscation, and it would have been confiscated if the owners had not paid money to redeem it. The appellants' claim under the policy was dismissed by the Queen's Bench Division, and their appeal to the Court of Appeal from this decision was dismissed as stated above.

Webster, Q.C., and *Tyser (Myburgh, Q.C., with them)* for the appellants.
Cohen, Q.C., and *Barnes* for the respondent.

THE EARL OF SELBORNE, L.C.—This is an appeal from a unanimous judgment of the Court of Appeal affirming a unanimous judgment of the Queen's Bench Division; and I believe that all your Lordships agree that it is not necessary to call upon the counsel for the respondent. I am by no means sure that it might not be sufficient for me to say simply that I agree with the judgments given by *FIELD* and *CAVE, JJ.*, and also in the reasons which they gave for those judgments, and in the reasons which were given in the Court of Appeal. I will, however, make one or two observations upon the principal points on which the case depends.

Everything depends upon the construction of the words of the warranty in the policy, the warranty being

"free from capture and seizure, and the consequences of any attempts thereat."

The first question which has been considered in the argument has been, what is the meaning of the words "capture or seizure?" "Warranted free," clearly means that the insurers are not to be liable for the things to which the warranty applies. I own that I should have hesitated, even if there had been no authority, before I should have been brought to agree with the view which was thrown out in the course of the argument, and which *BRETT, L.J.*, seemed to think might have influenced him if there had not been authority against it—I mean the view that "capture and seizure" in such a warranty must be taken to mean *prima facie* belligerent capture and seizure only. My reasons for saying so are that the word "seizure" is used as well as the word "capture." I am disposed to agree that if the word "capture" had stood alone it might have appeared to point to a belligerent capture, but the addition of the word "seizure" is only officious, as I read the warranty, by supposing that it is to exclude that narrow construction of the word "capture," and to let in other "seizures," such as *CORTON, L.J.*, suggests, by means of the revenue laws of a foreign state.

The facts of this case show what the nature and effect of such a seizure is. The ship was seized in every sense we can put upon the word "seized." It was taken forcible possession of, and that not for a temporary purpose, not as incident to a civil remedy and the enforcement of a civil right, not as security for the performance of some duty or obligation by the owners of the ship, but it was carried into effect in order to obtain a sentence of condemnation and confiscation of the ship; and the case states that that would have been the result of the seizure which took place in the present instance if money had not been paid to redeem the ship from that confiscation and total loss. To my mind those facts are properly described by the word "seizure" in its natural sense, and unless there is something else in the policy to show that the word was meant to bear a different sense, not inclusive of such a state of facts, I should have said, in the absence of authority, that they were included.

But then we find that there are two authorities, which show, at all events, that these words in such a warranty cannot be restrained to a belligerent capture. In *Kleinwort v. Shepard* (1) there was a capture by a mutinous crew—an act which might be described as piracy on the part of that crew undoubtedly, and might therefore have come within the word "pirates," as mentioned in the policy, but it was not a belligerent capture beyond all doubt. In the other case, *Powell v. Hyde* (2), there was no belligerent capture, there was an accident. The ship was shot at and sunk by a friendly power mistaking her for an enemy. That would certainly not

A be a belligerent capture, but it was regarded as a "capture" in the sense which was to be obtained from the juxtaposition of the words "capture" and "seizure," and the comparison of them with the other words which occur in the body of the policy, and show that it was meant to cover and include all sorts of losses of that kind—losses by "men-of-war," by "enemies," by "pirates," by "rovers," by "takings at sea," by "arrests, restraints, and detainerments of all kings, princes, and people."

B Therefore, both on authority and on principle, I reject the idea that these words "capture and seizure" can be so narrowly construed as to exclude such a seizure as that which took place in the present case.

But then it is contended that if the claim might have been made upon the footing of barratry, though there was a capture or seizure, and though the capture or seizure only caused the loss, and there would have been no loss without the capture or seizure, yet that if a claim might be made upon the footing of barratry, then the warranty does not apply. I confess I have never seen how such a construction could be put upon the policy and the warranty, taken together, without leading to consequences altogether destructive of the whole operation of the warranty. Because—let me suppose the case of a belligerent capture—that capture is as much attributable to "men-of-war" or "enemies," or "taking at sea," as any seizure by

D reason of barratry can be attributed to barratry; indeed, more directly and immediately. Men-of-war and enemies might or might not have taken the ship, but their coming into contact with the ship, their firing at her—we may suppose their placing her in a position of jeopardy—is the first step towards "capture or seizure," which is its consequence. The argument, if it is sound as to barratry, would seem to be sound as to men-of-war and enemies also, that because there is an express insurance against those things, therefore, a "capture or seizure," and consequently an attack by men-of-war or enemies, is to be taken out of the warranty. I might follow it further as to "pirates," and as to "restraints and detainerments of kings, princes, and people." It is quite manifest that the object of this warranty is, and must be, to except such losses, otherwise covered by the policy, and coming within its express terms, as arise out of, and are as losses occasioned by, "capture or seizure."

F That appears to me to be equally the case whether remotely it was occasioned by barratry or not; in fact, the remoter it is the stronger the argument that it must be the case as to barratry. Therefore, I entirely agree both in the conclusions and in the reasons of the two courts below.

G **LORD BLACKBURN.**—I also agree entirely in the result to which the courts below have come, and with one exception, which perhaps is not very material, I agree with their reasoning; but I think it is necessary to say that I do not at present agree in one thing said. A passage was cited from ARNOULD ON INSURANCE (1st Edn.), vol. ii, p. 838, which lays down that, while it is very true that the general rule is that in insurance you look to the proximate cause and not the remote cause, there is an exception in the case of barratry, and that the remote cause may be looked to there. I can only say that I think there is no other authority for such a rule, and, though certainly FIELD, J., and BRETT, L.J., seemed to suppose naturally, on the authority of that statement in the textbook, that this was a rule of insurance law, I, as at present advised, do not think that it is. The very instances which are given in the passage from ARNOULD are instances in which the courts thought rightly or wrongly—I think rightly—that the cause of loss was barratry, and that the consequence for which the parties were entitled to be indemnified was not a remote consequence. That is all I say upon that part of the subject. I am merely putting in a protest against what may be hereafter cited as being an established principle of insurance law. For my own part I do not think that it is.

I Proceeding from that to the rest of the case, I thoroughly agree in the judgments which were pronounced below. The policy here is in the ordinary Lombard Street form, which has been in use for more than a century, and contains the ordinary enumeration of the perils against the loss from which the underwriters undertake to

indemnify the assured. Many of these, as for instance, "men-of-war," "enemies," "pirates," "rovers," and, I may add, "barratry of the master or mariners," do not in themselves necessarily occasion any loss; but when by one of these the subject assured is taken out of the control of the owners, there is a total loss by that peril, subject to be reduced if by subsequent events the assured either do get, or but for their own fault might get, their property back: *Dean v. Hornby* (3). There are other perils, such as "takings at sea," "arrests, restraints, and detainments of princes," which from their nature involve such a taking of the subject insured out of the control of the owners.

That being the case, supposing there had been no warranty at all, was there a loss here which would be one for which the underwriters would be liable? Upon the facts stated, I cannot doubt it. The definitions of barratry in *Earle v. Rowcroft* (4) has never been departed from. The effect of that case is that the act of a captain, for his own purposes and to serve his own ends, engaging in a smuggling transaction which might tend, and in this case did tend, to the injury of his owners, and to the ship being seized, is barratry. The captain in the present case had done that: he had employed the ship for the purpose of carrying tobacco. When he was off the coast of Spain he caused the engines to be stopped to look out for the ship into which he had intended to tranship the tobacco in order that it might be smuggled, and he proceeded "dead slow" while he was looking out for that vessel. That was a clear case of barratry. While he was doing this "two craft came alongside with Spanish revenue officers on board, who seized the ship, and took her into Cadiz."

First of all, was that act of the two Spanish revenue officers in taking and seizing this ship, in itself one of those matters which would be covered by the insurance against the enumerated perils? I cannot myself doubt that it was. I cannot doubt that it came quite within the terms, "restraint and detention by a prince or people," namely the government of Spain, and their seizing the vessel was, I think, a thing for which the owners might have recovered under that head. But, it was also, I think, not at all a remote, but a direct and immediate consequence of the barratrous act of the captain, and it might, therefore, have been recovered for in the old times, when we were particular about pleadings under a count in which it was laid as being barratry, and the loss as being a consequence of it. The case that was referred to of *Havelock v. Hancill* (5) is a case where the party recovered on a count for barratry, which would not in itself occasion any damage—but it was held good on demurrer—and in those days they were particular upon demurrer—the count alleging almost identically the same thing as happened here, except that the seizure was by the English government for smuggling against the English law, instead of being by the Spanish government for smuggling against the Spanish law. That was a case in which the underwriters were held to be responsible, and I think myself that they might also have been held responsible if the count had alleged the loss to have been occasioned by restraint of princes.

Now comes the question, Does this warranty free the underwriters from that responsibility? That is the main question. First, let us see what the warranty is. There are warranties which in effect merely say, We will define the sort of adventure in which you shall be engaged when we are to indemnify you; for example, it shall be warranted that the ship shall not sail anywhere except in the Mediterranean, or something of that sort, defining the risk which they are to encounter; and if the ship goes out beyond that distance, then it is like a deviation. she has incurred a different kind of risk from that which the underwriters undertook to bear—it has become altogether a different adventure. That is one description of warranty. But there is another which has been for a long time used, expressed in the phrase "warranted free from" particular things. I need only point, as I did in the course of the argument, to the ordinary warranty which is printed at the foot, and has been so for more than a century, known as the memorandum,

A "corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general, or the ship be stranded; sugar, tobacco, hemp, flax, hides, and skins are warranted free from average under £5 per cent. and all other goods; also the ship and freight are warranted free from average under £3 per cent., unless general, or the ship be stranded, sunk, or burnt."

B That kind of warranty, "warranted free" in that sense, means that, although the general terms of the policy would have covered this, yet, considering the special riskiness of the particular matter, the underwriters, unless they are paid a premium for consenting to take it in, do not choose to be liable where the particular thing happens which they have stipulated by this warranty that they shall be warranted free from.

C Here they are "warranted free from capture or seizure, and the consequences of any attempts thereat." It was argued that here they have not been warranted free from barratry. That is true; but the barratry would itself occasion no loss at all to the parties insured if it had not been that the Spanish revenue officers, doing their duty—they were quite right in that respect—had come and seized the ship. The barratry of the captain in coasting along there—hovering, as we should call it, along the coast—in order that the small smuggling vessel might come and take the tobacco, would have done the insured no harm at all. The underwriters do undertake to indemnify against barratry; they do undertake to indemnify against any loss which is directly sustained in consequence of the barratry; and in this case, I think, as I said before, the seizure was as direct a consequence of the barratry as could well be. But still, as FIELD, J., says, it was the seizure which brought the barratry into operation. I think that is the phrase which he uses. E The seizure brought the loss into existence—it was a case of seizure. Then why should it not be protected by this warranty?

The American cases which have been referred to are quite different; they are founded upon *Havelock v. Hancill* (5). There the voyage was described as "any lawful adventure," or "any lawful voyage," and if it had been not a lawful voyage it would have been like a deviation. It would have been a different kind of adventure from that of which the underwriters took the risk. The fact of its being not a lawful voyage would have made it one for which they had not engaged to be responsible. The underwriter in that case might have said: "Non hæc in fœdera veni. I have engaged to indemnify you against the risks of a lawful voyage, you engaged in an unlawful voyage." But the answer was: "This was not an unlawful voyage, for what was done here was to engage in a lawful voyage, and the barratry of the captain did not make that voyage unlawful." G The decision has stood now for a century, and has not been quarrelled with. I should have thought that that was as plain a decision as one could wish for. The American courts upon that—with some want of logic, I cannot help thinking—drew the inference that, where there was a warranty free from seizure and capture in consequence of illicit trading, they were to hold that it was to be an illicit trading to which the insured was a party. H I think that is what it comes to, or at least to which the owner of the ship was a party. I think that is an illogical consequence, and I do not approve of the reasoning by which it was come to. But it is sufficient to say that it has nothing to do with the present case. There was no illicit trading here, there was nothing but the act of barratry. There are no such words used here as "warranted free from capture or seizure in consequence of illicit trading," if that would have made any difference. I

The question then is reduced, as it seems to me, to this: When the whole loss was occasioned by that which was certainly a "seizure," is it within the meaning of the warranty? I say certainly it is. If it were perfectly *res integra* there would be something to be said in favour of holding that "capture" and "seizure" ought to be limited, or might be supposed to be limited, to belligerent risks—risks in times of war—although I think that there would be a great deal to be said against it. But the point is not new. In *Kleinwort v. Shepard* (1) the seizure was one

which was in no wise connected with the acts of foreign princes or their subjects, it being the act of coolies, who were not pirates in the sense of being assailing thieves, for they were lawfully in the ship; they were passengers who rose in mutiny; they were not barratrous, for they were not the captain nor the crew, they were neither the one nor the other; but it had been held in *Palmer v. Naylor* (6), which I argued myself, that whether they were pirates or not, it was quite clear that they were ejusdem generis, and consequently they came within the words "and other perils." It was at least another peril which was clearly covered. In *Kleinwort v. Shepard* (1) it was decided that a seizure of that sort was a seizure within the perils which were warranted against. That is in fact a much stronger decision than the present. All that it is necessary to say in the present case is that the warranty is against a seizure by a power. I do not say at all that *Kleinwort v. Shepard* (1) is not perfectly right. I only say that it goes further than is required here, and I also say that when a decision has been come to and acted upon, which has stood for thirty years, as to the construction of such words as these, it requires some very strong reasoning to justify one in saying that we should now hold that where people have used these identical words, knowing the meaning which has been previously put upon them by a judicial decision, they do not mean the same thing. Consequently, I think that strong reasoning will be required for reversing *Kleinwort v. Shepard* (1).

But it is enough to say that this was a seizure, being the act of the power which made that seizure, and, therefore, that the court below are perfectly right in the conclusion at which they have arrived.

LORD BRAMWELL.—I am of the same opinion. What was in contemplation by the parties in this case may be very doubtful; and I should have thought that it was very doubtful also what was the meaning of these words originally; but a meaning has been put upon them, and, that meaning having been acted upon, I think it is desirable that it should be abided by, because undoubtedly people who make contracts make them in reference to the well-understood meaning of such words, and if that meaning is an inconvenient one they can alter the words. I think that the meaning of the words which are here to be construed is now plain. The warranty is a warranty "free from capture and seizure"; it is perfectly general in its terms. If the vessel has been captured or seized, and a loss has been thereby occasioned, it is within the warranty.

It is said here that the loss was not from the seizure, but that in truth it was from the barratry, and it is ingeniously suggested that the seizure was "an intermediate step." But it was the ultimate and final step which occasioned the loss, and but for the payment of money the ship would have been confiscated, which would have been merely a following up of the seizure. One might put this case: Supposing the ship had been confiscated and sold, and then the Spanish government, upon some representations made to them, had returned a portion of the proceeds, would there not have been a loss by seizure? There would. And is it not equally so now? To my mind that point is really not tenable. But then it is said that when barratry is the *causa remota* of the loss it nevertheless may be relied upon without reference to the *causa proxima*. I will say nothing as to any general rule, except to express a doubt as to whether what **BRETT, L.J.**, said about that matter is perfectly correct. I have a misgiving about it, but I do not consider it necessary to determine anything of that sort here. It is possible that in some cases where there has been barratry, and a consequent loss within the perils insured against, you might call that a loss by barratry. In my opinion you cannot do so in this case. Call it an ultimate loss if you like. That ultimate loss was by a seizure, and that was warranted against.

LORD FITZGERALD.—I entirely agree. The question arises on the proper interpretation of the limitation of the liability of the insurers contained in the clause, "warranted free from capture and seizure, and of any attempt thereat."

A This warranty must be taken to apply to some of the risks previously enumerated, and to limit the otherwise unlimited liability of the insurers. On looking back to the enumeration of the perils which the policy was intended to cover, we find some the generality of which may be the subjects of the limitations expressed in the warranty. For example,

B "arrests, restraints, and detainerments of all kings, princes, and peoples of what nation, condition, or quality soever; barratry of the master and mariners, and all other perils, losses, and misfortunes."

C The contention of the appellants is that the warranty does not apply where, as in the case before us, the seizure has been the immediate consequence of the barratrous act of the master, and, on the other hand, the respondent insists on the literal construction of the warranty as embracing all cases in which the ship has been taken forcible possession of by superior power or authority. If the latter construction is to prevail, then the respondent contends that, the seizure having been the immediate proximate cause of the loss, he, the insurer, is exempt from liability. The question seems a simple one; but, if we depart from the literal construction, we may be led into complications and metaphysical refinements from which mercantile contracts ought, as far as possible, to be free. If the question had come before us unfettered by authority, and if the decision in the court below had been in favour of the appellants, I should have been content. But I have an invincible objection to uncertainty in the interpretation of mercantile contracts. The literal interpretation of the exemption would embrace all cases of capture or seizure which would otherwise have been within the perils insured against, and so far as the authorities have gone they are in favour of the respondent's contention. E I allude to *Powell v. Hyde* (2) and *Kleinwort v. Shepard* (1), which have been already commented upon. In the construction of this warranty it is observable that capture and seizure do not mean the same thing. "Capture" would seem properly to include every act of seizing or taking by an enemy or belligerent. "Seizure" seems to be a larger term than "capture," and goes beyond it, and may reasonably be interpreted to embrace every act of taking forcible possession, either F by a lawful authority, or by overpowering force.

I am quite satisfied with, and adopt, the interpretation put upon these words in the judgments of the courts below, following the views put forward in *Powell v. Hyde* (2) and *Kleinwort v. Shepard* (1). It was urged upon us that it was unreasonable and unjust as applied to the present case. It appears to me, on the contrary, G that the warranty, as now interpreted, was a reasonable stipulation for the insurers to make. I find the following to be the definition of "barratry" given by WILLES, J., in *Lockyer v. Offley* (7) (1 Term Rep. at p. 259):

"Barratry is every species of fraud or knavery of the master by which the freighters or owners are injured."

H It is obvious with so loose a definition as that, there may be instances of barratry which may be either harmless, or effect but a small loss; for instance a deviation, or wilful delay. But barratry may also consist in a very small matter, over which the owners or freighters have no control, the effects or consequences of which may be very serious, and I can well understand the prudence of insurers stipulating. "We will not be responsible for seizure caused by some barratrous act of the master or crew, rendering not only the ship, but also the cargo, liable to confiscation."

I If such be the interpretation which is to be put upon the contract, I ask the question, By what was the loss occasioned? I apprehend that there can be but one answer to this question, namely, that the loss arose from the seizure. There was no loss occasioned by the act of barratry. The barratry created a liability to forfeiture or confiscation, but might in itself be quite harmless. But the seizure which was the effective act toward confiscation, and the direct and immediate cause of the loss, was not because the act of the master was an act of barratry, but that it was a violation of the revenue laws of Spain. In the same clause of the warranty the words are

"warranted free from capture and seizure, and the consequences of any attempt thereat." A

If in place of the Spanish cruiser having seized their vessel she had failed to seize her, but in the attempt had sunk the vessel, I should have put the same question, "What caused the loss?" and the proper answer would have been: "Not the barratrous act of the captain, but the sinking of the vessel by the Spanish cruiser." B
On these grounds I agree that the judgment of the court below should be affirmed.

Appeal dismissed.

Solicitors: H. C. Coote for H. A. Adamson, North Shields; Waltons, Bubbs & Walton.

[Reported by C. E. MALDEN, Esq., Barrister-at-Law.] C

Re PADSTOW TOTAL LOSS AND COLLISION ASSURANCE ASSOCIATION

[COURT OF APPEAL (Sir George Jessel, M.R., Brett and Lindley, L.J.J.), January 11, 1882] E

[Reported 20 Ch.D. 137; 51 L.J.Ch. 344; 45 L.T. 774;
30 W.R. 326]

Company—Registration—Mutual marine insurance association with more than twenty members—Indemnification of individual members an object for "the acquisition of gain"—Need for registration. F

Company—Winding-up—Unregistered company—Company required to be registered under the Companies Act, 1862—Company unlawful—Effect on winding-up order—Discharge by way of appeal—Leave to appeal out of time.

A mutual marine insurance association, formed in 1867, consisting of more than twenty members, and not registered, was managed by a committee of members, under certain rules and regulations. In 1880 a winding-up order was made on the petition of the assignee of a claim of a member whose ship had been lost. The petition was served at the abandoned office of the association, which had ceased to carry on business. The point of the constitution of the association had not been brought to the notice of the judge whose order to wind-up was in fact, though not in form, made *ex parte*, no one appearing to oppose it. In 1881 a member of the association, who had only just become aware of the presentation of the petition and the making of the winding-up order, gave notice of appeal from the order, asking that the time for appealing might be extended. G

Held: (i) the object of the association being the indemnification of the individual members in the event of loss was an object for "the acquisition of gain" within the meaning of the Companies Act, 1862, s. 4, and the association ought to have been registered under the Act; (ii) as the association was unregistered it was unlawful, and the court had no jurisdiction to make a winding-up order; (iii) the court making the order was competent to decide its own jurisdiction and in the circumstances the order was not a nullity but an erroneous order, and the proper mode of discharging the order was by way of appeal; (iv) as the order was made without the question of the constitution being disclosed to the court and as the appellant was ignorant of the making of the order leave to appeal out of time ought to be given. H I

A Notes. Section 4 of the Companies Act, 1862, has been replaced by ss. 429 and 434 of the Companies Act, 1948. Section 399 of the 1948 Act corresponds to s. 199 of the 1862 Act.

Followed: *Jennings v. Hammond* (1882), 9 Q.B.D. 225; *Shaw v. Benson* (1883), 11 Q.B.D. 563. Considered: *Re Bowling and Welby's Contract*, [1895-9] All E.R.Rep. 920; *Re Ilfracombe Permanent Mutual Benefit Building Society*, [1901]

B 1 Ch. 102. Applied: *I.R.Comrs. v. Cornish Mutual Assurance* (1924), 94 L.J.K.B. 237; *Re United General Commercial Insurance Corp., Ltd.*, [1927] All E.R.Rep. 380. Referred to: *Marrs v. Thompson* (1902), 86 L.T. 759; *Brighton College v. Marriott*, [1925] 1 K.B. 312; *Cornish Mutual Assurance v. I.R.Comrs.*, [1926] A.C. 281; *Greenberg v. Cooperstein*, [1926] Ch. 657; *Thomas v. Evans, Jones v. South-West Lancashire Coal-Owners' Association* (1926), 135 L.T. 673; *Armour v. Liverpool Corp.*, [1939] 1 All E.R. 363; *Vandyk v. Minister of Pensions and National Insurance*, [1954] 2 All E.R. 723.

As to registration of companies and meaning of "carrying on business" and "gain," see 6 HALSBURY'S LAWS (3rd Edn.) 83, 84; and for cases see 9 DIGEST (Repl.) 69, et seq. As to winding-up by the court, see 6 HALSBURY'S LAWS (3rd Edn.) 528 et seq.; and for appeals, see *ibid.*, 712 et seq.; and for cases see 10 DIGEST (Repl.) 848 et seq., 1034 et seq. As to illegal companies, see 6 HALSBURY'S LAWS (3rd Edn.) 793 et seq.; and for cases see 10 DIGEST (Repl.) 1174 et seq. For the Companies Act, 1948, ss. 199, 429, 434, see 3 HALSBURY'S STATUTES (2nd Edn.) 754, 775, 778.

Cases referred to:

- E** (1) *Re Arthur Average Association for British, Foreign and Colonial Ships, Ex parte Hargrove & Co.* (1875), 10 Ch. App. 542; sub nom. *Re Arthur Average Association, Ex parte Cory and Hawksley*, 44 L.J.Ch. 569; 32 L.T. 713; 23 W.R. 939; 2 Asp.M.L.C. 570, L.J.J.; 10 Digest (Repl.) 1160, 8074.
- (2) *Re South Wales Atlantic Steamship Co.* (1876), 2 Ch.D. 763; 46 L.J.Ch. 177; 35 L.T. 294, C.A.; 10 Digest (Repl.) 1178, 8210.
- F** (3) *Smith v. Anderson* (1880), 15 Ch.D. 247; 50 L.J.Ch. 39; 43 L.T. 329; 29 W.R. 21, C.A.; 9 Digest (Repl.) 70, 270.

Also referred to in argument:

- Re Plumstead Waterworks Co., Ltd., Ex parte Hardinge* (1860), 2 De G.F. & J. 20; 29 L.J.Ch. 741; 2 L.T. 8; affirmed (1862), 1 New Rep. 40; 32 L.J.Ch. 145; 7 L.T. 550; 8 Jur.N.S. 1140; 11 W.R. 99, L.J.J.; 10 Digest (Repl.) 927, 6336.
- G** *Re Tucker, Ex parte Tucker* (1879), 12 Ch.D. 308; 48 L.J.Bcy. 118; 28 W.R. 219, C.A.; 4 Digest (Repl.) 575, 5115.
- Re National Permanent Benefit Building Society, Ex parte Williamson* (1869), 5 Ch. App. 309; 22 L.T. 284; 34 J.P. 341; 18 W.R. 388, L.J.; 10 Digest (Repl.) 758, 4928.
- H** *R. v. Whitmarsh* (1850), 15 Q.B. 600; 16 L.T.O.S. 108; 117 E.R. 586; sub nom. *R. v. Whitmarsh, Re National Land Co.*, 19 L.J.Q.B. 469; sub nom. *R. v. Joint Stock Companies Registrar, Re National Land Co.*, 15 Jur. 7; 9 Digest (Repl.) 71, 277.
- Bear v. Bromley* (1852), 18 Q.B. 271; 7 Ry. & Can. Cas. 507; 21 L.J.Q.B. 354; 19 L.T.O.S. 60; 16 J.P. 710; 16 Jur. 450; 118 E.R. 101; 9 Digest (Repl.) 71, 279.
- I** *Re London Marine Insurance Association, Andrews' and Alexander's Case, Chatt's Case, Cook's Case, Crew's Case* (1869), L.R. 8 Eq. 176; 20 L.T. 943; 17 W.R. 784; 10 Digest (Repl.) 1162, 8092.

Appeal to discharge a winding-up order made by MALINS, V.-C.

The subject of the winding-up order was a mutual marine assurance association which was formed in 1867 and which carried on business at Padstow in Cornwall. The association consisted of more than twenty members and was not registered under the Companies Act, 1862.

The society was managed by a committee of the members, under certain rules and regulations. The rules, which were endorsed on the policies issued by the association, and made part of them, provided that it should consist of owners and part owners of vessels. Rules 3, 5 and 8 provided as follows:

"3. That on any vessel, or part thereof, being entered in this association, the owner, or owners, shall immediately pay the sum of £1 per cent. on the amount insured, as a deposit towards paying any loss that may happen, and 5s. per cent. towards a fund for incidental expenses; and that the said owner or owners, on subscribing his or their names to the legal documents of the association, shall become a member thereof, and be subject to its rules. The money deposited shall be placed at the disposal of the committee for the time being.

5. No vessel shall be insured in this association in any greater sum than £1,000, and which amount shall not in any case, exceed three-quarters of the value of such vessel.

8. The perils insured against are as follows: In case any vessel belonging to this association shall be taken, lost, wrecked, destroyed by fire, or stranded, and thereby receive so much damage as shall induce the owner or owners to abandon her to this association, and which abandonment such owner or owners may make when the actual damage done to the vessel stranded shall be satisfactorily shown to the committee to exceed 75 per cent. of her entered value, subject to the proviso hereinafter contained, then the members, their heirs, executors, or administrators, severally, and not jointly, each one for himself, and not for each other, shall, as often as the case shall happen, and after satisfactory proof be given, pay the loser or losers of such vessel the amount insured in this association, rateably and proportionately by each member according to his amount assured. . . . In case any vessel insured in this association should run down any other vessel, and the owners be called on to make good the value of the vessel so run down, this association shall either defend any action that may be brought against the owners of the vessel which may have run down such other vessel, and pay its proportion of costs and damages in such cases (such damages and costs not to exceed the amount the said vessel is insured in this club), or pay to such owner two-thirds of the sum in which the vessel may be insured in this association, in either case subject to the usage at Lloyd's."

Rule 9 provided that if the contribution of a member should not be recovered through his insolvency, the loss should be borne by the members generally. The policies issued by the association were signed by the manager per procuration of the several members.

On Sept. 21, 1875, Richard Redway, one of the members, effected a policy of insurance for £400 for a year on a ship called the *Memento*, of which he was the owner. The ship was lost in February, 1876. Disputes arose between him and the committee as to his right to recover the amount of the insurance, and the question was in August, 1877, referred to arbitration. In January, 1878, Redway assigned for value the policy, and all moneys payable to him under it to the Devon and Cornwall Banking Co. In February, 1878, the arbitrators made an award that £253 was due to Redway on the policy. The agreement to refer to arbitration was in April, 1878, made an order of the Queen's Bench Division; and in March, 1879, the banking company brought an action in the name of Redway in the Queen's Bench Division against the association for payment of the sum found due by the arbitrators, and in April, 1879, they obtained judgment by default for £253, with costs. In November, 1879, the banking company issued execution on the judgment, but failed to obtain any payment thereby.

In 1880 the banking company presented a petition for the winding-up of the association, which had then ceased to carry on business, and had closed its office. The petition was served at the abandoned office of the association, and was

A advertised in the "London Gazette" and in two local papers. The association did not appear on the hearing of the petition, and on May 28, 1880, MALINS, V.-C., made a winding-up order. The petition stated that the association consisted of more than seven members, but did not state that it consisted of more than twenty members, and so far as appeared the petitioners did not know this. On Nov. 18, 1881, Mr. Charles Bryant, the appellant, who had been a member of the association, and who had only just become aware of the winding-up order, gave notice of appeal from the order and of an application for the extension of the time for appealing. The application for the extension of time for appealing was ordered to stand over to the hearing of the appeal.

By the Companies Act, 1862, s. 4:

C "No company, association, or partnership, consisting of more than ten persons, shall be formed, after the commencement of this Act, for the purpose of carrying on the business of banking, unless it is registered as a company under this Act, or so formed in pursuance of some other Act of Parliament, or Letters Patent; and no company, association, or partnership, consisting of more than twenty persons, shall be formed after the commencement of this Act, for the purpose of carrying on any other business that has for its object the acquisition of gain by the company, association, or partnership, or by the individual members thereof, unless it is registered as a company under this Act, or is framed in pursuance of some other Act of Parliament, or of letters patent, or is a company engaged in working mines within and subject to the jurisdiction of the Stannaries."

E By s. 199:

"Subject as hereinafter mentioned, any partnership, association, or company, except railway companies, incorporated by Act of Parliament, consisting of more than seven members, and not registered under this Act, and hereinafter included under the term "unregistered company," may be wound up under this Act; and all the provisions of this Act with respect to winding-up shall apply to such company . . ."

Glasse, Q.C., and *Methold* for the appellant.

Cookson, Q.C., and *Hornell* for the liquidator.

G SIR GEORGE JESSEL, M.R.—This appeal is on a point which was not brought to the notice of MALINS, V.-C., whose order was in fact, though not in form, made ex parte. The petition was served correctly according to law, but in fact the appellant had no notice of it. There was nothing in the petition to call the attention of the learned judge to the question of the lawfulness of the association.

H The first point to consider is whether, assuming that the association was an unlawful one, and that the court had no jurisdiction to make an order to wind it up, the proper mode of getting rid of that order was to appeal from it. I think it was. The order was made by a court which was competent to decide whether it had jurisdiction, and must be treated as a decision that it had jurisdiction. There was, therefore, an error in the order, and an appeal from it would lie. The next question is whether leave to appeal ought to be given. I think it ought, notwithstanding the expiration of the twenty-one days limited by Ord. 58 for so doing.

I It is plain that the order was made without the difficulty in the constitution of the association being disclosed to the court. I do not say that was done improperly, for probably the counsel who obtained the order did not know of the difficulty. Under these circumstances, and considering that the appellant was ignorant of the making of the order, leave to appeal ought to be given. The next question is, whether the association was clearly an unlawful one, and whether, if so, a winding-up order could be made. If the association was one which was unlawful under s. 4 of the Act, I think that both by the authority of the decided cases such as *Re Arthur Average Association* (1), and *Re South Wales and Atlantic*

Steamship Co. (2), and on principle no winding-up order could be made. Section 199 must apply to some partnership, association, or company which could be lawfully formed. If the formation of the association was prohibited by s. 4 it was impossible that the legislature should say that that which could not be formed under s. 4 should be wound-up under s. 199 with all the consequences which would follow from a winding-up order. A

The last and most difficult question is, whether this association was one the formation of which was prohibited by s. 4. Was it an association formed for the purpose of carrying on business? On this point I think there can be no doubt. The policy is in the form of an ordinary policy of marine assurance. It copies Lloyd's policy almost verbatim. It is signed for the several members by procuration. In form it is a policy of marine insurance by several insurers who are the members of the association. There is every feature of a marine insurance company. B

Was, then, the association one whose business had for its object "the acquisition of gain by the association or by the individual members thereof?" It is plain, though the object was not the acquisition of gain for the association as a whole, the object was the acquisition of gain by the individual members. Each member paid a small sum with the view of obtaining a larger sum on the happening of an uncertain event. Was the obtaining of the large sum a loss or a gain because there happened to be a loss? It appears to me that there could not be any such limitation of the meaning of the word "gain." I do not think that, because the loss of a vessel was the occasion of a claim, the payment of the claim was the less a gain to the person who received it. And, looking at the general scope of the Act, I think the object of the provision is that commercial associations shall be registered, and that this association comes within the purview of the section, and it ought to be construed so as to carry out its object without too minute a criticism of the particular words. Consequently the winding-up order ought not to have been made, and it must be set aside. But, as there has been a general miscarriage, no costs will be given. C D E

BRETT, L.J.—I am of the same opinion. The order appealed from being one of a superior court, which has jurisdiction in certain cases to make a winding-up order, if there is any error in it, it is an error in the particular case, and not an assumption of an unwarranted jurisdiction. The order cannot, therefore, be treated as a nullity, but is the proper subject of an appeal. The ordinary rule, therefore, which governs the time within which an appeal must be brought, applies, but it is a case in which the court ought to exercise its power to enlarge the time. If s. 4 applied to this association the law could take no cognisance of it at all, and the absence of notice to the petition could make no difference. It may not be necessary to decide the latter point, because the petitioner, who claims through a member who clearly had notice of the constitution of the association, cannot stand in a better position than he did. If the association is one prohibited by s. 4, I would not call it illegal, but its existence could not be recognised in any way by the law; it cannot be said to have ever existed. It is not an association formed to carry on a business, the object of which is the acquisition of gain by the association itself. But the object is that, in consideration of the members insuring other members' ships, their own ships should be insured in case of loss. The object of each individual member is that he shall be indemnified in case of the loss of his ship. Is that object the acquisition of gain? He lost his ship, and got the insurance money from his brother associates. From the loss of the ship he got that which was a gain to himself, and this, in my opinion, fulfilled the meaning of s. 4 of the Act. No association, therefore, of which the law could take cognisance has existed, and no winding-up order could be made. I may add that in *Smith v. Anderson* (3) I expressed an inclination of opinion to the contrary, but, after full argument, I feel that that opinion cannot be sustained. F G H I

LINDLEY, L.J.—I also concur. The question is whether a diversion of loss from the individual members was a gain to them within the meaning of s. 4.

A I think the words are wide enough, and are intended to be wide enough to include such a case. Then what is the consequence of the association not being registered? The words of the section are imperative, and they mean that such an association, if unregistered, is illegal in this sense, that the law cannot recognise its existence except in a criminal court.

B Solicitors: *Clarkson, Greenwell & Wyles; G. E. Philbrick.*

[*Reported by E. S. ROCHE, Esq., Barrister-at-Law.*]

TILLET AND ANOTHER v. NIXON AND ANOTHER

[CHANCERY DIVISION (Pearson, J.), December 7, 1883]

[Reported 25 Ch.D. 288; 53 L.J.Ch. 199; 49 L.T. 598;
32 W.R. 226]

D *Mortgage—Receiver—Appointment—Appointment by court—Legal mortgage—
Power of mortgagee himself to appoint receiver.*

E The court held to be authorised, under the Supreme Court of Judicature Act, 1873, s. 25 (8), to appoint a receiver on the application of a legal mortgagee, notwithstanding that he may appoint a receiver himself without coming to the court. When an action for foreclosure is pending, and the parties are at arm's length, it is much more desirable that the receiver should be appointed by the court.

F **Notes.** The Conveyancing Act, 1881, s. 19 (1) (iii) and s. 24 (1) (2) were replaced by the Law of Property Act, 1925, s. 101 (1) (iii), (5), and s. 109 (1), (2). The Supreme Court of Judicature Act, 1873, s. 25 (8), was replaced by the Supreme Court of Judicature Act, 1925, s. 48.

Considered: *Anchor Trust Co. v. Bell*, [1926] Ch. 805; *Refuge Assurance Co. v. Pearlberg*, [1938] 3 All E.R. 231.

G As to the appointment of a receiver by the court, see 27 HALSBURY'S LAWS (3rd Edn.) 366-369; and for cases see 35 DIGEST (Repl.) 588 et seq. For the Law of Property Act, 1925, ss. 101, 109, see 20 HALSBURY'S STATUTES (2nd Edn.) 655, 673; and for the Supreme Court of Judicature Act, 1925, s. 45, see 18 HALSBURY'S STATUTES (2nd Edn.) 482.

Cases referred to in argument:

Pease v. Fletcher (1875), 1 Ch.D. 273; 45 L.J.Ch. 265; 33 L.T. 644; 24 W.R. 158; 1 Char. Pr. Cas. 35; 35 Digest (Repl.) 589, 2615.

H *Truman & Co. v. Redgrave* (1881), 18 Ch.D. 547; 50 L.J.Ch. 830; 45 L.T. 605; 30 W.R. 421; 35 Digest (Repl.) 601, 2741.

Cole v. Crust, [1883] W.N. 141.

I **Application** by the plaintiffs for the appointment of a receiver of the rents and profits of certain freehold hereditaments comprised in a mortgage dated Oct. 21, 1882, and made between the defendant Augustus Nixon of the one part, and the plaintiffs, J. Tillett and C. E. Groves, of the other part, to secure £1,135 and interest. The security was a first mortgage, under which the plaintiffs obtained the legal estate. There was a subsequent mortgage by the defendant Nixon to one J. Gargery. The action was for an account and foreclosure in default of payment, and the second mortgagee was made a defendant.

The interest on the plaintiffs' mortgage was in arrear, but the defendant contested the appointment of a receiver because of pending negotiations for the payment off of the mortgage by means of money which he anticipated he should obtain at a lower rate of interest.

The provisions of the Conveyancing Act, 1881, which were referred to as applying to mortgages executed after Dec. 31, 1881, are the following: A

"Section 19 (1). A mortgagee, where the mortgage is made by deed, shall by virtue of this Act have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further (namely):

(iii). A power, when the mortgage money has become due, to appoint a receiver of the income of the mortgaged property, or of any part thereof. B

Section 24 (1). A mortgagee entitled to appoint a receiver under the power in that behalf conferred by this Act shall not appoint a receiver until he has become entitled to exercise the power of sale conferred by this Act, but may then, by writing under his hand, appoint such person as he thinks fit to be receiver.

(2). The receiver shall be deemed to be the agent of the mortgagor; and the mortgagor shall be solely responsible for the receiver's acts and defaults, unless the mortgage deed otherwise provides." C

By the Supreme Court of Judicature Act, 1873, s. 25 (8):

"A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the court in all cases in which it shall appear to the court to be just or convenient that such order should be made; and any such order may be made either unconditionally or upon such terms as the court shall think just; and if an injunction is asked, either before, or at, or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted, if the court shall think fit, whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title; and whether the estates claimed by both or by either of the parties are legal or equitable." D

Thurstan Holland for the plaintiffs.

St. John Clerke for the mortgagor. E

Dobbs for the second mortgagee. F

PEARSON, J.—I have always thought it a very hard case, that a legal mortgagee had no right to come to the court and ask for a receiver of the mortgaged property. I think, however, under the Supreme Court of Judicature Act, 1873, the court is now authorised to appoint one where it could not previously have done so; and those who framed s. 25 (8) of that Act seem to have been of the same opinion as I have expressed as to the hardship of the case. I have no doubt the mortgagee might appoint a receiver under the Conveyancing Act, 1881, without coming to the court, but when an action for foreclosure is pending, and the parties are at arm's length, it is much more desirable that the receiver should be appointed by the court. If the mortgagee wishes to have the appointment of a receiver effected in chambers the mortgagor cannot object, and cannot refuse to accede to the request. In this case there is no objection to the name of the person proposed, and I, therefore, appoint him to be receiver. Any question as to the costs of the application can be taken before the taxing master. G

Solicitors: *Dain*; *Snow*; *S. E. Lambert*. H

[Reported by J. F. WAGGETT, Esq., Barrister-at-Law.] I

A

CASTRO v. REGINAM

[HOUSE OF LORDS (Lord Selborne, L.C., Lord Blackburn and Lord Watson),
March 10, 11, 1881]

B

[Reported 6 App. Cas. 229; 50 L.J.Q.B. 497; 44 L.T. 350;
45 J.P. 452; 29 W.R. 669; 14 Cox, C.C. 546]

Criminal Law—Sentence—Statutory maximum sentence for one offence—Conviction of two separate offences—Offences committed with common purpose—Power to pronounce maximum sentence for each of the two offences—Perjury.

C

The appellant was charged with perjury on an indictment which contained two counts, the first alleging perjury committed on the trial of an action of ejectment in 1871, the second alleging perjury committed in some proceedings in Chancery in 1868. The assignments of perjury in the two counts were, therefore, not identical, but the object of the proceedings in 1868 and in 1871 was the same, namely, to establish the appellant's right to certain landed estates. The jury returned a verdict of guilty on both counts of the indictment, and the appellant was sentenced to seven years penal servitude upon each count, the second term to commence upon the expiration of the first term. The charges had been brought under the Perjury Act, 1728, s. 2, which provided: "it shall . . . be lawful for the . . . judge before whom any person shall be convicted of . . . perjury . . . to order such person to be sent to some house of correction . . . for a term not exceeding seven years. . ."

D

E

Held: (i) although the two offences were committed with a common purpose they were separate offences, and, therefore, the convictions of the appellant were valid; (ii) the sentences also were valid although their aggregate exceeded the maximum sentence which the court would have had power to pass for either offence alone.

F

Notes. Considered: *R. v. Southern* (1929), 142 L.T. 383. Referred to: *R. v. Thompson*, [1914] 2 K.B. 99; *R. v. Greenberg*, [1943] 1 All E.R. 504; *R. v. Sims*, [1946] 1 All E.R. 697; *R. v. Morris*, [1950] 2 All E.R. 965.

As to joinder of offences in an indictment, concurrent and consecutive sentences, and the offence of perjury generally, see 10 HALSBURY'S LAWS (3rd Edn.) 391, 392; 492, 493; 623–627 respectively; and for cases see 14 DIGEST (Repl.) 256 et seq.; 548 et seq.; 15 DIGEST (Repl.) 813 et seq. For the Perjury Act, 1911, see 5 HALSBURY'S STATUTES (2nd Edn.) 963.

G

Cases referred to:

- (1) *O'Connell v. R.* (1844), 11 Cl. & Fin. 155; 5 State Tr.N.S. 1; 3 L.T.O.S. 429; 9 Jur. 25; 1 Cox, C.C. 413; 8 E.R. 1061, H.L.; 14 Digest (Repl.) 356, 3448.
- (2) *Young v. R.* (1789), 3 Term Rep. 98; 100 E.R. 475; sub nom. *R. v. Young*, 1 Leach, 505; 2 East, P.C. 828; 14 Digest (Repl.) 261, 2281.
- (3) *R. v. Powell* (1831), 2 B. & Ad. 75; 9 L.J.O.S.M.C. 71; 109 E.R. 1071; 14 Digest (Repl.) 376, 3683.
- (4) *Wilkes v. R.* (1769), 4 Bro. Parl. Cas. 360; Wilm. 322; 2 E.R. 244; sub nom. *R. v. Wilkes*, 4 Burr. 2527; 19 State Tr. 1075, H.L.; 14 Digest (Repl.) 375, 3674.
- (5) *R. v. Robinson* (1834), 1 Mood.C.C. 413, C.C.R.; 14 Digest (Repl.) 375, 3678.
- (6) *R. v. Cutbush* (1867), L.R. 2 Q.B. 379; 36 L.J.M.C. 70; sub nom. *R. v. Cutbush*, *Ex parte Paine*, 10 Cox, C.C. 489; sub nom. *Re Paine*, 8 B. & S. 319; 15 W.R. 742; sub nom. *R. v. Paine*, 16 L.T. 282; sub nom. *R. v. Maidstone Justices*, *Ex parte Paine*, 31 J.P. 454; 42 Digest 667, 776.
- (7) *Tweed v. Lipscombe*, 15 Sickel's N.Y.App. Cas. 559.

H

I

(8) *R. v. Jones* (1809), 2 Camp. 131; 31 State Tr. 251; 14 Digest (Repl.) 261, 2282. A

(9) *R. v. Kingston* (1806), 8 East, 41; 103 E.R. 259; 14 Digest (Repl.) 254, 2205.

Also referred to in argument:

R. v. Rhodes (1703), 2 Ld. Raym. 886; 92 E.R. 92; 15 Digest (Repl.) 820, 7321.

Ryalls v. R. (1849), 11 Q.B. 795; 18 L.J.M.C. 69; 12 L.T.O.S. 557; 12 J.P. 581; 13 Jur. 259; 3 Cox, C.C. 254; 116 E.R. 672, Ex. Ch.; 14 Digest (Repl.) 245, 2111. B

R. v. Ellis (1826), 6 B. & C. 145; 9 Dow. & Ry. K.B. 174; 4 Dow. & Ry. M.C. 268; 5 L.J.O.S.M.C. 25; 108 E.R. 406; 14 Digest (Repl.) 417, 4062.

R. v. Price (1805), 6 East, 323; 2 Smith, K.B. 525; 102 E.R. 1310; 14 Digest (Repl.) 377, 3687.

R. v. Trueman (1839), 8 C. & P. 727; 14 Digest (Repl.) 258, 2250. C

Creppe v. Durden (1777), 2 Cowp. 640; 98 E.R. 1283; 38 Digest (Repl.) 95, 685.

R. v. Benfield and Saunders (1760), 2 Burr. 980; 97 E.R. 664; 14 Digest (Repl.) 253, 2190.

R. v. Aylett (1785), 1 Term Rep. 63; 99 E.R. 973; 15 Digest (Repl.) 813, 7763.

R. v. Galloway (1829), 1 Mood.C.C. 234.

R. v. Roberts (1692), 4 Mod. Rep. 100; Carth. 226; Comb. 193; Holt, K.B. 363; 1 Show. 389; 3 Salk. 198; 87 E.R. 286; 14 Digest (Repl.) 240, 2049. D

Appeal from a decision of the Court of Appeal (JAMES, BRAMWELL and BRETT, L.JJ.), reported 5 Q.B.D. 490, on a writ of error from a decision of the Court of Queen's Bench on an indictment for perjury, reported L.R. 9 Q.B. 350, when the plaintiff in error was sentenced to two consecutive terms of seven years' penal servitude each. E

The indictment contained two counts. The first count charged that the plaintiff in error had committed perjury by falsely swearing that he was Roger Tichborne in an action of ejectment (*Tichborne v. Lushington*) tried by BOVILL, C.J., and a special jury in the Court of Common Pleas at Westminster. The second count charged that the plaintiff in error had committed perjury, also by swearing that he was Roger Tichborne, in an affidavit sworn before a commissioner appointed to administer oaths in Chancery in the City of London. The plaintiff in error was tried at Bar in the Court of Queen's Bench before COCKBURN, C.J., and MELLOR and LUSH, JJ., and a special jury. On Feb. 28, 1874, the jury found him guilty on both counts, whereupon sentence was passed by MELLOR, J., as follows:

"The sentence of the court is that for the perjury alleged in the first count of this indictment, upon which you have been convicted, you be kept in penal servitude for seven years; and that for the perjury alleged in the second count, of which you have also been convicted, you be kept in penal servitude for the further term of seven years, to commence immediately upon the expiration of the term of penal servitude assigned to you in respect of your conviction upon the first count of the indictment." F H

Judgment was entered on the record in the following terms:

"The jurors, on their oaths, say that the said Castro, &c., is guilty of the premises above charged in and by both the said counts. Whereupon all and singular the premises being seen and understood by the court, it is considered, adjudged, and ordered that he, the said Castro, alias Orton, &c., for the offence charged in and by the first count of the indictment be kept in penal servitude for the term of seven years now next ensuing; and that for and in respect of the offence charged in and by the second count of the indictment he be kept in penal servitude for the further term of seven years, to commence immediately upon the expiration of the said term of penal servitude for his offence in the first count charged; and he is now committed into the custody of the keeper of the gaol of Newgate, to be by him kept in safe custody in execution of this judgment." I

A The following grounds of error were assigned: (i) that the alleged perjuries constituted one offence only; (ii) That the second count did not disclose a separate perjury from that disclosed in the first count; (iii) That the offence in general being the same could not be treated as several offences in the same indictment; (iv) That without statutory provision several distinct offences could not be charged in the same indictment; (v) That two distinct and several indictable offences could
 B not be tried collectively; (vi) That without statutory provision there could not be two judgments on one indictment; (vii) That on one indictment the maximum penalty assigned by statute could not be cumulatively exceeded; (viii) That on one indictment without statutory provision a sentence of penal servitude or imprisonment could not be made to begin and to run from a future day; (ix) That penal servitude as a punishment for perjury was additional only.

C By s. 2 of the Perjury Act, 1728:

“The more effectually to deter persons from committing wilful and corrupt perjury or subornation of perjury, besides the punishment already to be inflicted by law for so great crimes, it shall and may be lawful for the court or judge before whom any person shall be convicted of wilful and corrupt perjury or subornation of perjury, according to the laws now in being, to order such
 D person to be sent to some house of correction within the same county for a time not exceeding seven years, there to be kept to hard labour during all the said time, or otherwise to be transported to some of His Majesty’s plantations beyond the seas, for a term not exceeding seven years, as the court shall think most proper, and thereupon judgment shall be given that the person convicted
 E shall be committed or transported accordingly, over and besides such punishment as shall be adjudged to be inflicted on such person, agreeable to the laws now in being.”

Benjamin, Q.C., Atherley Jones, Hedderwick, and Russell Spratt for the appellant.

F *The Attorney-General (Sir Henry James, Q.C.), the Solicitor-General (Sir Farrer Herschell, Q.C.), Poland and A. L. Smith, for the respondent, were not called on to address the House.*

LORD SELBORNE, L.C.—Notwithstanding that the case has been argued at the Bar of the House with so much zeal in support of the appeal, I believe your Lordships are agreed that it is unnecessary to call upon the learned counsel
 G for the Crown to answer the objections which have been raised to the judgment pronounced by the Court of Queen’s Bench. No fewer than six objections have been taken to that judgment, and I will deal with them shortly, reserving to the last that which alone appeared to me to be seriously relied upon by the leading counsel for the appellant.

H The first objection to the judgment was that there was no finding of guilty upon each count, but that there was a general finding of guilty upon the charges which were contained in both counts. This objection was founded upon the language of the verdict, which was as follows:

“And now at this day—that is to say, on the said Saturday, the 28th day of February, in the year of our Lord 1874, the jurors aforesaid so empanelled and sworn as aforesaid, to try the issues so joined as aforesaid, upon their oath
 I say that the said Thomas Castro, otherwise called Arthur Orton, otherwise called Sir Roger Charles Doughty Tichborne, Bart., is guilty of the premises on him above charged in and by both counts of the indictment aforesaid above specified in the manner and form as aforesaid as by the indictment aforesaid is above supposed against him.”

I need not say more with regard to this objection than that it appears to be founded upon a perverse and an unreasonable construction of the language of the verdict, which clearly refers to each count.

His LORDSHIP dealt with two points raised respectively under s. 24 of the Criminal Procedure Act, 1851 [repealed by Indictments Act, 1915] and the Perjury Act, 1728 [repealed by Perjury Act, 1911], which do not now call for report. A

The next objection is that, the perjury in question having been committed in one and the same proceeding, it could not be made the subject of two separate punishments. No authority, however, was cited to show that perjury committed in the Court of Chancery in 1868 and perjury committed before the Chief Justice of the Common Pleas in 1871 must be regarded as constituting one and the same offence, even although they had one common object—that of substantiating a claim to certain estates. I should have been of opinion that the offences were separate, even although the assignments of perjury in each count had been precisely the same, but in point of fact there are some which are different. There were two distinct offences committed at two distinct times in two distinct suits, and it is clear that the appellant was indictable in respect of each of them. B C

It has further been very zealously argued at your Lordships' Bar that, however many counts there might be, only one judgment could be properly passed upon one indictment for misdemeanour. No authority whatever has been cited in support of that contention, but *O'Connell v. R.* (1), which has been so often referred to for other purposes, is a full authority against it. I do not think it necessary to refer to any other authority than to read two or three passages which are to be found in the opinions delivered in that case. In the first place PARKE, B., says this (11 Cl. & Fin. at pp. 295, 296): D

"If this point were to be considered independently of the understood rule upon this subject, and supposing that no such rule existed, I should say that where an indictment contains several counts, each ought to be brought to its proper legal termination by a proper judgment. The practice has grown up, and much increased in modern times, of introducing many counts into one indictment; and though we know practically that these are most frequently descriptions only in different words of the same offence, they are allowable only on the presumption that they are different offences, and every count so imports on the face of the record, as BULLER, J., states in *R. v. Young* (2), though TAUNTON, J., intimated a different opinion, I think without sufficient ground, in *R. v. Powell* (3). The question then being how these counts are to be dealt with on the face of the record, I should have said, a priori, that it was the duty of the court acting between the Crown and the accused, and the right of the accused to have the charge of each offence, for as such I must treat it, properly and finally disposed of on the record, so that the accused as well as the Crown might know for what offence the punishment was inflicted, and for what not, . . ." E F G

I will now refer to what was said in this House by two noble and learned Lords who took part in the judgment which the House pronounced, namely, LORD DENMAN, C.J., and LORD CAMPBELL, afterwards Lord Chief Justice. LORD DENMAN said (11 Cl. & Fin. at p. 377): H

"So with regard to several counts in criminal cases, the objection may be entirely avoided by the court passing a separate judgment upon each count, and saying, 'We adjudge that upon this count on which the prisoner is found guilty he ought to suffer so much; that on the second count he ought, on being found guilty, to receive such a punishment. Whether the count turns out to be good or not we shall now pronounce no opinion.'" I

LORD CAMPBELL adds (*ibid.* at p. 415):

"It is an utter mistake to suppose that there is only one corpus delicti which is made the subject of several counts in one indictment. Even with respect to felony, the law supposes a separate offence to be charged in each count; and in misdemeanours there are not unfrequently in the different counts entirely different offences, of different sorts, committed at different times."

A I may add that the judgment in that case was that, if there were not a separate judgment on each count, then, if there were one count bad at law, the judgment, being incapable of being referred to the good counts, must be regarded as distributed among them all, and the whole proceeding would fail. I must say that I heard this point argued by the junior counsel for the appellant with some surprise, because I understood that it had been given up by his learned leader.

B This brings me to the remaining objection, and the only one of substance—if such it could be called—in the case, which is, that a separate and cumulative sentence of seven years' penal servitude was imposed upon the appellant in respect of each count of the indictment, whereas by s. 2 of the Perjury Act, 1728 [repealed by Perjury Act, 1911] and the Acts of Parliament amending the same the maximum term of penal servitude that could be inflicted in respect of the offence charged in the indictment was seven years only, and no greater penalty could be imposed for any offence or offences charged in one and the same indictment greater than the maximum penalty imposed by the law for such offence or offences. If it were not possible consistently with the law to inflict cumulative punishments, one to take effect after the expiration of the other, this argument might have had some weight. It has, however, been settled in this House as long ago as 1769, in *R. v. Wilkes* (4), that the proper course when more than one sentence had to be pronounced was that the second term of punishment should commence at the expiration of the first.

To the reasons given for that by WILMOT, C.J., and apparently adopted by this House, I will shortly refer. I will first, however, state the question which was raised and put to the judges, which was this:

E “Whether a judgment of imprisonment against a defendant to commence from and after the determination of an imprisonment to which he was before sentenced for another offence is good in law?”

to which the learned judges returned an affirmative answer in the terms of the question; and thereupon this House affirmed the judgment which had been in fact so pronounced. That was a case of misdemeanours, and the material passages

F which I think it worth while to refer to in the opinion delivered by WILMOT, C.J., and reported in 19 State Tr. at p. 1133, are these:

“In treasons and felonies a certain known judgment which cannot be departed from, viz., in the present tense of the subjunctive passive; but in misdemeanours, where punishment is discretionary, the limitation as to time seems only to be that the punishment shall take place before a total dismissal of the party; a punishment shall not hang over a man's head when he has been once discharged; that is properly a punishment in futuro. But while he remains under a state of punishment, while he is suffering one part of his punishment, he is very properly the object of a different kind of punishment to take place during the continuance of the former, or immediately after the end of it.”

G

H A little further on he says that if the punishment had been inflicted by imprisonment for twelve months, then, as he was already sentenced to ten months, it would have been only an imprisonment for two; in other words, that the power which the court thought fit, having discretion, to exercise, of awarding a period of twelve months' imprisonment for the second offence, could not have been exercised unless it were by placing it after the expiration of the first.

I

I will observe that in a case like the present, where the statutory power is to imprison for a term not exceeding seven years, if you were to pass two simultaneous sentences commencing at the same time, it would be manifest that for the second offence there would be no punishment at all suffered, even though it were given for the maximum period. Later WILMOT, C.J., says this:

“We cannot explore any mode of sentencing a man to imprisonment who is imprisoned already but by tacking one imprisonment to the other, as is done in the present case.”

So far, therefore, as relates to misdemeanours, and subject, therefore, to the question whether this authority would apply when the aggregate of the two punishments exceeds in point of time the sentence which there would have been power to award for either offence alone, *R. v. Wilkes* (4) in this House is a clear and distinct authority in favour of the proposition that when a man is found guilty of two distinct misdemeanours, being distinct and separate offences, and not the same (I apprehend that it makes no kind of difference whether it be by two indictments simultaneously tried and found against him, or upon two counts in one, and the same indictment), there, not only a competent, but the proper course independent of any statutory legislation, was and is to pronounce the second sentence of imprisonment, within the power of the court as to duration, to begin after the expiration of the first.

If that be so, I ask what difference can it make that a statute has said that for a single offence, instead of having a discretionary power to imprison for any term that may be thought fit, the court shall have power to imprison for a term not exceeding seven years? The only difference it makes is that for each offence the court can go as far as seven years, and cannot go further; but the moment that it is ascertained that it is proper for the court to make a second sentence for a distinct offence commence after the expiration of the imprisonment to be suffered for the first, then the sentence so commencing, being for seven years only, is not within the sense of the statutory limit, and it is a mere fallacy, the moment that you understand the point of *R. v. Wilkes* (4), to mix up the two together as if they were one offence, and to say that because only one seven years can be inflicted for a single offence, therefore only seven years in the aggregate can be inflicted for two offences. The statute has not said so, and having regard to what the House decided in *R. v. Wilkes* (4), it would be perfectly nugatory, and would be absolutely depriving the court of the power of postponing the commencement of the sentence, to say that it ought to be so. Because, if the argument were good for anything, it would be good not only to cut off the seven years, but to cut off any part of the seven years. If the first sentence was for the full period of seven years, the result would be that it would be impossible, according to that argument, to sentence a man for a second offence for a period to commence after the end of the first.

It does not stop there, because since 1769 the legislature has thought fit to extend this principle even to cases of felony. By the Criminal Law Act, 1827 [repealed by Criminal Justice Act, 1948], it was provided by s. 10 of the Act that when a person was

"already imprisoned under sentence for another crime, it shall be lawful for the court to award imprisonment for the subsequent offence, to commence at the expiration of the imprisonment to which such person shall have been previously sentenced."

The section went on to provide, *ex cautela*, as I conceive, that the court might award a sentence for a subsequent offence

"although the aggregate term of imprisonment... may exceed the term for which either of those punishments could be otherwise awarded."

These words I apprehend that if those last words had not been there the effect would have been practically the same; but those words at all events show that as far as those cases are concerned the intention of the legislature when expressly dealing with them was the same as I conceive would have resulted in law from the rule which was settled in this House in *R. v. Wilkes* (4) as to cases of misdemeanour.

That was followed by *R. v. Robinson* (5), in which thirteen learned judges were of opinion that, there being two distinct misdemeanours charged in the same indictment in different counts, and one sentence for two years' imprisonment

A passed, that was bad, because by statute one year was the maximum term which the court had the power to inflict for the offence. All the thirteen judges are stated to have been unanimously of opinion that the sentence was incorrect, and that there should have been consecutive judgments of one year's imprisonment for each offence. The conviction was, therefore, held to be bad. That was a case of misdemeanour; it was not a case of felony; it is, therefore, as far as the opinion
B of the thirteen judges goes, expressly in point on the present occasion.

After that another Act of Parliament was passed, giving justices, in the exercise of summary jurisdiction in criminal cases, a similar power to that which had been given to the court by the Act of 1827. That Act was the Summary Jurisdiction Act, 1848. It said that where justices upon information should adjudge a defendant to be imprisoned, and the defendant should "be then in prison undergoing
C imprisonment upon a conviction for any other offence, the warrant of commitment for the subsequent offence shall in every such case be forthwith delivered to the gaoler to whom the same shall be directed," and it should be lawful for the justices issuing it, if they thought fit, to award imprisonment for such subsequent offence which should commence at the expiration of the imprisonment to which such defendant should have been previously adjudged or sentenced. The legislature did
D not add in that statute the words, "although the aggregate term of imprisonment may exceed the term for which either of the punishments could be otherwise awarded." A question under that statute came before the Court of Queen's Bench in *R. v. Cutbush* (6) in 1867, and the only difficulty that was felt there by the learned judges, if any difficulty was seriously felt, was that the language of the one statute was: "Whenever sentence shall be passed for felony upon a person
E already imprisoned under sentence for another crime"; and the words of the later statute were: "such defendant shall be then in prison undergoing imprisonment"; and the later statute, being thus expressed, seemed to justify the argument that if he had not actually got into prison, although a sentence of imprisonment had been pronounced upon him, the sections did not apply. But that was held to be an untenable argument. Cockburn, C.J., stated, after communing with the other
F judges, that it was ascertained that the practice of the judges, as far as living judicial memory went, under the Act of 1827, had been to act upon that statute whenever more than one case of felony was established against a man, and he was convicted of those offences at one and the same time, and to make the sentence of imprisonment for the second or third offence, as the case might be, commence at the expiration of the sentence previously awarded. The learned Chief Justice,
G although admitting that there was some technical difficulty, not in any other part of the matter, but in the words I have read, which seemed to contemplate that the man should be actually in prison, yet thought the reason and substance of the case to be so clear, in addition to the authority to be derived from the exposition based upon the earlier statute by the uniform practice, as to make it right to hold that cumulative sentences might be awarded under those statutes even though the
H man had not already found his way to prison; and in point of fact one sentence was passed practically at the same time as the other.

The practice, therefore, as far as can be ascertained from any of the authorities, or from any of the books, has been uniform in favour of consecutive cumulative sentences of this kind. If it were not so, it would be difficult to see how it would be possible that any punishment at all could be inflicted for more than one offence,
I if the convictions took place at the same time. The decision in the State of New York in *Tweed v. Lipscombe* (7), appears to me to proceed upon New York law and not upon English law; and the cardinal proposition upon which it depends is one of those which, if the view I have submitted to your Lordships is correct, we must reject as erroneous, namely, that only a single judgment can be pronounced upon a single indictment. For all these reasons, and also bearing in mind that the courts before whom this question has already come have unanimously agreed in their determination that there is no error in this record, I must move your Lordships to affirm the judgment, and to dismiss the appeal.

LORD BLACKBURN.—I have never been able, from the beginning to the end, A
to entertain the least doubt that the judgment in this case should be affirmed.
The first point which has been made on behalf of the plaintiff in error I think only
requires to be stated to answer itself. It has been said that, when there was in
the Court of Chancery a proceeding pending to set aside some outstanding term
in order to permit a trial at law in an action of ejectment, and in the course of
that the plaintiff, who is now the prisoner, being sworn, committed wilful and B
corrupt perjury, for the purpose of misleading the Court of Chancery in that suit,
that was not a different offence, or rather, that the two offences were substantially
the same as the offence he committed afterwards, at the trial of the ejectment, in
swearing falsely, and committing wilful perjury, with the intent to mislead the
court that was trying the question of ejectment. It is said that they were sub-
stantially the same offence, because both perjuries were committed in suits in C
which the ultimate object was to recover certain estates situate in Hampshire and
Dorsetshire.

Taking that to be the point, and stating it in that way, it does seem to me,
upon the face of it, to be difficult to state anything which would make it more
obviously wrong than the mere statement of the case does. We have nothing
whatever to do with the ultimate object of the suit. The crime of perjury was D
complete as soon as the appellant wilfully and falsely swore a matter with the
intention to mislead the Court of Chancery. The crime of perjury was complete
when, at a subsequent time, he wilfully and intentionally made a false statement
on oath with intent to mislead the Court of Common Pleas. No doubt his object
in each case was to recover the same estates. In like manner, in the case which
was put by way of illustration, the object of a man who breaks open a house in the E
country with the intention to steal a jewel-case, and, finding that the lady has
carried it to London, goes to London, and breaks into a house in London, and
gets the jewel-case, his object in each case is to get the jewels, but no one will
dispute that they are two crimes. It would have been quite possible, if the
legislature had been so wilfully absurd, to have so worded the Perjury Act, 1728,
as to say that, when a man has, with one object, committed perjury, and commits F
afterwards any number of other perjuries for the same purpose, the aggregate
punishment shall never, under any circumstances, exceed the seven years. Such
a thing, if sufficiently expressed by the legislature, would, of course, be valid, but
it is not pretended that there is a word in the statute which can by any torturing
in argument afford a basis for that proposition.

HIS LORDSHIP dealt with the points under the Criminal Procedure Act, 1851, and G
the Perjury Act, 1728, which, as stated supra, need not now be reported, and
continued: Then we come to what is more nearly approaching to something of
substance. I must say at once that I totally disagree with what has been
repeatedly asserted by both the learned counsel at the Bar—that the pleadings
at common law in a criminal case and a civil case were in the slightest degree
different. I am speaking, of course, of the time before the Judicature Acts were H
passed, which swept them all away. Many enactments had from time to time
been passed relieving the strictness of pleadings in civil cases which did not relieve
them in criminal cases, but the rules of pleading at common law were exactly
the same in each case. The course taken with regard to an indictment which
was found was this. The Queen having sent her commission to the grand jury,
the indictment presented all the offences charged against the prisoner, and if it I
was brought before the court sufficiently that a man had committed ten murders,
fifty burglaries, and a score of larcenies, they would find, not one finding as to
them all, but that he had committed each of those charged offences, and if there
were many other persons, as generally there are, it would be also found that those
other persons had committed the offences charged against them also. Upon that
a process could be issued against a man so charged to bring him upon his trial
before a petty jury to try whether he was guilty of those offences so charged, or
not.

- A At common law there was no objection whatever in point of law to bringing a man who was charged with several offences, whether those charges were felonies or misdemeanours, before one petty jury, and making him answer for the whole at one time. The contrary was asserted by the learned counsel, but, although repeatedly challenged to do so, he did not cite any authority in support of his contention. There was no legal objection to doing this; it was frequently not
- B fair to do it, because it embarrassed the man on trial if he was accused of several things, and the mere fact of accusing him of several things was supposed to tend to increase the probability of his being found guilty, as it amounted to giving evidence of bad character against him. For these mixed motives it was well established that whenever it would be unfair to a man to bring him to trial for several things at once an application might be made to the discretion of the presiding judge to say, "Try me only for one offence, or try me only for two offences, if one was the real thing let me be tried for one and one only", and wherever it was right that that should be done the judge would permit it. It is further established by a long series of decisions that where the several charges were of the nature of felony, the joining of two felonies in one count was so necessarily, I may say, unfair to the prisoner, that the judge ought, upon an application being
- D made to him, to put the prosecution to their election, and send them to two trials. It never was decided, indeed the contrary was often maintained, that if that application for the election was not made, even in felony, the joining of several felonies, that is to say, the taking several felonies which had been found upon the finding of the indictment together, and trying those several felonies before one jury, was wrong in point of law; on the contrary, it was repeatedly held that it was right
- E enough, although, if the proper application had been made at the proper time in a case of felony, the party prosecuting would have been put to his election, or made to take one trial only, and not both at the same time.

- In cases of misdemeanour it was by no means a matter of course that it should be done. I rather think that in point of practice, if the judge upon an application had been satisfied that to try the prisoner for several misdemeanours together would
- F have worked injustice to him, he had a perfect right to say: "I will not work this injustice by trying them together; let us diminish them in number, and try a reasonable number and no more." I do not know whether that was ever done in a case of misdemeanour, but I think it is very possible. I feel very little doubt that it may have been. I think that in such a case as the American case which was cited [*Tweed v. Lipscombe* (7)], where a man in one indictment was called
- G upon to answer for two hundred offences, he might not unreasonably have said: "That is too much to put a man upon his trial for; select five or six, try me on those, and let the rest stand over." I do not see that that would be at all an unreasonable application. In the present case, if an application had been made to the Court of Queen's Bench to put the prosecution to their election, and if it had been said: "I cannot be fairly tried for one offence of perjury committed in
- H Middlesex, if at the same time I am to be tried for perjury committed in London, therefore, there must be two separate trials," the Court of Queen's Bench would doubtless have said: "We will listen to the arguments that may be urged in its favour." What they could possibly have been, I do not know; but no such application was made. The prisoner was tried upon two indictments, the two counts were taken both together, and the result was that he was found guilty upon both.
- I Then came the question: What was the sentence to be? It is clear that, if the court had been pleased to grant the application, these two counts might have been tried, the one in London before a London jury, and the other in Middlesex before a Middlesex jury, and, but for the Act relating to the Central Criminal Court, which gives that court jurisdiction over both places, they must have been so tried. If they had been so tried, and if each jury had found a verdict of guilty on the counts brought before it separately, *R. v. Wilkes* (4) would have been an authority absolutely in point as to the sentence. But it is argued that when both charges were tried together before one jury, the consequence must be that the prisoner

was not to be punished in the same way as he would have been if he had been tried for each offence before a separate jury, and he is, therefore, entitled to get off with less punishment. Why, I am sure I cannot conceive; nor can I see that any authority has been cited for that—at any rate, in English law—nor does it proceed on any reason. A

In regard to the American case which was cited [*Tweed v. Lipscombe* (7)], it might be enough to say that I observe that it proceeds upon the express ground that the court was acting upon New York decisions, subsequent to the Declaration of Independence, and upon New York statutes, and not upon English rules or English law. I daresay that decision may be right according to those New York decisions and statutes. The decision was this. They say that, according to their view, of the New York decisions, where there is but one trial before one jury, it must be for one offence, and one only, and upon that they all rest. They logically enough say that, if that is granted where there are sentences passed for more than one offence, all but one must be *extra vires*; accordingly, they held that the power of passing a sentence was exhausted. I leave it to the American judges to say whether that was right or not according to American law. I do not pretend to express an opinion on that, but I am quite clear that it is not English law. B C

I think that the English decisions are all the other way. I will mention but one or two cases which prove it. The first is *Young v. R.* (2), where the law is laid down in the way I have stated, that it is not a matter of right and law that two indictments shall not be tried together, but only a matter of election. Then comes *R. v. Jones* (8), where LORD ELLENBOROUGH, C.J., both laid down the law as I have stated it, and acted upon it. Then *R. v. Kingston* (9), where LORD ELLENBOROUGH, C.J., again repeats the doctrine; and lastly, *R. v. Robinson* (5), where it was said that the doctrine of *R. v. Wilkes* (4) ought to have been applied to a case where there were two misdemeanours in separate counts tried together before one judge. Taking all these cases together, I myself can feel no doubt at all that by the English law, and going by that alone, there is not a pretence for this writ of error. D E

LORD WATSON.—After hearing the very ingenious arguments on the part of the appellant, I have come to the same conclusion as your Lordships, that there has been no reason whatever shown for reversing the judgment now under the review of the House. The view which I take of the various objections which have been urged against the validity of the verdict and sentence has been so well expressed already that I do not feel justified in adding more than a few words to what has already fallen from your Lordships. F G

The question as to what constitutes a separate offence where there has been a repetition of acts of the same character may at times involve questions of extreme nicety. It is unnecessary to deal with any of the cases such as have been suggested in the course of the argument, as to whether statements differing in their character, made by a person under oath upon the same occasion, will constitute separate acts of perjury when falsely made. It is quite unnecessary to consider that in the present case. I have no hesitation in holding with your Lordship upon the Woolsack, who, I think, indicated that opinion, that where at two different times, at different places, in different suits, and under the sanction of two different oaths, the same man repeats the same false statement, he thereby commits two separate acts of perjury, two different crimes; and I do not think it possible to bind these up together as one transaction, as was suggested in the able argument of the leading counsel for the appellant. You cannot make them *partes ejusdem negotii*, when so separated in time and place otherwise, by the mere fact that the person who committed the perjury on each of these occasions was actuated in both by the same motive, and had the same improper object in view. I think the criticism upon the terms of the verdict is quite unfounded, and that it must be taken that these words import, as according to their natural signification they do, in my opinion, that the jury thereby found the accused guilty H I

A of each of the separate charges of perjury in this indictment preferred against him.

What appeared to be the most important consideration which counsel for the appellant had to urge on his behalf was, that where upon one indictment there are two separate charges ejusdem generis, and the prisoner is convicted of both, if there be a statutory limit to the punishment which may be inflicted for one of these offences, that is to be the measure of all the punishment that can be inflicted upon him for more than one offence. So far as I could follow the argument, the learned counsel failed to assign any good reason for that contention. I think he did not dispute that separate cumulative punishments may be awarded, the second to take effect from the date of the expiring of the first sentence. But then it was said, although that is competent, there is an important rule of qualification which you must observe, and that rule is this: if for each offence the statute says that you shall inflict a sentence of not more than seven years' penal servitude, you cannot for the two offences exceed that limit.

For that proposition, which seems at first sight a very startling one, and does not, in my view, lose that character upon a closer inspection, no authority whatever was cited. At length at the close of his argument an appeal was made by the learned counsel to an American case, not as an authority, because I take it that the judgment of a court in New York is not an authority in a case of this kind arising in England with regard to English rules of procedure in criminal cases, but as showing an argument that ought to convince the House that it ought to come to the same conclusion in the present case as the court in America arrived at in *Tweed v. Lipscombe* (7). That case, even if it were receivable, does not appear to me to be in the least degree an authority for the proposition in support of which it was quoted. What was decided there, as I understand the case, was that the law of America differs from the law of England; and one of the judges expressly puts it that because of that difference the English authorities were of no authority in America. I should have thought that the converse of that proposition would be equally true, namely, that this decision in America, such being the difference between the laws of the two countries, would be of no authority here. But assuming *Tweed v. Lipscombe* (7) to be an authority, what does it come to? It comes to this—that in prosecutions for misdemeanour in America you can only proceed for one offence upon each indictment, and if you desire to have cumulative punishment extending to more than one statutory punishment, you must bring more than one separate indictment. The inference which I draw from the words used by the two learned judges who decided that case is that you might have more than one penalty of the full amount tacked together, if you brought separate proceedings for that purpose. But in England it is not necessary to bring two separate proceedings in order to try one criminal for two misdemeanours, and I see no reason whatever, even if I accept that decision as law, for holding that if you can tack together two periods of the full amount of the prescribed sentence, one for each offence, when you try by separate indictments, the same may not be done when two offences are tried upon the same indictment. Still further, it appears to me among the cases cited at the Bar there is to be found, not only sufficient authority, but ample authority for the proposition that such a sentence is sustainable, and is good according to the law of England.

Had there been any serious doubt or difficulty attending these questions of criminal law which have been raised at the Bar, I should have given my opinion with very great hesitation and diffidence; but looking to the very unsubstantial character of the objections which have been stated to this conviction and sentence, I cannot say that I feel the least hesitation in giving my concurrence to the views which have been expressed by your Lordships.

Appeal dismissed.

Solicitors: *E. Kimber; Solicitor to the Treasury.*

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

A

INMAN STEAMSHIP CO. v. BISCHOFF

[HOUSE OF LORDS (Lord Selborne, L.C., Lord Blackburn, Lord Watson and Lord FitzGerald), July 11, 14, 15, August 1, 1882]

[Reported 7 App. Cas. 670; 52 L.J.Q.B. 169; 47 L.T. 581;
31 W.R. 141; 5 Asp.M.L.C. 6]

B

Insurance—Marine insurance—Freight—Perils of the sea—Loss of freight—Exercise by charterers of special power under charterparty—Right to “put ship out of pay.”

By a charterparty dated Feb. 20, 1879, by which the Admiralty chartered for three months a steamship owned by the appellants, the owners covenanted that the ship should at all times during the continuance of the charter be in every respect seaworthy, and it was also provided that if at any time the ship became incapable, from any cause whatsoever, to perform efficiently the service contracted for, “it shall and may be lawful to and for the [charterers] . . . to put the ship out of pay, or to make such abatement by way of mulct out of the hire or freight of the said ship as they shall adjudge fit and reasonable.” On Feb. 22 the appellants effected a time policy on “freight outstanding” against the ordinary marine perils including perils of the sea. On Mar. 21, during a voyage to South Africa, the ship struck a rock, and sustained damage which rendered her unfit to perform the chartered service. The charterers thereupon put her out of pay as respected the remaining period of the charter.

C

D

Held: the cause of the loss of freight was, not a peril of the sea, but the exercise by the charterers of the special power conferred on them by the charterparty; loss through the exercise of that power was a distinct and different risk from that of loss by perils of the sea; the appellants were insured against the latter risk but not against the former; and, therefore, they were not entitled to recover on the policy.

E

Per LORD BLACKBURN and LORD FITZGERALD: The freight was earned by the appellants and the fact that they were deprived of it under the provisions of the charterparty did not constitute a loss within the policy.

F

Notes. Considered: *The Alps*, [1893] P. 109; *The Bedouin*, [1894] P. 1; *Asfar v. Blundell*, [1896] 1 Q.B. 123; *Brankelow Steamship Co. v. Canton Insurance Office*, [1899] 2 Q.B. 178; *Hall Bros. Steamship Co. v. Young*, *The Trident*, [1939] 1 All E.R. 809; *Re an Arbitration between Sea and Land Securities, Ltd., and Dickinson & Co., Ltd.*, *The Alresford*, [1942] 1 All E.R. 88. Referred to: *Manchester Liners v. British and Foreign Marine Insurance* (1901), 18 T.L.R. 183; *Williams v. Canton Insurance Office*, [1901] A.C. 462; *Adelaide Steamship Co. v. A.-G.*, [1925] All E.R.Rep. 65; *Greck Govt. v. Minister of Transport*, *The Ilissos*, [1948] 1 All E.R. 904.

G

As to proximate cause of loss, see 22 HALSBURY'S LAWS (3rd Edn.) 90-95; and for cases see 29 DIGEST (Repl.) 237 et seq.

H

Cases referred to:

- (1) *Beatson v. Schank* (1803), 3 East, 233; 102 E.R. 587; 41 Digest 436, 2738.
- (2) *Boone v. Eyre* (1779), 1 Hy. Bl. 273, n.; 1 Wms. Saund. 320, c.; 2 Wm. Bl. 1312; 126 E.R. 160; 12 Digest (Repl.) 472, 3526.
- (3) *Havelock v. Geddes* (1809), 10 East, 555; 103 E.R. 886; 41 Digest 325, 1834.
- (4) *Everth v. Smith* (1814), 2 M. & S. 278; 105 E.R. 385; 29 Digest (Repl.) 327, 2471.
- (5) *Philpott v. Swann* (1861), 11 C.B.N.S. 270; 30 L.J.C.P. 358; 5 L.T. 183; 7 Jur.N.S. 1291; 1 Mar.L.C. 151; 142 E.R. 800; 29 Digest (Repl.) 243, 1830.
- (6) *Montoya v. London Assurance Co.* (1851), 6 Exch. 451; 20 L.J.Ex. 254; 17 L.T.O.S. 82; 155 E.R. 620; 29 Digest (Repl.) 238, 1793.

I

- A (7) *Ionides v. Universal Marine Insurance Co.* (1863), 14 C.B.N.S. 259; 2 New Rep. 123; 32 L.J.C.P. 170; 8 L.T. 705; 10 Jur.N.S. 18; 11 W.R. 858; 1 Mar.L.C. 353; 143 E.R. 445; 29 Digest (Repl.) 268, 2029.
- (8) *Bondrett v. Hentigg* (1816), Holt, N.P. 149, N.P.; 29 Digest (Repl.) 257, 1924.
- B (9) *Jackson v. Union Marine Insurance Co.* (1874), L.R. 10 C.P. 125; 44 L.J.C.P. 27; 31 L.T. 789; 23 W.R. 169; 2 Asp.M.L.C. 425, Ex. Ch.; 29 Digest (Repl.) 301, 2278.
- (10) *Hadkinson v. Robinson* (1803), 3 Bos. & P. 388; 127 E.R. 212; 29 Digest (Repl.) 241, 1820.
- (11) *Taylor v. Dunbar* (1869), L.R. 4 C.P. 206; 38 L.J.C.P. 178; 17 W.R. 382; 29 Digest (Repl.) 234, 1763.
- C (12) *M'Swiney v. Royal Exchange Assurance* (1849), 14 Q.B. 634; 18 L.J.Q.B. 193; on appeal sub nom. *Royal Exchange Assurance v. M'Swiney* (1850), 14 Q.B. 646; 19 L.J.Q.B. 222; 16 L.T.O.S. 22; 14 Jur. 998; 117 E.R. 250, Ex. Ch.; 29 Digest (Repl.) 121, 652.
- (13) *Flint v. Flemmyng* (1830), 1 B. & Ad. 45; L. & Welsb. 257; 8 L.J.O.S.K.B. 350; 109 E.R. 704; 29 Digest 170, 1059.
- D (14) *Rankin v. Potter* (1873), L.R. 6 H.L. 83; 42 L.J.C.P. 169; 29 L.T. 142; 22 W.R. 1; 2 Asp.M.L.C. 65, H.L.; 29 Digest (Repl.) 325, 2462.
- (15) *De Vaux v. Salvador* (1836), 4 Ad. & El. 420; 1 Har. & W. 751; 6 Nev. & M.K.B. 713; 5 L.J.K.B. 134; 111 E.R. 845; 29 Digest (Repl.) 246, 1844.

Also referred to in argument:

- E *Halhead v. Young* (1856), 6 E. & B. 312; 25 L.J.Q.B. 290; 2 Jur.N.S. 970; 4 W.R. 530; 119 E.R. 880; sub nom. *Hallhead v. Young*, 27 L.T.O.S. 100; 29 Digest (Repl.) 181, 739.
- Geipel v. Smith* (1872), L.R. 7 Q.B. 404; 41 L.J.Q.B. 153; 26 L.T. 361; 20 W.R. 332; 1 Asp.M.L.C. 268; 41 Digest 411, 2558.
- Hadley v. Clarke* (1799), 8 Term Rep. 259; 101 E.R. 1377; 12 Digest (Repl.) 459, 3426.
- F *Mercantile Steamship Co. v. Tyzer* (1881), 7 Q.B.D. 73; 29 W.R. 790; 5 Asp.M.L.C. 6, n.; 41 Digest 363, 2115.
- Greer v. Poole* (1880), 5 Q.B.D. 272; 49 L.J.Q.B. 463; 42 L.T. 687; 28 W.R. 582; 4 Asp.M.L.C. 300; 29 Digest (Repl.) 245, 1843.

G **Appeal** from a decision of the Court of Appeal (LORD COLERIDGE, C.J., BAGGALLAY and BRAMWELL, L.JJ.), reported 6 Q.B.D. 648, reversing a decision of BRETT, L.J., in favour of the plaintiffs (the present appellants) at the trial of the action which was brought by the appellants, owners of a steamship, the *City of Paris*, against the respondents, who were underwriters of a policy on freight outstanding under a charterparty.

H *Benjamin, Q.C.*, and *French* for the appellants.
Cohen, Q.C., and *Barnes (C. Russell, Q.C.)*, with them) for the respondents.
 Their Lordships took time for consideration.
 Aug. 1, 1882. The following opinions were read.

I **LORD SELBORNE, L.C.**—The question in this appeal is whether a loss of freight by the exercise of a power of mulct or abatement reserved by charterparty to the charterers, which power in this case arose and was exercised by reason of the ship being temporarily rendered inefficient for the service in which she was engaged by perils insured against, is a loss for which the insurers are liable, under an ordinary time policy "on freight outstanding." It has been held by the Court of Appeal that they are not so liable, on the ground that the perils insured against were not the proximate cause of the loss.

Although the charterparty is not mentioned in the policy, nor is the freight therein described as chartered freight, an insurance on freight must necessarily

have reference to some contract of affreightment, under which, during the time covered by that policy, freight might be earned; and to ascertain what the freight insured was, in case of loss, the actual contract of affreightment must necessarily be regarded. In this case the insurers had express notice, by a letter of Feb. 19, 1879, in which the order for the insurance was given, that the *City of Paris*, the ship mentioned in the policy, was an Inman steamer, then about to proceed on a voyage to Natal on government charter. There were, at that time, hostilities in progress between this country and the chief of Zululand, and the government charter was for the use of the ship as a transport to convey troops and stores. That charter had reference to the general regulations for Her Majesty's transport service, and the special terms contained in it were in substance similar to those which had been long in use in government charters for similar purposes, as appears from *Beatson v. Schank* (1). Under these circumstances it appears to me that the question arising upon the policy ought to be determined in the same way as if the charterparty had been seen by the insurers, and referred to in the policy, though not, of course, so as to extend the contract of the underwriters by any unnecessary implication to anything not properly covered by the express terms of the policy.

The charterparty, dated Feb. 20, 1879, was for the service and employment of the ship as a transport, on monthly hire, for the term of three calendar months certain, and thenceforward until the Board of Admiralty should give notice of discharge, such notice to be given when the ship was in port within the United Kingdom. The shipowners contracted to keep the ship in every respect seaworthy and fit for the service in which she was engaged; and the Board of Admiralty agreed to pay for the hire and freight of the ship, at the rate of 25s. per ton per calendar month, during such time as the ship should be continued in Her Majesty's employ, and should duly and efficiently perform that service, upon certificates, and by monthly instalments, with certain reserves, in the manner therein mentioned, one month's freight being paid in advance. This agreement of the Board of Admiralty was, however, subject to a proviso, thus expressed :

"If at any time or times hereafter it shall be made to appear to the commissioners that any delay has been caused or has accrued by breach of orders, by neglect of duty, or that the said ship becomes incapable from any defect, deficiency, breach of orders, or from any cause whatsoever, to perform efficiently the service contracted for, then and in every such case it shall or may be lawful to and for the commissioners to retain in arrear the pay of the ship for two months . . . to put the said ship out of pay, or to make such abatement by way of mulct out of the hire or freight of the said ship as they should adjudge fit and reasonable."

Upon the construction of this charterparty, I am of opinion that it is not a condition precedent of the contract of the Board of Admiralty to pay the monthly hire and freight of the ship, that the ship should "duly and efficiently perform the service" for which she was engaged: *Boone v. Eyre* (2); *Havelock v. Geddes* (3). I am also of opinion that the ship could not be discharged from that service, without the consent of the shipowner, elsewhere than within some port of the United Kingdom; and that the power reserved to the commissioners to "put the ship out of pay," for any of the causes mentioned, had reference only to a retention of the monthly payments, which ought otherwise to have been made, so that no exercise of that power could result in a loss of freight. The power, therefore, upon the exercise of which the present question depends is that of making "such abatement by way of mulct out of the hire or freight of the said ship" as the commissioners should adjudge fit and reasonable, being the same power which in *Beatson v. Schank* (1) was adjudged by the Court of King's Bench to be valid in law. This, according to the terms of the charterparty, was a power depending upon a judgment to be exercised, not by any officer or officers in charge of troops or stores on board the ship, but by the commissioners for executing the office of Lord High Admiral.

A The facts which are material are these. The ship proceeded with troops and stores to Simon's Bay, and there, on Mar. 21, 1879, she struck a rock, receiving such serious injury that she was rendered unseaworthy and incapable of efficiently performing the service for which she was engaged, until she had received extensive repairs, which were not completed, so as to make her again seaworthy and fit to sail or to perform the service contracted for, until May 23 following, which was
B after the expiration of the time covered by the insurance. The freight down to Mar. 21, 1879, when she struck the rock, was duly paid. On April 17, 1879, Captain Adean, the senior naval officer in Simon's Bay, instead of granting the usual certificate on which monthly payments were to be made according to contract, noted, on the form provided for that purpose, that the ship had been "inefficient since Mar. 21, 1879, having touched the Roman rock and sustained much damage"; also
C that the

"City of Paris was discharged from Her Majesty's service on April 17, 1879, having been retained so long on account of removal of government stores, etc."

The troops and stores on board had, in fact, remained in the ship until they could conveniently be transferred to other vessels, an operation which was not completed by the local agents of the government until April 17, 1879. The agents of
D the government having declined to continue the employment of the ship, she returned to England in July, 1879, and a correspondence between her owners and the Board of Admiralty, or their solicitors, which had been commenced when she was on her voyage homeward, was continued till Aug. 2, 1879. The owners did not profess to be able to insist upon any legal claim, but they asked for equitable consideration from Her Majesty's government; and the Board of Admiralty ultimately decided to make them some allowance in respect of the expenses of the voyage homeward, but declined to pay freight for the period subsequent to Mar. 21, 1879.

Having regard to the construction and legal effect of the charterparty, it appears to me that the acts of Captain Adean at Simon's Bay and the form of certificate signed by him on April 17 may be laid out of the case, inasmuch as the charter-
F party did not authorise the Board of Admiralty, and still less authorised their local agents, to discharge the ship from the service in which she was engaged until she had returned to the United Kingdom, and the power of making an abatement by way of mulct out of freight was reserved only to the Board themselves, and cannot be regarded as having been finally exercised by them until after the ship's return to the United Kingdom. If the shipowners had voluntarily consented to a varia-
G tion of the terms of the charterparty, involving a relinquishment of their claim to freight (which does not appear to have been the case), this could not have thrown upon the insurers any liability to which they would not otherwise have been subject: *Everth v. Smith* (4); *Philpott v. Swann* (5). The result is that, in my opinion, a right to the freight in question must be deemed to have accrued under the terms of the charterparty, but to have been subsequently, in July, 1879, defeated under
H the power of abatement by way of mulct reserved by the contract to the Board of Admiralty.

It has not been without doubt, or, I must add, without reluctance, that I have come to the conclusion that this is not a loss so directly, proximately, and immediately resulting from the perils of the seas insured against, so as to make it payable under the terms of the policy by the insurers. The general principle of causa
I proxima, non remota, spectatur is intelligible enough, and easy of application in many cases; but that there are cases in which a too literal application of it would work injustice, and would not really be justified by the principle itself, is apparent from the observations of POLLOCK, C.B., in *Montoya v. London Assurance Co.* (6), of ERLE, C.J., in *Ionides v. Universal Marine Insurance Co.* (7), and from *Bondrett v. Hentigg* (8). Nor do I think that the question can entirely depend upon the difference between a condition precedent (without which the right to freight would never accrue), and a condition subsequent, by which it might be defeated. The observations of BRAMWELL, B., at the conclusion of the judgment in *Jackson v.*

Union Marine Insurance Co. (9), and from what took place during the argument of that case, as stated by CLEASBY, B., appear to me to be adverse to so narrow a view. If, in the present case, the other terms of the charterparty being the same, a power had been reserved to the charterers or their agents to determine the contract and their liability to further freight on the occurrence of any such damage to the ship by perils of the sea as might render her inefficient for the service which she had undertaken, and if such power had been exercised before any further freight was earned, I should have been of opinion that this was a loss of freight by perils of the sea for which the insurers were liable. Nor would it, in my opinion, have made any difference, although provision might have been made by the contract for the continuance of the troops and stores in the ship, after the exercise of the power to determine the contract, until such time as they could be conveniently landed or transferred to other vessels.

But between such a case and that of a subsequent mulct under a special power, such as that contained in this charterparty, after freight had been earned which (unless the power of mulct were exercised) would be payable under the contract, there seems to me to be an important difference. The principle of such cases as *Hadkinson v. Robinson* (10), *Taylor v. Dunbar* (11), *M'Swiney v. Royal Exchange Assurance Corpn.* (12), seems to be here applicable, and obliges me to conclude that the risk of loss by the exercise, in such circumstances, of such a special power is different from the risk of loss by perils of the seas, and ought to have been insured against in some more special manner, if it was the intention of the parties that it should be covered by the policy. I do not dissemble that there appears to me to be something of refinement in the distinction which the rule laid down by the authorities, as applied to the particular facts of this case, obliges me to make; but, though refined, it seems to be a real distinction, and to justify the judgment of the court below. Upon the whole, therefore, I am unable to differ from the opinion which is entertained by others of your Lordships who heard this appeal, and I must move your Lordships to affirm the judgment appealed from, and to dismiss the appeal, with costs.

LORD BLACKBURN stated the facts and continued: In *Flint v. Flemyng* (13) **LORD TENTERDEN** said (1 B. & Ad. at p. 48):

"Freight as used in the policy of insurance, imports the benefit derived from the employment of the ship";

so that description covers the monthly hire of the ship for time. But as soon as it is ascertained that the policy attached on the hire under a particular charterparty, the charterparty must be read in order to see how the subject-matter was affected by the misfortune which happened. Under one charterparty a temporary disablement of the ship might occasion a loss for which the underwriters on ship would be responsible, but which would not have any effect at all on the insured's right to recover the hire of the vessel while she was disabled. Under another, such a temporary disablement might deprive the shipowner of all claim for hire during the time she was disabled. In the first of these cases there could be no claim against the underwriters on freight, for there was no loss of freight. In the second, I do not see how it could properly be denied that there was such a loss. But the construction of the charterparty may be such, and this is the case now at Bar, that it is a nice question whether the pecuniary loss which the assured have sustained in consequence of a peril of the sea is one which does or does not occasion a loss of the hire. If it does not occasion such a loss, though the consequence may be one which might have been insured against by an apt description, the underwriters on freight have not insured against it. Whether the individuals who subscribed this policy would have refused to insure at all on such a risk as being too speculative for them, or would have been willing to insure on an increased premium, I cannot tell. If what has happened is not a loss of freight within the meaning of the policy, they have a right to refuse to indemnify against it. The construction, therefore, of this charterparty is all important. I may observe that I do not think that it makes

A any difference in its construction that the charterers here are acting on behalf of Her Majesty, and that the regulations of Her Majesty's transport service are incorporated in and form part of the charterparty, and that two cases, *Beatson v. Schank* (1) and *Havelock v. Geddes* (3) are very material authorities as to the principles upon which it should be construed.

B The owners say, and, it seems clear, say truly, that had it not been for the accident, which was a peril of the sea, they would have received pay from Mar. 21, 1879, till May 20, 1879, when the policy expired by effluxion of time, and that they did not receive it at all; and they claim against the underwriters on freight to be indemnified against this. BRETT, L.J., was of this opinion, and the plaintiffs before him had judgment against the underwriters. The Court of Appeal reversed this judgment. It is clear that the pecuniary damage to the assured was precisely the same whether the hire for these two months was, in consequence of the perils of the sea, never earned, or whether the commissioners had, in consequence of the perils of the sea, a right to make abatement by way of mulct to such amount as in their judgment was fit and reasonable, and to deduct that from the pay, and thought it fit and reasonable to deduct the whole. But the difference to the underwriters is considerable. In the first case the hire is clearly lost by the peril insured against. In the other I think it cannot properly be said that the hire has been lost at all, though the assured have had an equivalent mulct levied out of it.

C The courts below have not entered into the question what was the construction of the charterparty in any detail, BRAMWELL, L.J., in the Court of Appeal rather putting the judgment on the maxim *causa proxima, non causa remota, spectatur*, which is, no doubt, perfectly good law, and saying something about *causa causans*, and *causa sine qua non*. I must own that I have always sympathised with what LORD COLONSAY said in *Rankin v. Potter* (14) (L.R. 6 H.L. at p. 160):

E "Something is said about proximate and remote causes, and these are matters which are very apt to lead us into philosophical mazes";

which I think he did not use as a term of eulogy. I think, as he did, that when we get a clear view of the facts it is best to keep out of such philosophical mazes; and, as I think, the question here is not what was the proximate cause of a loss of freight, but whether there was any loss of freight. It seems to me clear that neither Captain Adean at the Cape nor the commissioners at home, nor anyone else, had power to discharge the *City of Paris* before the three months certain for which she was hired. Had she totally perished, so that she never could have been employed again at all, the hire would have ceased from the time of her destruction; but here use was made of her as a storeship till April 17, and after she was repaired she was capable of performing the work of a transport efficiently.

G In *Havelock v. Geddes* (3), where by the terms of the charterparty the defendants had bound themselves to pay a monthly hire, and the shipowners had, as here, covenanted, without any exception of the perils of the sea, to keep the vessel efficient, LORD ELLENBOROUGH, C.J., says (10 East, at p. 566):

H "The question then is whether, because the plaintiff has undertaken to keep the vessel tight, etc., the defendants have a right to deduct anything out of the freight they are to pay, in respect of the time which may be taken up in making good such defects as may occur during the period for which the vessel is hired? And we are of opinion that they are not. From the accidents to which ships are liable, it was in the ordinary course of things to expect that this ship might want repairs in the course of her voyage, and when the defendants were making their bargain they should have stipulated to deduct for the time which might be exhausted in making these repairs, if they meant to make that deduction. Without such a stipulation, we think the true construction of the charterparty is that while these repairs are going on the ship is to be considered as in the defendants' service, and the defendants liable to continue their payments."

I No question as to insurance arose in that case, but it seems to me clear that, if the plaintiff had insured his freight he could not have recovered anything in respect

of the peril of the sea causing the necessity for those repairs, for no part of the freight was thereby lost; any damage to the ship would be borne by the underwriters on ship; any extra expenses to which he was put in consequence of his covenant would have to be insured by a special description. A

It is, however, argued that in this charterparty the words in the covenant to pay the freight

“during such time as the ship shall be continued in Her Majesty’s employ, and shall duly and efficiently perform the service for which she is hereby engaged,” B

amount to such a stipulation as LORD ELLENBOROUGH refers to. In *MAUDE AND POLLOCK ON SHIPPING* (3rd Edn.) at p. 235, it is said, I think quite accurately:

“It is often difficult in construing charterparties to ascertain whether particular stipulations amount to conditions precedent. This is to be determined by seeking for the intention of the parties as apparent on the instrument, and from the surrounding circumstances, and by applying the ordinary rules of construction to each particular case. It does not depend on any formal arrangement of the words, but on the reason and sense of the thing as it is collected from the whole contract. Generally speaking, any stipulation which goes only to a portion of the consideration, or, in other words, the breach of which would deprive the party who has a right to insist upon it of a portion only of the benefit of his contract, will be construed not to be a condition precedent. It must, however, be recollected that this rule, although a very useful one, is only a rule of construction, or means of discovering the intention of the parties, to be applied where the words will bear either sense. For it is clear that the courts will not make contracts for the parties, and that if they use language which distinctly shows that they intend such a stipulation to be a condition precedent, it will be so construed. Constructions, however, tending to absurd and unreasonable results, will be avoided, if this can be without violence to the terms used, because, where the intention is not clearly expressed, the parties are not to be presumed to have meant to make an absurd or unreasonable contract.” C D E F

In this case the government did receive some benefit from the employment of the ship between Mar. 21 and April 17, though she was disabled from duty and efficiently performing the service for which she was engaged; and cases may easily be supposed in which they might have received more. I am, therefore, strongly inclined to think that the words relied on, even if they stood alone, would not amount to a condition precedent. But it is not necessary to decide the point, for the words are materially qualified and their effect altered by what follows, which shows that the charterers were relying upon the stipulation mentioned in *Beatson v. Shank* (1). There in a transport charter, the provision, as stated in the report, was that G

“upon the loss of time, breach of orders, or neglect of duty by the said master, or from the ship’s inability to execute or proceed on the service in which she might be employed, being made to appear, the said commissioners should have free liberty and be permitted to mulct or make such abatement out of the freight and pay of the ship as should be by them adjudged fit and reasonable.” H

The words in the charterparty now before us are slightly different, and there is introduced a power to the commissioners to I

“retain in arrear the pay of the ship for two months, as aforesaid, and to put the ship out of pay,”

which, as I think, must be construed as enabling them, not to discharge the ship, but to withhold the giving of the monthly bills previously stipulated for for two months, during which time the commissioners would have time to consider how they should use the power to make abatement by way of mulct out of the pay.

- A I think that *Beatson v. Schank* (1) puts the proper construction upon this clause. If any of the specified cases, including inability from any cause whatever to perform efficiently the service contracted for, arises, the parties have agreed that the commissioners may make such abatement by way of mulct as they shall adjudge fit and reasonable. All that a court of law can inquire into is whether there was such a case as to give the commissioners jurisdiction; if there was, even if they make an
- B abatement which in the opinion of the court was neither fit nor reasonable, the court cannot interfere, and I think that the commissioners may properly take into consideration many things besides the mere inability, so that it is not at all clear that the resolution to pay nothing for the period from Mar. 21 to April 17, though the ship was then retained in the service, and actually used, might not be reasonable and fit, though it certainly seemed to me at first to be an inequitable resolution.
- C But can it be said that the making such an abatement by way of mulct or fine, not necessarily because of the peril of the sea, is a loss of the freight, though power is given to retain and levy it out of the freight? I think not, any more than the power conferred on the Admiralty Court to give damages against the ship for a collision occasioning damage to another ship, and to enforce the payment by a proceeding in rem against the ship, is a loss of the ship. That was *De Vaux v. Salvador* (15). The prejudice which the owner of the ship sustains in the last case is a consequence of the peril of the sea, the collision, and it may be, and every day is, insured against by a collision or running-down clause now in common use, but it is not a loss of the ship.

It may be doubted whether the prejudice which the shipowners in this case sustained from the abatement by way of mulct is so direct and immediate a consequence, for it may have been imposed, or at least its amount increased, for many other reasons, and it might be difficult, though I think it possible, to frame a clause to cover it. But I think that it should be insured against, if at all, under a clause framed for the purpose, as it is not a loss of freight. I, therefore, think that the judgment of the Court of Appeal is right, and should be affirmed.

- F **LORD WATSON.**—The terms of the policy of Feb. 22, 1879, appear to me to be sufficient to include freight to be earned under a time charter, and seeing that the respondents, when they accepted the insurance, had notice that the *City of Paris* was under a contract of charterparty, I am of opinion that the policy attached to the freight therein stipulated for, whether they did or did not choose to inform themselves of the particulars of the contract, and consequently that the respondents
- G became liable for such part of that freight as might be lost by any of the risks insured against during the period covered by the policy. There are two facts in the present case which have not been disputed. The first of these is that the injury sustained by the vessel in Simon's Bay, and her consequent detention there while undergoing necessary repairs, were due to perils of the seas within the meaning of the policy. The second is that the Commissioners of the Admiralty, who
- H were the charterers, have not paid, and refuse to pay, freight subsequent to Mar. 21, 1879.

Accordingly, the only question which arises for decision is whether the freight, which the vessel, in the absence of any casualty, would have earned between Mar. 21 and May 19, 1879, is lost freight for which the insurers are liable. In order to appreciate the merits of that question, it is necessary to consider very carefully

I the terms of the charterparty. The engagement of the vessel was for an indefinite period, three calendar months being the minimum. Notice of discharge was only to be given when the vessel was in a port in the United Kingdom, and the owners were bound to keep her "staunch and substantial both above water and beneath, and in every respect seaworthy," at all times during the continuance of her charter. These stipulations seem to indicate that it was within the contemplation of both parties that the owners should from time to time, during the currency of the charterparty, make such repairs upon the ship as were necessary to her efficiency as a transport. The clauses of the charterparty which bear upon the payment of

freight are somewhat peculiar, and the decision of the present case appears to me to depend upon the effect to be given to them. Freight is made payable at a monthly tonnage rate, during the time that the ship is in Her Majesty's employ, and "shall duly and efficiently perform the service for which she is hereby engaged." The first month's freight is to be paid in advance. At the end of the second month the owner, on producing a certificate in due form, is entitled to a bill for a moiety of a month's freight; and at the end of the third month, upon production of a similar certificate, he becomes entitled to a bill for another moiety. At the end of the fourth and each succeeding month a bill for one month's freight is receivable upon a certificate being produced. The result of this arrangement is that, after the expiration of the first three months, the charterers have always from one to two months' freight already earned in their hands; and it is provided that the owner

"shall be paid the balance of freight on the passing in the office of the requisite accounts and documents after the discharge of the said ship."

Then follows the provision that if it shall be made to appear at any time to the commissioners that any delay has been caused by breach of orders, or that the ship became incapable from any cause whatsoever to perform efficiently the service contracted for, it shall be lawful for them

"to retain in arrear the pay of the ship for two months as aforesaid, and to put the said ship out of pay, or to make such abatement by way of mulct out of the hire or freight of the said ship as they shall adjudge fit and reasonable."

If the facts of the present case were such as to bring it within the principle of *Jackson v. Union Marine Insurance Co.* (9) that would afford an easy solution of the only question in issue. In that event the Commissioners of the Admiralty would have been, at common law, entitled to rescind the contract of charterparty, in respect that the sea risk encountered by the *City of Paris* in Simon's Bay had made the object which the contracting parties had in view commercially impossible of attainment. But there is really no analogy between the case of a charter for a single voyage with a particular cargo, and that of a charter indefinite as to time, place, and cargo; and, moreover, it appears to me that, on a fair interpretation of this charterparty, it was mutually contemplated that the ship might be injured by perils of the seas, and that, whenever that occurred, she was to be repaired. In my opinion, neither the Commissioners of the Admiralty, nor their officials at Simon's Bay, had a legal right to terminate the contract and to discharge the *City of Paris* from Her Majesty's service on April 17, 1879. It is, however, unnecessary to consider whether any liability would have attached to the insurers if the commissioners had insisted upon their right to discharge the vessel upon April 17, and had declined to pay freight upon that footing alone. The commissioners ultimately disallowed all claims for freight after Mar. 21, but allowed the cost of coals consumed on the homeward voyage, and the case was presented to your Lordships as if the commissioners had not discharged the vessel at Simon's Bay, but had disallowed freight from and after Mar. 21 in consequence of her inefficiency to perform the service for which she had been engaged.

In this aspect of the case it could hardly be maintained that the commissioners were not empowered by the terms of the charterparty to refuse payment of freight subsequent to Mar. 21, 1879; but, when that is conceded, the question still remains whether the payments so withheld constitute lost freight within the meaning of the policy. The appellants in the first place maintain that, by the terms of the charterparty, the due and efficient performance of the service for which the vessel was engaged formed a condition precedent to the earning of freight. I am unable so to read the contract. The language of the leading clause with respect to freight does not appear to me to be fairly susceptible of that construction, and any such construction is quite inconsistent with the clause which follows giving power to the commissioners to make an abatement by way of mulct out of the hire or freight of the ship. Reading the two clauses together, I think it is clear that freight was to run during the whole period of the vessel's engagement, but that the commissioners,

A in the event of delay occurring, or of the vessel becoming inefficient, were to have the power of declining to issue monthly pay bills (which I take to be what is meant by putting the ship out of pay), and of retaining the freight, deducting from its amount on final settlement any sum which they in their discretion might fix as a reasonable mulct in respect of such delay or inefficiency.

B If I am right in my construction of the charterparty the case turns upon a very narrow point. The inefficiency of the vessel was admittedly due to perils of the sea, which were within the risk insured by the policy, and, if it had been expressly stipulated in the charterparty that freight should cease to be payable so long as the ship was incapable from that cause of efficiently performing her contract, I do not doubt that the insurers would have been liable. That would have been a plain case of cesser or loss of freight by the perils insured against, but that is not the present case. The abatement of freight is not, in my opinion, necessarily dependent upon the fact that the vessel had been disabled by sea risks, but it is entirely dependent upon the discretion of the Commissioners of the Admiralty, who are not limited in the exercise of that discretion to considerations arising out of the casualty which has occasioned delay. They may quite legitimately take into account, in determining whether they will or will not inflict a mulct, the conduct of her owners under a totally different contract of charterparty, and many other considerations equally foreign to the ship or freight insured. In these circumstances, while I am conscious that the question is one of great nicety, I am unable to regard a disallowance of freight, which may be legitimately made on such considerations, as lost freight in the proper sense of the term. It appears to me that the deduction from freight, which the commissioners are empowered to make, is in truth and substance a penalty imposed upon the shipowner, which they are entitled to levy out of the freight retained in their hands. I am, accordingly, of opinion that the judgment of the Court of Appeal ought to be affirmed.

F LORD FITZGERALD.—The judgments of my noble and learned friends have my entire concurrence. As the charter was not limited in time, and might continue for a considerable period, it seems plain that its duration was not to be determined by any necessity arising for repairs, unless at least the repairs proved to be of so extensive a character, and likely to occupy so much time, as practically to put an end to the objects of the charter, and thus entitle the charterers to abandon the undertaking. The proviso so much commented on, which is the foundation of your Lordships' judgment, seems to me to have conferred on the commissioners large powers of a judicial character, to be exercised according to judicial discretion. They do not seem, either by themselves or their officers, to have directly and formally exercised those powers. It is not pretended that they determined to retain in arrear the pay of the ship for two months, and to put the ship out of pay; nor did they formally and directly adjudge and declare that it would be fit and reasonable to make any abatement by way of mulct out of the hire or freight of the ship. I have not been able to discover that Captain Adean had authority to discharge the ship from the service. Under such circumstances I should have had some difficulty in coming to the conclusion that the commissioners had legally exercised the powers conferred on them by the contract of affreightment, and had adjudged it to be fit and reasonable that there should be a mulct out of the freight. It seems, however, to be assumed on both sides that the commissioners did, in some form or other, exercise their powers, and did eventually adjudge it to be fit and reasonable to make, and did make, an abatement by way of mulct out of the hire or freight equivalent to the two months' freight which had otherwise been earned. It is on this that the plaintiffs seek to maintain the present action.

I I concur in the opinion that there has been no loss of freight within the terms of the policy. The freight was earned, but the plaintiffs have been deprived of it by the commissioners, in the exercise of the discretionary powers which the contract of affreightment vested in them. That was a risk against which the insurers did

not insure. If, however, there was a loss of freight, it would remain to be considered whether "peril of the sea" was the immediate cause of the loss. The maxim, in jure non remota causa, sed proxima, spectatur, applies specially to marine insurances, so that in order to entitle the plaintiff to recover here the loss must be a direct, and not a remote consequence of the peril of the sea. The touching on the Roman rock was a peril of the sea, and probably but for that the ship would have completed her undertaking and earned her two months' freight, but it does not follow that the touching on the rock and consequent injury were the causa causans. The freight was not necessarily and directly lost by that calamity, and the consequent necessity for repairs. The plaintiffs were deprived of their right to the freight, if they were so deprived, by the action of the commissioners, or their officers, under the special provisions of the charterparty. The loss was not by the perils of the sea, but was occasioned by the contract. I concur in the opinion of BRAMWELL, L.J., in this case, that the loss was not the necessary and proximate effect of the perils of the sea, and that the plaintiffs have failed to establish the immediate relation of the one to the other.

Appeal dismissed.

Solicitors: Gregory, Rowcliffes & Co. for Hill, Dickinson & Lightbound, Liverpool; Waltons, Bubb & Walton.

[Reported by C. E. MALDEN, Esq., Barrister-at-Law.]

GRIFFITHS v. EARL OF DUDLEY

[QUEEN'S BENCH DIVISION (Field and Cave, JJ.), June 13, 16, 1882]

[Reported 9 Q.B.D. 357; 51 L.J.Q.B. 543; 47 L.T. 10;
46 J.P. 711; 30 W.R. 797]

Statute—Contracting out of operation—Prohibition—Express or to be implied from language of statute.

Fatal Accident—Widow—Action by—Action barred by conduct which would have barred action by husband in lifetime.

By an agreement entered into between a workman, the husband of the plaintiff, his widow, and the defendant, his employer, the workman undertook, in the event of his receiving personal injury to look for compensation to a fund to which he and the employer both contributed, and that he would not claim compensation under the Employers' Liability Act, 1880. The workman having been killed in the course of his employment, his widow brought an action against his employer under s. 1 of the Fatal Accidents Act, 1864, and the Act of 1880.

Held: (i) in the absence of express provision forbidding contracting out of a statute, or necessary implication from the language of the statute to that effect, a person could enter into a binding contract not to claim benefits conferred by the statute; in the Act of 1880 there was no such prohibitory provision, express or implied; and, therefore, the agreement between the deceased workman and his employer was not invalid; (ii) the right of the widow to bring the action under the Act of 1864 was a matter of procedure only and not a personal right, and so she was barred by conduct of her husband which would have barred an action by him in his lifetime; accordingly, in the present case she was barred by the agreement entered into by her husband with his employer from maintaining an action under the Act of 1880 against the employer.

- A Notes.** Considered: *Williams v. Mersey Docks and Harbour Board* (1905), 74 L.J.Q.B. 481. Distinguished: *Nunan v. Southern Rail. Co.*, [1923] All E.R.Rep. 21. Considered: *Dewhurst v. Salford Guardians*, [1925] 1 Ch. 655; *Davidsson v. Hill*, [1900-3] All E.R.Rep. 997; *Miller v. Grand Trunk Rail. Co. of Canada*, [1906] A.C. 187; *British Columbia Electric Rail. Co. v. Gentile*, [1914] A.C. 1034; *Haydock v. Goodier*, [1921] 2 K.B. 384; *Russell v. Rudd*, [1923] A.C. 309; *Admiralty Comrs. v. Valverde (Owners)*, [1938] 1 All E.R. 162; *Yelland v. Powell Duffryn Associated Collieries, Ltd.*, [1941] All E.R. 278. Referred to: *Haigh v. Royal Mail Steam Packet Co.*, ante p. 177.

As to contracts void under statutes, see 8 HALSBURY'S LAWS (3rd Edn.) 143, 144, and as to claims under the Fatal Accidents Acts, see *ibid.*, vol. 28, pp. 34-40. For cases see 12 DIGEST (Repl.) 300-307 and 36 DIGEST (Repl.) 208 et seq. For the

- C Fatal Accidents Acts, 1846 and 1864**, see 17 HALSBURY'S STATUTES (2nd Edn.) 4, 9.

Cases referred to:

- (1) *Wilson v. Merry* (1868), L.R. 1 Sc. & Div. 326; 19 L.T. 30; 32 J.P. 675, H.L.; 34 Digest (Repl.) 280, 1999.
- (2) *Read v. Great Eastern Rail. Co.* (1868), L.R. 3 Q.B. 555; 9 B. & S. 714; 37 L.J.Q.B. 278; 18 L.T. 822; 33 J.P. 199; 16 W.R. 1040; 36 Digest (Repl.) 216, 1142.
- (3) *Priestley v. Fowler* (1837), 3 M. & M. 1; Murp. & H. 305; 7 L.J.Ex. 42; 1 Jur. 987; 150 E.R. 1030; 34 Digest (Repl.) 266, 1887.
- (4) *Blake v. Midland Rail. Co.* (1852), 18 Q.B. 93; 21 L.J.Q.B. 233; 18 L.T.O.S. 330; 16 Jur. 562; 118 E.R. 35; 36 Digest (Repl.) 221, 1176.
- (5) *Bradshaw v. Lancashire and Yorkshire Rail. Co.* (1875), L.R. 10 C.P. 189; 44 L.J.C.P. 148; 31 L.T. 847; 23 W.R. 310; 24 Digest (Repl.) 766, 7555.
- (6) *Leggott v. Great Northern Rail. Co.* (1876), 1 Q.B.D. 599; 45 L.J.Q.B. 557; 35 L.T. 334; 24 E.R. 784; 24 Digest (Repl.) 766, 7557.
- (7) *Pym v. Great Northern Rail. Co.* (1863), 4 B. & S. 396; 2 New Rep. 455; 32 L.J.Q.B. 377; 8 L.T. 734; 10 Jur.N.S. 199; 11 W.R. 922; 122 E.R. 508, Ex. Ch.; 36 Digest (Repl.) 208, 1097.

- F Appeal** by the defendant against a decision of Dudley, Worcestershire, County Court, in favour of the plaintiff, a widow, in an action brought by her, under the Fatal Accidents Acts, 1846 & 1864, and the Employers' Liability Act, 1880 [repealed by the Law Reform (Personal Injuries) Act, 1948], to recover damages from the defendant, as compensation for the loss and injury sustained by her and her children in the death of her husband, a workman in the employ of the defendant, through an accident caused by the negligence of another workman, employed by the defendant as machinery inspector, in failing to see that the machinery and plant at the defendant's collieries, where the deceased man was employed, were in a safe and proper condition, in consequence of which neglect of duty an accident occurred which resulted in the deceased's death.

- H R. T. Reid** for the defendant.
Jelf, Q.C., and *Rupert Kettle* for the plaintiff.

Cur. adv. vult.

June 16, 1882. The following judgments were read.

- I FIELD, J.**—In this case a rule was obtained by counsel, on behalf of the defendant (Lord Dudley), calling on the plaintiff to show cause why judgment should not be entered for the defendant, or why there should not be a new trial on the ground of misdirection and error in law on the part of the learned county court judge in deciding that the defendant was liable, and that the deceased man, Griffiths, did not, and had no power to, contract, on behalf of himself or of his personal representatives, that the Employers' Liability Act, 1880, should not apply in his case; and, further, on the ground also that such a contract was void for want of mutuality or consideration, and also as being against public policy. The case is a most important one, and the Act of Parliament which we are called on to

construe is a very important and a very useful one, and one upon which it is most desirable that, so far as this court can make it clear, there should be no element of doubt or uncertainty with regard to its effect and operation. A

The facts of the present case, which it is material I should state at first starting, are sufficiently clear. The plaintiff sues, not in her representative capacity as the administratrix or executrix of her deceased husband, but as his widow; and she claims as such widow to be entitled, in default of the personal representatives suing, to maintain an action against the defendant to recover damages for the pecuniary loss and injury sustained by her and her children in consequence of her husband's death—a right given to her by the Fatal Accidents Act, 1846 and 1864. The deceased man was a workman in the employ of the defendant, the Earl of Dudley, who is a very extensive mine and colliery owner, with a very numerous body of workmen in his employ. It appears that at the mines and collieries belonging to Lord Dudley the following system, by which his workmen are taught and encouraged to be prudent and thrifty, has for a great many years been established and acted on. There is a box called "The Field Club Box," or "The Field Box," to which every workman in the defendant's employ is expected to, and as a matter of fact does, contribute, out of his earnings, a small sum weekly, and, whatever the total amount of such contributions may be, Lord Dudley adds out of his own pocket an equal sum, thus doubling the total amount collected. The fund or money thus subscribed and raised is applied under the supervision, and at the discretion, as to amount, of the colliery managers, in whom the workmen place entire and implicit confidence, for the benefit of the workmen, in providing surgical and medical aid, a weekly sick allowance in case of accident or illness in the course of their work, funeral expenses in case of death, and an allowance to the widow and family of a workman killed when engaged in his employment. B C D E

This state of things had been in existence at the collieries long before the passing of the Employers' Liability Act, 1880. The general object of that Act clearly was to avoid the absolute injustice arising to workmen from the then state of the law on the subject, by which an employer, unless he had himself been guilty of actual personal negligence, was held not to be liable to a workman in his employ for injuries sustained by the latter in the course of his employment. If the employers knew that the plant upon which a workman was to be engaged at work was out of order, and the workman did not know of it, it was clear, even before the Employers' Liability Act, that a duty was cast upon the master to keep the plant in order, and he would, therefore, be liable; but it was also clear, and remains clear now, that, for the negligence of a fellow-workman, not being a person described in the sections of the Act as one intrusted with general superintendence or management, the master was not, and is not now, liable [The doctrine of common employment was abolished as a defence by the Law Reform (Personal Injuries) Act, 1948]. *Wilson v. Merry* (1), however, in the House of Lords, finally decided, that a person put by the employer in his own place to superintend and manage the whole of the work, whatever it might be, was nevertheless a fellow-servant of the workmen, and that an injured workman, therefore, could not recover damages from the master for injuries arising from the negligence of such superintendent, although similar negligence on the part of the master himself, resulting in injury to a workman, would have given such workman a right of action. It was the object and intention of the Act of 1880, as is clearly shown by its language, to remedy that evil and injustice, to remove the obstacle to recovery of compensation arising merely from the fact of the injured person being in the service or employment of the person against whom he brought his action, and also to avoid the injustice arising in cases where workmen were injured or killed in consequence of the negligence of persons in the position of foremen and superintendents under the employers, and where, before the Act, no remedy existed. Upon the Act coming into operation, if no contract had been made between the deceased man and the defendant, his employer, without doubt the deceased would have been entitled to the benefit of all its provisions, because I think the object and intention of the Act were to get rid F G H I

A of the inference arising from the mere fact of service and employment, and not in any way to get rid of an absolute and express contract.

What happened here when this Act came into operation? Lord Dudley, it appears, determined not to employ any persons in his mines and collieries who were not willing to enter into or to continue in his employ under the terms and conditions of the printed notice referred to in the case. I do not say that he
B determined this autocratically and without consulting his workmen, for the men held meetings and came to the conclusion that it was desirable to go on upon the old system regarding the "Field Box"—at all events it is clear that the deceased man Griffiths assented to, and was willing to, and did, continue in or enter into his employment at the collieries upon these terms, and it is also perfectly clear that these terms do expressly stipulate and contract that neither the workman nor his
C representatives, nor any person entitled at his death to look to the funds of the "Field Box" for compensation in case of injury or death, shall look to Lord Dudley for compensation in any such case. There is no suggestion or allegation of fraud or duress of any kind in the matter, neither was it a mere naked bargain without consideration; on the contrary, the defendant puts his hand into his pocket every year for the purpose of doubling the fund which the thrifty workman is willing to
D lay by. It is clear that the deceased was ready and willing to relinquish his rights under the Act of 1880 in consideration of the benefits accruing to him under the terms and conditions of service to which he agreed, and on which he was content to stand; and by those terms he could not, had he survived, have sought compensation from the defendant under the Act. The contract into which he entered seems to me to be a very sensible and reasonable one, and founded upon abundant and
E very good consideration.

Under these circumstances, then, the deceased workman sustained injuries in the course of his employment from which he died, and thereupon his widow, the plaintiff, brought the present action, which was tried before a very learned and honoured county court judge, who took a view of the statute in which, upon the whole, I am unable to concur. First, he held that in this particular case the contract
F was void for want of mutuality and consideration. The entry into the service is clear, and though there is nothing in writing by the workman, yet the entry into the service and being allowed to serve on the terms of the printed notice is abundant consideration; and the plaintiff's counsel did not press the point, which is clearly untenable, and though he took it, as in duty bound to do, he very properly abandoned it. Secondly, the county court judge held that the contract
G was void, as being against public policy. The only public policy that can be suggested in the present case is the interest of the employed; and it is said, if I apprehend the argument aright, that, the intention of the Act and of the legislature being such as it is supposed, and as I have before stated it to be, that intention will be entirely frustrated, and it would be contrary to the public interests of the realm, if workpeople were to be allowed to enter into such a contract as this.
H Why? I do not myself see why it is that a workman is always to be put upon so low a stage. My experience of them as a body is that as a general rule they are very intelligent people, who understand their own interests exceedingly well, perhaps quite as well as those above them in the social scale, and that they are quite able to make reasonable and sensible contracts. No doubt sometimes their wage is low and their quantity of service is great, and they may occasionally be placed in a position of hardship in being obliged to accept what is not a good contract or to go without work. To such an extent, perhaps, it may be said that a contract of this kind might interfere with public policy. But in this particular instance, this contract, so far from frustrating the intention of the Act or being antagonistic to the interest of the workman, is, in my judgment, quite the contrary. It advances a thrifty policy, and is calculated to teach and induce the workmen to be prudent and saving, and I see no ground on which it can be brought within any principle opposed to either public or private policy or interest.

Thirdly, it was held by the county court judge that, although the deceased man, A had he lived, might himself have been precluded by his contract from maintaining an action under the Act, yet that he could not, as it is called, "contract his widow out of the Act," or contract, as it is said, against her. A man who contracts, contracts for himself and his own acts, and his representatives are bound by his acts; his administratrix or his executrix is clearly bound by them. But it is said that the widow comes in as of a new right, quite distinct from and independent of B that of her husband or his representatives. There is no doubt a good deal in that argument. The language of the statute, without doubt, gives to the widow a right to sue independently of her representative character as executrix or administratrix, for the Fatal Accidents Act, 1846, s. 2, provides that the action shall be brought in the name of the executor or administrator of the deceased person for the benefit of the wife, husband, parent, or child of the deceased person, and then C the amending Act of 1864, by s. 1, goes a step further, and says that, in case no action be brought by the executor or administrator within six months after the death, then it may be brought in the name of all or any of the persons, if more than one, for whose benefit the action would have been if it had been brought by the executor. There is no doubt, therefore, that to that extent a right is given D to the widow to sue, but that is only a mode of procedure. It does not give her a new independent and individual right. It is procedure merely. The executors might take a different view of the matter from the widow; they might perhaps think that the defendant was not liable, or they might hesitate about incurring the costs of an action with a small estate; therefore, it was thought right to make her the person to move in the matter in their default, but not thereby to give her any new right. That that is so is clearly established by *Read v. Great Eastern Rail. Co.* (2) in which it was held by the Court of Queen's Bench that the widow E was barred by an act of her deceased husband in his lifetime, which was a bar to him. That can, of course, only be because she took to that extent the right under him, but in respect of injury to him she was barred by a contract made by him.

We are now brought to the last point, viz., whether by the language of the Employers' Liability Act, 1880, itself the defendant is not precluded from setting F up the contract as a defence to the action. I thought at the time, and I think now, that the language of s. 1 of the Act is not free from doubt, but I think it would be construing the statute too closely to draw the inference from the words in question which I at one time thought might be drawn from them. The way in which the construction that for a short time I thought might be put upon the statute occurred to me was, that the doctrine of *Priestley v. Fowler* (3) was not G founded upon fraud or compulsion, or anything of that sort, but upon contract. It was there held that, from the mere fact that the relation of employer and workman existed, the necessary implication was that on entering the service there was an implied contract that the workman should not look to the master for compensation in the case of accidents in his employment. Then the words of the section in question are that a workman injured H

"shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of, the employer, nor engaged in his work."

At first I thought that might mean, if one took him, as being a workman, out of the service; then, of course, an express contract would not alter that in any way. I and could not carry it further than an implied one. But, as CAVE, J., pointed out during the argument, the workman himself is obliged to rely on those words. because, in this present case, if he had not held the relation of workman to Lord Dudley, he would have had no action at all. It is not pretended that he was a volunteer, or that he was invited to come; it was by reason of his contract to do the defendant's work that he was there. Therefore, one of the elements of his own proof is that he was a workman; and to strike out the words "as if he was not a workman, etc.," would be cutting away his ground of action altogether. for

A it was only by reason of his being a workman that he was lawfully on the premises. My doubt arose merely from the peculiar language of the section.

But, independently of that peculiar language, I think it is better to take a broad view of an Act of Parliament, and see whether we can discover in it what the real intention of the legislature was. The intention of the legislature, as expressed generally by the Act, was, it seems to me, that in cases where the master or his representative, as defined by the Act, had been guilty of negligence resulting in injury to the workman, then the injured workman should have his remedy and be entitled to maintain an action for the recovery of damages against his employer, without being met by the answer on the part of the latter that the negligence was that of a fellow-workman and not of the employer. For that purpose this was the mode adopted for expressing that view. The language of the Act does not go far enough to oblige us to say that freedom of contract is forbidden by the Act; and I am fortified in that view by a reference to the different Acts of Parliament in which the legislature have expressed their determination and will that a man shall not make a contract in defiance of that which public policy requires. As a general rule, I think right is required. As a general rule, too, the law of this country absolutely respects freedom of contract; but at times the legislature has come to the conclusion that a great public interest is to be served, or a great public injustice avoided, by preventing certain persons from making contracts contrary to these general rules. Where the legislature has done this, as in the Ground Game Act, 1880, the old Landlord and Tenant Act, the Truck Act, and in various other instances, it has done so expressly. There is nothing of that kind here. It is also a perfectly legitimate rule of construction to see what the consequences of any particular decision are likely to be, and, if it appears that a given construction would be likely to lead to injustice, it is not, of course, to be presumed that the legislature used doubtful or ambiguous language with the intention of creating such a result; but it is no reason for the court not carrying out a statutory provision, clearly and unambiguously expressed, that it seems to be unjust; and if there is no doubt in the language used, the consequences, whatever they may be, must be put up with.

In the present case it would, I think, tend to great injustice if the suggested doubtful construction of the section in question were to prevail. The strongest argument to my mind in favour of the view taken by the county court judge, and urged before us today by the learned counsel for the plaintiff, is the known desire of the legislature to protect workmen of all classes. There is no question about that. Late hours, fenced machinery, education, factory labour, employment of children; all these are cases in which the legislature has afforded protection. For wise and good purposes undoubtedly Parliament has taken care of certain classes of people, and intends that they shall have the full benefit of that legislation. If one could see that, by putting the construction upon this statute which I think we ought to put, a large class of workmen would be deprived of any just protection which the legislature clearly intended to give them, that would be a strong argument and reason for our not so construing the Act; but it is not sufficiently clear that that would be so, nor do I see enough in the arguments advanced on behalf of the plaintiff to justify the court in interfering with the broad principle of freedom of contract, or laying down as law that workmen are not at liberty to contract for themselves, unless the legislature has, in clear, express, and unmistakable terms, prohibited them from so doing. On the above grounds and for the above reasons, therefore, I have come to the conclusion that the plaintiff's action is not maintainable, and that the judgment of the learned county court judge in his favour must be reversed and judgment be entered for the defendant.

I **CAYE, J.**—I am entirely of the same opinion. The short point in this case is whether a workman can contract himself, his representatives, and his wife and family, out of the benefits of the Employers' Liability Act, 1880. The plaintiff's husband did so contract himself, and it has been contended for the plaintiff that

that contract is, on four grounds, no answer to the action brought by her as his widow. A

First, it was said that there was no mutuality—no consideration for the contract. That point, however, was given up by counsel for the plaintiff in the course of the argument. It is quite untenable, and it is unnecessary to say any more about it. Secondly, it was said that such a contract was against public policy. No authority, however, was cited in support of that proposition, and I am not able B myself to see that such a contract is at all against public policy. Certainly it is a view of the matter which should not be held by us, unless we were perfectly satisfied that the case fell within the lines of the old decisions upon that point. Freedom of contract ought not to be narrowed by the judges upon their view of what public policy is, unless they are perfectly clear that they are acting, in so narrowing it, within the lines which have been laid down by the old cases on C the subject. To my mind the present case does not at all fall within those old lines, and, therefore, I reject that second contention of the plaintiff also.

Thirdly, it was said that, although a workman may be entitled to bargain away his own personal rights under the Act, he is not entitled to bargain away the rights of his wife and family. With regard to that argument, heretofore, before the Fatal Accidents Acts, a man who had sustained personal injuries through an accident and died left behind him nothing in respect of which his representatives D could sue for damages, unless there was damage caused by the accident and his death to his personal estate, in which case a cause of action survived to his personal representatives, but, in respect of an injury to his person only, no cause of action survived. This was thought, and not unreasonably, to be unjust and hard in the case of a person who thus met with his death and left persons in certain E degrees of relationship surviving him, and consequently the legislature interfered, and passed the Act of Parliament known as Lord Campbell's Act, whereby, by way of substitution for that part of the right of action which up to that time died with the decease of the injured person, a right to bring an action for the recovery of damages was given to his family—persons, that is, standing in certain degrees of relationship to him. Whether that was a new and an independent right given to F the family of the deceased, or whether it was simply in substitution of the right which would have existed in the man himself had he survived, has been decided already by the Court of Queen's Bench in *Read v. Great Eastern Rail. Co.* (2), and by that case we are bound. Several cases, viz., *Blake v. Midland Rail. Co.* (4); *Bradshaw v. Lancashire and Yorkshire Rail. Co.* (5); *Leggott v. Great Northern Rail. Co.* (6); and *Pym v. Great Northern Rail. Co.* (7) were cited before us by G counsel for the plaintiff as being inconsistent with the decision in *Read v. Great Eastern Rail. Co.* (2), but, for myself, I am entirely unable to say that they are inconsistent with that decision, and I am of opinion that *Read's Case* (2) is still binding upon us, and that we are, therefore, bound to decide in accordance with it.

Then comes the last point, arising upon the language of s. 1 of the Act of 1880, which, it has been argued for the plaintiff, prohibits the making of any contract H which shall be capable of being used or set up as an answer or defence to an action by a workman against an employer under the Act. I quite agree that the language of this section is very far from being happily chosen. What the section says is this:

"Where after the commencement of this Act personal injury is caused to a workman [he] shall have the same right of compensation and remedies against I the employer as if [he] had not been a workman or nor in the service of the employer, nor engaged in his work."

If that were taken in its apparently literal sense, it would follow that the plaintiff's deceased husband must be regarded as a stranger. He was on the defendant's premises, when he met with the accident, by virtue of his contract of service, and by virtue of that only, and he was there for the purpose of performing the work which he had contracted to do, and for that purpose only; and, if he is to be

- A regarded as not having been a workman, nor in the service of the defendant, the employer, nor engaged in his work, it follows that he was on the premises as a trespasser, or at most as a mere licensee—not there under any contract, nor there in the performance of some work in which both parties were interested. The result of that in this and the vast majority of such cases would be that no action whatever could be maintained.
- B It is impossible to suppose that such a result was intended by the legislature. What was considered was this. As far back as the decision in *Priestley v. Fowler* (3) it was held, and it continued thenceforward to be held, that a workman should not be able to sue his master for injuries sustained through the negligence of a fellow-workman, and the courts have expressed that in a way which is usual in courts of common law, viz., they have held that there was an implied contract
- C between the master and the workman to that effect. In the courts of common law there has always been some hesitation in laying down a liability as existing in any other way than by way of contract or as a tort; and, inasmuch as this could not be said to be a tort, there were numberless liabilities which it was desired should be established to be by contract. Then, where there was no express contract, the contract received the name of implied contract, which means simply
- D legal liability having a very strong resemblance in its incidents and character to the liability which arises out of an express contract. That doctrine, as laid down in *Priestley v. Fowler* (3), was subsequently extended in *Wilson v. Merry* (1), and extended beyond the mere fact of injury arising from the negligence of what one would call simply a “fellow-workman” to that of injury caused by the negligence of a foreman or superintendent in the service of the employers.
- E After a time it began to be thought that it was not expedient, or for the public advantage, that that doctrine should any longer prevail, and consequently the Employers’ Liability Act, 1880, was passed for the expressed purpose of removing the obstacle which had been placed by the decision in *Wilson v. Merry* (1) in the way of a workman’s recovering damages from his employer, in a case where the injury had been occasioned otherwise than by the negligence of a fellow-servant
- F pure and simple. That statute consequently provided that in five specified classes of cases a workman might bring his action “as if he had not been a workman,” which I take to mean nothing more than this—that when a workman brings his action within these five specified cases, the employer shall not be at liberty to say; “You occupied the position of a workman in my service and, therefore, you must be taken to have impliedly contracted to bear the consequences arising from
- G the negligence of your fellow-workmen in these five cases.” The legislature has said that that shall not be the legal result of the position of workman and employer, or, in other words, that, in the five cases specified in s. 1 of the Act, the workman shall not be held to have impliedly contracted to bear those risks. That is the natural and reasonable sense of the language of the statute, and I think we are not compelled to put upon it a meaning which would really destroy what the legislature
- H has intended, and would, in point of fact, so far from helping a workman, take from him some of those benefits which the legislature intended to confer upon him. I agree, therefore, with FIELD, J., in thinking that the judgment should be entered for the defendant in this case.

Appeal allowed.

- I Solicitors: Stokes & Robinson for W. Waldron, Brierley Hill; Benbow, Saltwell & Tryon.

[Reported by HENRY LEIGH, Esq., Barrister-at-Law.]

DALLOW v. GARROLD. Ex Parte ADAMS

[COURT OF APPEAL (Sir Baliol Brett, M.R., and Lindley, L.J.), December 2, 3, 1884]

[Reported 14 Q.B.D. 543; 54 L.J.Q.B. 76; 52 L.T. 240;
33 W.R. 219; 1 T.L.R. 114]

Solicitor—Charging order—Priority as against garnishee—Solicitors Act, 1860 (23 & 24 Vict., c. 127), s. 28.

By s. 28 of the Solicitors Act, 1860 [now Solicitors Act, 1957, s. 72], a solicitor who had been employed in any court proceedings might obtain a declaration from the court or judge before whom the proceeding had been heard that he should be entitled to "a charge upon the property recovered or preserved" through his instrumentality "for the taxed costs, charges and expenses of" the proceedings, and "all conveyances and acts done to defeat, or which shall operate to defeat, such charge or right, shall, unless made to a bona fide purchaser for value without notice, be absolutely void and of no effect as against such charge or right. . . ."

A solicitor acted on behalf of a successful plaintiff in certain proceedings, and in due course the defendant paid the amount of the debt and the balance of the taxed costs to the sheriff. Before the money was paid over a garnishee summons was served on the sheriff by a judgment creditor of the plaintiff. Subsequently the solicitor obtained an order under s. 28 of the Solicitors Act, 1860, charging the fund in the sheriff's hands with the balance of the taxed costs remaining due to him.

Held: the garnishee was not "a bona fide purchaser for value without notice," and, therefore, under s. 28, the solicitor was entitled to priority.

Shippey v. Grey (1) (1880), 42 L.T. 673, and *Faithfull v. Ewen* (2) (1878), 7 Ch.D. 495, applied.

Notes. The Solicitors Act, 1860, s. 28, has been replaced by the Solicitors Act, 1957, s. 72 (37 HALSBURY'S STATUTES (2nd Edn.) 1116).

Applied: *Re Suffield and Watts*, *Ex parte Brown*, [1886-90] All E.R.Rep. 276; *Cole v. Eley* (1894), 38 Sol. Jo. 533. Considered: *The Paris*, [1896] P. 77; *Higgs v. Higgs*, [1934] P. 95. Applied: *Re Blake, Clutterbuck v. Bradford*, [1945] 1 All E.R. 1. Referred to: *Watts v. Hetley* (1899), 44 Sol. Jo. 134; *Re Deakin, Ex parte Daniell*, [1900] 2 Q.B. 489; *The Marie Gartz* (No. 2), [1920] P. 460; *G Campbell v. Campbell and Lewis*, [1941] 1 All E.R. 274.

As to priority of charging orders where a charging order in favour of a solicitor has been made, see 36 HALSBURY'S LAWS (3rd Edn.) 189; and for cases see 42 DIGEST 301 et seq.

Cases referred to:

- (1) *Shippey v. Grey* (1880), 49 L.J.Q.B. 524; 42 L.T. 673; 28 W.R. 877, C.A.; 42 Digest 302, 3365.
- (2) *Faithfull v. Ewen* (1878), 7 Ch.D. 495; 47 L.J.Ch. 457; 37 L.T. 805; 26 W.R. 270, C.A.; 42 Digest 302, 3369.
- (3) *Haymes v. Cooper, Cooper v. Jenkins* (1864), 33 Beav. 431; 3 New Rep. 627; 33 L.J.Ch. 488; 10 L.T. 87; 10 Jur.N.S. 303; 12 W.R. 539; 55 E.R. 435; 42 Digest 289, 3242.

Also referred to in argument:

Re Stanhope Silkstone Collieries Co. (1879), 11 Ch.D. 160; 48 L.J.Ch. 409; 40 L.T. 204; 27 W.R. 561, C.A.; 10 Digest (Repl.) 998, 6855.

Hamer v. Giles, Giles v. Hamer (1879), 11 Ch.D. 942; 48 L.J.Ch. 508; 41 L.T. 270; 27 W.R. 834; 42 Digest 298, 3319.

Hough v. Edwards (1856), 1 H. & N. 171; 26 L.J.Ex. 54; 2 Jur.N.S. 814; 156 E.R. 1164; 42 Digest 288, 3236.

- A *Eisdell v. Coningham* (1859), 28 L.J.Ex. 213; 21 Digest (Repl.) 748, 2350.
Birchall v. Pugin (1875), L.R. 10 C.P. 397; 44 L.J.C.P. 278; 23 W.R. 923;
 sub nom. *Burchell v. Pugin*, 32 L.T. 495; 42 Digest 289, 3241.
Higgs v. Schrader (1878), 3 C.P.D. 252; 47 L.J.Q.B. 426; 26 W.R. 831; 42
 Digest 299, 3332.
 B *Beavan v. Earl of Oxford* (1856), 6 De G.M. & G. 507; 25 L.J.Ch. 299; 26
 L.T.O.S. 277; 2 Jur.N.S. 121; 4 W.R. 274; 43 E.R. 1331, L.C. & L.J.J.;
 21 Digest (Repl.) 660, 1495.

Appeal from an order of the Divisional Court (POLLOCK, B., and LOPES, J.), in an action brought by a garnishee to set aside a charging order made by DENMAN, J., in favour of a solicitor, one Adams.

- C In an action *Dallow v. Garrold* the plaintiff recovered £10 8s. 11d., the amount by which the sum found to be due to the plaintiff on his claim exceeded the amount found to be due to the defendant on his counterclaim. There was a balance of £97 19s. 3d. due from the defendant to the plaintiff in respect of costs. These sums were paid to the sheriff on April 7, 1884, together with £2 2s. interest and £1 6s. costs of execution.

- D On April 8, 1884, a creditor named Davies, who had obtained a county court judgment against the plaintiff for £8 8s. 10d., caused a garnishee summons from the county court, returnable on May 27, attaching all debts due to the plaintiff to answer the county court judgment, to be served on the sheriff. On April 18, 1884, notice of the receipt of the money by the sheriff, and of the service of the garnishee summons, was given by the sheriff to the plaintiff's solicitor. On May 3,

- E 1884, the sheriff paid to the plaintiff's agent £101 7s. 3d. out of the sum which he had received under the execution, retaining the balance of £10 8s. 11d. On May 14, 1884, Mr. Adams, the solicitor who had acted for the plaintiff in the action of *Dallow v. Garrold*, gave notice to the sheriff that he claimed a charge on the sum retained in respect of the balance of taxed costs due to him, which amounted to £58 12s. 8d. On June 11, 1884, Mr. Adams made an application to

- F DENMAN, J., and obtained an order under the Solicitors Act, 1860, s. 28, charging the fund recovered by the plaintiff with the costs due to Mr. Adams. On June 24, 1884, the garnishee summons (which had been adjourned) came on for hearing before the judge of the county court. The charging order was produced, and the judge declined to make any order on the summons, but directed the sheriff to retain the money in his hands for twenty-eight days in order that the garnishee might
 G have time to apply to set aside the charging order. A. L. SMITH, J., at chambers set aside the charging order, but his order was reversed by the Divisional Court.

By the Solicitors Act, 1860, s. 28 :

- H "In every case in which an attorney or solicitor shall be employed to prosecute or defend any suit, matter, or proceeding in any court of justice, it shall be lawful for the court or judge before whom any such suit, matter, or proceeding has been heard or shall be depending, to declare such attorney or solicitor entitled to a charge upon the property recovered or preserved, and upon such declaration being made, such attorney or solicitor shall have a charge upon and against and a right to payment out of the property, of whatsoever nature, tenure, or kind the same may be, which shall have been
 I recovered or preserved through the instrumentality of any such attorney or solicitor, for the taxed costs, charges, and expenses of or in reference to such suit, matter, or proceeding; and it shall be lawful for such court or judge to make such order or orders for taxation of, and for raising and payment of such costs, charges, and expenses out of the said property as to such court or judge shall appear just and proper, and all conveyances and acts done to defeat, or which shall operate to defeat, such charge or right, shall, unless made to a bona fide purchaser for value without notice, be absolutely void and of no effect as against such charge or right: Provided always, that no such order

shall be made by any such court or judge in any case in which the right to recover payment of such costs, charges, and expenses is barred by any statute of limitations."

W. E. Hume Williams (*A. T. Lawrence* with him) for the garnishee.
Hollams for the solicitor.

SIR BALIOL BRETT, M.R.—In this case a solicitor acting on behalf of the plaintiff in the action has obtained judgment for the plaintiff against the defendant for the amount of the debt and costs. The costs in such a case are certainly something which is recovered, and I am of opinion that they are "property recovered" within the meaning of the Solicitors Act, 1860, s. 28. The amount of the debt and costs was originally in the hands of the judgment debtor, and afterwards came into the hands of the sheriff. While this money was in the hands of the sheriff a garnishee summons was served on the sheriff by a judgment creditor of the plaintiff. A charging order was afterwards obtained by the solicitor who had acted for the plaintiff in the action. The question to be decided is, whether the solicitor is entitled to have the proceeds of the judgment paid over to him, or whether the garnishee is entitled to priority.

This turns on the construction of s. 28 of the Solicitors Act, 1860. Here there is no conveyance within the meaning of that section, but there is an "act done," namely, the application for the garnishee order, which will "operate to defeat" the "charge or right" of the solicitor, if it is held entitled to priority. Here there was a case depending before the court; by the statute "the court or judge before whom any such suit, matter, or proceeding has been heard or shall be depending" can make a charging order, and these words, "the court or judge," in a statute or rule of court, unless there is something to show a contrary intention, are always taken to include a judge sitting at chambers. Therefore, by these words *DENMAN, J.*, had jurisdiction, and the proper person to make the charging order made it.

Then the question is whether the solicitor's charge is to be defeated by a garnishee order in favour of a judgment creditor of the plaintiff. Is a person who obtains a garnishee order within the meaning of these words in Act, "unless made to a bona fide purchaser for value without notice." The argument on behalf of the garnishee is, that any person whose claim is bona fide is protected by these words, but the words mean a person who has purchased for value, and a person who has obtained a garnishee order has not done that, and, therefore, is not within the exception. I am, therefore, of opinion that, if we decide the case on the construction of the statute alone, the solicitor is entitled to priority. Moreover, I cannot distinguish the facts of the present case from those of *Shippey v. Grey* (1), and the decision of the Court of Appeal in that case was founded on the previous decision, also of the Court of Appeal, in *Faithfull v. Ewen* (2), to the same effect. Therefore, there are two decisions of the Court of Appeal, which are binding on us, and there is also a long string of decisions in the Admiralty, Common Law, and Chancery Courts. Counsel has argued ably on behalf of the garnishee, but the weak point of the argument is, that he has been driven to trying to distinguish the present case from the authorities referred to by taking separate sentences out of the judgments of different judges, instead of dealing with the facts of the cases.

For these reasons I am of opinion, both on principle and authority, that we ought to decide against the appeal. In delivering judgment in the court below, *POLLOCK, B.*, made use of the following expressions :

"It seems to me that the intention must have been to give the solicitor something beyond the lien that existed before in his favour upon funds which might be in his custody, and to enable an order to be made charging any property recovered through his instrumentality. That being so, the question is, whether that charging order is to be dealt with as if it were a mere voluntary charge given by the party entitled in favour of another, or whether it is to be looked upon as intended to give the solicitor priority over all persons whatsoever

A claiming any interest in the fund, so long as the fund remains under the control of the court. It seems to me that the latter is the effect intended by the Act."

I think this is the proper result of all the previous cases.

LINDLEY, L.J.—I am also of opinion that the decision of the Divisional Court ought to be affirmed. Mr. Davies wants to attach the money in the hands of the sheriff; that money is the proceeds of the action brought by Dallow against Garrold, and he knows this; he is not a purchaser, and he cannot say he had no notice that it was probable that the solicitor who acted for the plaintiff in that action would apply for a charging order; but he says that because he is first his garnishee summons is to defeat the solicitor's claim. I am of opinion that this contention is contrary to the terms of the Act. The Act comes to this, that a solicitor has an inchoate right to obtain a charging order, which right cannot be defeated by a claim made by any person who has notice. It has been so held in all the cases which have been decided on this section, among which I may refer to the decision of LORD ROMILLY in *Haymes v. Cooper* (3). There are also the two decisions of the Court of Appeal, which have been already referred to, and a number of cases in Admiralty, Common Law, and Chancery Courts, all to the same effect.

Appeal dismissed.

Solicitors: *Matthews & Garrold; Roberts & Barlow.*

[*Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.*]

F THE GLENAVON (OWNERS) v. THE GLENFRUIN (OWNERS). THE GLENFRUIN

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Butt, J.), March 10, 18, 19, 31, 1885]

[Reported 10 P.D. 103; 54 L.J.P. 49; 52 L.T. 769; 33 W.R. 826;
5 Asp.M.L.C. 413]

Shipping—Salvage—Salvors owners of assisted vessel—Right of shipowners to recover salvage from cargo owners—Salvage rights of master and crew unaffected—Right of cargo owners to counterclaim from salvors.

Shipping—Seaworthiness—Absolute warranty—Latent defect in main shaft—Impossibility of detecting flaw—Liability of shipowners.

A steam screw-ship carrying cargo under a bill of lading containing exceptions against loss or damage from machinery and all and every the dangers and accidents of the seas and of navigation, of whatever nature or kind, became disabled through her main shaft breaking in consequence of a latent defect which was in existence prior to the sailing of the vessel but could not have been detected. Another vessel belonging to the same owners rendered salvage assistance.

Held: (i) the warranty of seaworthiness in the bill of lading was absolute, and, although it was impossible for the shipowners to have discovered the flaw in the shaft the defect rendered the vessel not reasonably fit for the voyage and, therefore, the vessel was unseaworthy; (ii) the exceptions in the bill of lading had no application in the case of a ship which was unseaworthy at the time of sailing and the unseaworthiness was the efficient cause of the loss or damage; (iii) to avoid circuity of action the shipowners, as the owners of both vessels,

were precluded from recovering salvage from the cargo owners; (iv) salvage awarded to the crew of the salving vessel could be claimed from the shipowners by the cargo owners by way of counterclaim.

Notes. Applied: *The Northumbria* (1906), 95 L.T. 618. Considered: *The Kafirstan*, [1937] 3 All E.R. 747; *Smith Hogg & Co. v. Black Sea and Baltic General Insurance Co.*, [1940] 3 All E.R. 405. Referred to: *The Maori King v. Hughes* (1895), 73 L.T. 141; *The Duc D'Aumale*, [1900-3] All E.R.Rep. 510; *Nelson v. Nelson Line (Liverpool), Ltd.* (1907), 96 L.T. 402; *The Europa*, [1904-7] All E.R.Rep. 394; *Ingram and Royle, Ltd. v. Services Maritimes Du Tréport, Ltd.* (1913), 82 L.J.K.B. 374; *The Leon Blum*, [1915] P. 90; *The Christel Vinnen*, [1924] P. 61; *Akt. Ocean v. Harding*, [1928] 2 K.B. 371; *Fiumana Società Di Navigazione v. Bunge & Co.*, [1930] 2 K.B. 47; *Tempus Shipping Co. v. Louis Dreyfus & Co.*, [1931] 1 K.B. 195; *Goulandris Bros. v. B. Goldman & Sons*, [1957] 3 All E.R. 100.

As to exceptions relieving the shipowner, see 35 HALSBURY'S LAWS (3rd Edn.) 288 et seq., as to seaworthiness, see *ibid.*, 373-377, 401 et seq., and for salvage, see *ibid.*, 731 et seq. For cases see 41 DIGEST 407 et seq., 471 et seq., 838 et seq.

Cases referred to:

- (1) *Lyon v. Mells* (1804), 5 East, 428; 1 Smith, K.B. 478; 102 E.R. 1134; 41 Digest 472, 3039.
- (2) *Kopitoff v. Wilson* (1876), 1 Q.B.D. 377; 45 L.J.Q.B. 436; 34 L.T. 677; 24 W.R. 706; 3 Asp.M.L.C. 163; 41 Digest 473, 3045.
- (3) *Steel v. State Line Steamship Co.* (1877), 3 App. Cas. 72; 37 L.T. 333; 3 Asp.M.L.C. 516, H.L.; 41 Digest 428, 2693.

Also referred to in argument:

Nugent v. Smith (1876), 1 C.P.D. 423; 45 L.J.Q.B. 697; 34 L.T. 827; 41 J.P. 4; 25 W.R. 117; 3 Asp.M.L.C. 198, C.A.; 8 Digest (Repl.) 18, 95.

The Miranda (1872), L.R. 3 A. & E. 561; 41 L.J.Adm. 82; 27 L.T. 389; 21 W.R. 84; 1 Asp.M.L.C. 440; 41 Digest 422, 2651.

Phillips v. Clark (1857), 2 C.B.N.S. 156; 26 L.J.C.P. 168; 29 L.T.O.S. 181; 3 Jur.N.S. 467; 5 W.R. 582; 140 E.R. 372; 41 Digest 424, 2664.

Lloyd v. General Iron Screw Collier Co. (1864), 3 H. & C. 284; 4 New Rep. 298; 33 L.J.Ex. 269; 10 L.T. 586; 10 Jur.N.S. 661; 12 W.R. 882; 2 Mar.L.C. 32; 41 Digest 421, 2646.

Grill v. General Iron Screw Collier Co. (1868), L.R. 3 C.P. 476; 37 L.J.C.P. 205; 18 L.T. 485; 16 W.R. 796; 3 Mar.L.C. 77, Ex. Ch.; 41 Digest 422, 2647.

Tattersall v. National Steamship Co. (1884), 12 Q.B.D. 297; 53 L.J.Q.B. 332; 50 L.T. 299; 32 W.R. 566; 5 Asp.M.L.C. 206; 41 Digest 496, 3245.

Kay v. Wheeler (1867), L.R. 2 C.P. 302; 36 L.J.C.P. 180; 16 L.T. 66; 15 W.R. 495; 2 Mar.L.C. 466, Ex. Ch.; 41 Digest 415, 2587.

Action by the owners, master, and crew of the steamship *Glenavon*, against the owners of the cargo laden on board the steamship *Glenfruin*, for salvage services rendered thereto.

The *Glenavon* was an iron screw-steamship of 2,985 tons gross register, with engines working up to 2,650 horse-power, and was manned by a crew of sixty-six hands. At the time the salvage services were rendered she was on a voyage from Japan and China to New York laden with a cargo of tea. The *Glenfruin* was at the time the services were rendered on a voyage from Hankow to London, laden with a cargo of tea. The value of the *Glenfruin* and her freight was £70,000, and of her cargo £158,000. Sixty-two sixty-fourth shares in the *Glenavon* and sixty-two sixty-fourth shares in the *Glenfruin* were owned by the same nineteen persons. The remaining two sixty-fourth shares in the *Glenavon* were held by a Mr. William Houston, and the remaining two sixty-fourth shares in the *Glenfruin* by another gentleman.

On June 18, 1884, the *Glenfruin* had broken her main shaft, and on June 26, at about noon, she being then in the Indian Ocean about 2°22' N. lat. and 68°39' E.

- A long., she was observed by those on board the *Glenavon* flying signals for assistance. On the *Glenavon* coming up with the *Glenfruin* it was discovered that the breakdown of the *Glenfruin*'s machinery was due to a fracture in the screw-shaft. After the breakdown, efforts had been made to repair the shaft, and an engineer from the *Glenavon* went on board the *Glenfruin* to render assistance. On the morning of June 27 the *Glenavon* began to tow the *Glenfruin*, and continued so doing until July 2, when the repairs to the shaft of the *Glenfruin* were completed and her engines set ahead. It being uncertain whether the repairs would hold, it was agreed that the *Glenavon* should stay by the *Glenfruin* until she had passed Cape Guardafui. On July 4 Guardafui was passed, and at noon on July 5, as the *Glenfruin*'s engines continued to work well, and Aden was only 350 miles distant, the *Glenavon* parted company and proceeded on her voyage. The *Glenfruin* eventually reached London in safety. The towage extended over about 900 miles, and the weather was fine during the rendering of the services. By way of defence the defendants alleged that the action of the plaintiffs as owners of the *Glenavon* in assisting the *Glenfruin* was done only in fulfilment of the contracts contained in the bills of lading and that the cargo was laden on board the *Glenfruin* under the contracts on terms that the vessel should be seaworthy for the voyage and the vessel was not seaworthy in that the screw-shaft was defective, unsound and in improper condition. The defendants further counterclaimed for any remuneration awarded to the plaintiffs or to the master or crew of the *Glenavon* or any of them. In their reply the plaintiffs denied that their action in towing the *Glenfruin* was in fulfilment of the contracts and that the *Glenfruin* had put to sea in an unseaworthy condition. They further alleged that the breaking of the shaft was within the terms of the following exception in the bills of lading:

F "The act of God, the Queen's enemies, pirates, robbers by land or sea; restraint of princes, rulers, or people, loss or damage from machinery, boilers, or steam, or from explosion, heat, or fire on board, in hulk, or craft, or on shore; jettison, barratry, misfeasance, error in judgment; any act or neglect or default whatsoever of pilots, master, or crew, in the management or navigation, of the ship; risks of craft, or hulk, or transhipment, and all and every the dangers and accidents of the seas, rivers, and canal, and of navigation, of whatsoever nature or kind, are excepted."

G At the hearing of the action evidence was given on behalf of the plaintiffs as to the nature of the salvage services. It was also proved that the screw-shaft had been bought from a first-class firm, that the flaw was due to a latent defect which it would have been impossible to discover, and that the owners of the *Glenfruin* had used all reasonable diligence in the selection of the shaft.

Russell, Q.C., Cohen, Q.C., and Bucknill for the plaintiffs.

Webster, Q.C., Tyser and Barnes for the defendants.

- H Mar. 31, 1885. **BUTT, J.**, stated the facts and continued: The principal questions raised and discussed in the case were: (i) Was the breakdown of the *Glenfruin*'s shaft caused by unseaworthiness? (ii) Does the implied warranty of seaworthiness in the bill of lading amount to a contract by the shipowners that the ship (including her machinery) shall be in fact reasonably fit for the voyage, or only that due care shall be taken to make her so fit? (iii) Was the warranty qualified, I or were the shipowners otherwise exempted from liability for the breaking of the shaft by the exceptions in the bill of lading?

With reference to the first of these questions, it appears from the evidence that very few, if any, of these large shafts are turned out, even by the best makers, without some flaws in the welding. If one of such flaws is of a serious nature, it is apt to extend from the strain put upon it by the working of the engines, and in course of time so to weaken the shaft as to make it unfit for the purposes for which it is designed. This is almost always, if not always, the cause of the breaking of the shafts of large steamers. The shaft in question had been made by one of

the best firms, and after its completion it was impossible for that firm, or for the owners of the ship, to discover the flaw until it was laid bare by the breaking of the shaft. That flaw was a very serious one. It had no doubt increased gradually during the four years the shaft was in use, and the defect culminated in the breakdown on a voyage on which the ship had met with no more than ordinary weather. I find as a fact that, when the *Glenfruin* started from Hankow, the shaft was not reasonably fit for the voyage; in other words, that the ship was unseaworthy. A B

On the second question, viz., that relating to the nature and extent of the warranty of seaworthiness, I am, I think, concluded by authority. I have always understood the result of the cases from *Lyon v. Mells* (1) to *Kopitoff v. Wilson* (2) to be, that under his implied warranty of seaworthiness the shipowner contracts, not merely that he will do his best to make the ship reasonably fit, but that she shall really be reasonably fit for the voyage. Had those cases left any doubt in my mind it would have been set at rest by the observations of some of the Peers in the opinions they delivered in *Steel v. State Line Steamship Co.* (3). C

Thirdly, I am of opinion that the exceptions in the bill of lading have not the effect either of limiting the implied warranty or of otherwise exempting the shipowner from liability to the owners of cargo for damage or loss occasioned by the breaking of the shaft. It appears to me that the reasonable construction of the exceptions relied on by the plaintiffs, viz., "all and every the dangers and accidents of the seas, rivers, and canal, and of navigation of whatever nature or kind"—must be "dangers and accidents" happening to a seaworthy vessel, and that the exception has no application to the case of a ship which was unseaworthy at the time of sailing, and the unseaworthiness of which was the efficient cause of the loss or damage. In *Steel v. State Line Steamship Co.* (3), to which I have already referred, the decision of the House of Lords was that the exceptions contained in the bill of lading then under consideration were exceptions of matters subsequent to the sailing of the ship with the goods on board. I can see no reason for taking a different view of the exceptions in the bill of lading in the present case. The result is, that the part owners of the *Glenavon*, who were also part owners of the *Glenfruin*, would be liable to the owners of cargo on board the *Glenfruin* for any loss occasioned by the breakdown of the machinery. In other words, such part owners (plaintiffs in the present suit) would be liable to reimburse the defendants any amount of salvage that I might award. To avoid what is termed "circuity of action," I must decline to make any award in favour of those plaintiffs. D E F

There is, however, one of the plaintiffs (Mr. William Houston, the owner of two sixty-fourth shares of the *Glenavon*) who is not a part owner of the *Glenfruin*, and who would, therefore, be entitled to his proportion of the salvage that would have been awarded to the plaintiffs had none of them been part owners of the *Glenfruin*. Again, I do not understand it to have been contended, either in the pleadings or in the argument, that the master and crew of the *Glenavon* are not entitled to salvage remuneration. Having regard to all the circumstances of the case, and bearing in mind that the two ships for practical purposes must be taken to have belonged to the same owners, and that the cargo only of the *Glenfruin*, and not ship, freight, and cargo, are proceeded against in this action, I award £40 to the plaintiff William Houston, £50 to the master, and £250 to the officers and crew of the *Glenavon*, according to their respective ratings. There will also be judgment for the defendants on their counterclaim against the owners of the *Glenfruin* for the amount of salvage I have awarded. G H. I

Solicitors: *Hollams, Son & Coward; Waltons, Bubb & Johnson.*

[Reported by J. P. ASPINALL, Esq., and BUTLER ASPINALL, Esq., Barristers-at-Law.]

A

LAMB v. MUNSTER

[QUEEN'S BENCH DIVISION (Field and Stephen, JJ.), November 23, 1882]

[Reported 10 Q.B.D. 110; 52 L.J.Q.B. 46; 47 L.T. 442;

31 W.R. 117]

B

Discovery—Interrogatory—Refusal to answer—Objection that to answer "might tend to criminate" person interrogated—Libel action.

The plaintiff in an action for libel administered interrogatories to the defendant relating to the writing and publication of the alleged libel. The defendant declined to answer all the interrogatories upon the ground that his answers "might tend to criminate" him. The plaintiff took out a summons that the

C

defendant should be directed to make further and better answers.

Held: the defendant was not bound to state in precise words that to answer the interrogatories would criminate him; to answer the interrogatories fully would clearly incriminate the defendant;

D

Notes. Applied: *Re Genese, Ex parte Gilbert* (1886), 3 Morr. 223. Followed: *Pankhurst v. Wighton* (1886), 2 T.L.R. 745. Distinguished: *Derbyshire County Council v. Derby Corpn.* (1896), 74 L.T. 747. Referred to: *Triplex Safety Glass Co. v. Lancegaye Safety Glass (1934), Ltd.*, [1939] 2 All E.R. 613; *Blunt v. Park Lane Hotel, Ltd.*, [1942] 2 All E.R. 187.

As to crimination as a ground for resisting production of documents, see 12 HALSBURY'S LAWS (3rd Edn.) 50 et seq.; and for cases see 18 DIGEST (Repl.) 224 et seq.

E

Case referred to:

(1) *R. v. Boyes* (1861), 1 B. & S. 311; 30 L.J.Q.B. 301; 5 L.T. 147; 25 J.P. 789; 7 Jur.N.S. 1158; 9 W.R. 690; 9 Cox, C.C. 32; 121 E.R. 730; 22 Digest (Repl.) 391, 4191.

Also referred to in argument:

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Scott v. Miller (1859), John. 328; 28 L.J.Ch. 584; 33 L.T.O.S. 270; 5 Jur.N.S. 858; 7 W.R. 561; 70 E.R. 448; 18 Digest (Repl.) 134, 1187.

Fisher v. Owen (1878), 8 Ch.D. 645; 47 L.J.Ch. 681; 38 L.T. 577; 42 J.P. 758; 26 W.R. 581, C.A.; 18 Digest (Repl.) 226, 1939.

McFadzen v. Liverpool Corpn. (1868), L.R. 3 Exch. 279; 37 L.J.Ex. 193; 18 L.T. 611; 16 W.R. 1212; 18 Digest (Repl.) 171, 1482.

G

Re Reynolds, Ex parte Reynolds (1882), post; 20 Ch.D. 294; 51 L.J.Ch. 756; 46 L.T. 508; 46 J.P. 533; 30 W.R. 651; 15 Cox, C.C. 108, C.A.; 22 Digest (Repl.) 391, 4192.

Re Firth, Ex parte Schofield (1877), 6 Ch.D. 230; 46 L.J.Bey. 112; 37 L.T. 281; 26 W.R. 9, C.A.; 5 Digest (Repl.) 658, 5779.

H

Appeal from a decision of WATKIN WILLIAMS, J., at chambers, reversing the decision of Master WALTON, who had ordered the defendant to make further and better answers to certain interrogatories which had been delivered to him by the plaintiff.

The action was one for libel which charged the defendant with writing and publishing certain defamatory statements contained in two placards. The statement of defence denied the publication, and pleaded justification. The plaintiff administered interrogatories to the defendant relating to the writing and publication of the said placards. To these interrogatories the defendant made the following answer:

I

"In answer to the said interrogatories, I, the above-named Henry Munster, make oath, and say as follows: I decline to answer all the said interrogatories, upon the ground that my answers to them might tend to criminate."

Gore for the plaintiff.

Woollett (*Prankerd* with him) for the defendant.

FIELD, J.—We have come to the conclusion that the decision of **WATKIN WILLIAMS, J.**, is right, and are of opinion that this answer is in substance sufficient. This is an important point, no doubt; and whether it be right or not, the principle of the law of this country is that a man shall not be compelled to say anything on oath to criminate himself. The expression “criminating himself” may have various meanings; and I think it may mean, that the person making the statement will be brought within the pains and penalties of a criminal trial; and no man is bound to bring himself within them. How is that objection to be raised? At the trial, when the witness is in the witness-box, he is asked a certain question which he refuses to answer because of its known tendency to criminate him. Counsel for the plaintiff says that is not enough, but that the witness must answer more; he must state that, in his opinion, to answer the question would tend to criminate him. This would practically be to refer the witness to a professional lawyer to ask his opinion of the tendency of the question. The question now, in my opinion, comes in the province of the judge. The judge can look at the question itself; having regard to the surrounding circumstances, and irrespectively of the possible answer of the witness, he should look to the nature of the answer for the purpose of seeing whether it would have a tendency to criminate the witness interrogated. Though adverse to giving too favourable a construction to this principle of law, I should hesitate to compel a man to answer a question which might tend to criminate him.

What is the present case? These are clearly questions tending to criminate the defendant. He is charged with a libel for which he could be indicted. Having got his answer to these interrogatories, the plaintiff might go before a grand jury at Lewes and prefer a bill of indictment against the defendant. They would also tend to substantiate the plaintiff’s first ground of action, viz., the publication of the libel. If the answers to these interrogatories will tend to criminate the defendant he need not answer them. It is said that it is not enough for the defendant to swear on oath that the answer would tend to criminate him, but that he believes it would tend to criminate him. I do not find any authorities on which counsel for the plaintiff can rest his application. It has been thought to be a mistake to compel a man to decline to answer a question tending to criminate him on the common-sense ground that the refusal to answer in the presence of the jury would be a proof to them of the truth of the question. However, it is the law. I find that as a matter of fact the different judges in the different cases use different words as to what will be a sufficient answer. I am of opinion there is no substance in this application, that the answer is sufficient, and that the order should be affirmed.

STEPHEN, J.—I am of the same opinion, but would like to add a few words to the effect that I agree with my learned brother in this matter. In every case one ought to consider the main principle of law on this point, but it would be a very great pity to lay down any strict rule as to the particular form of words in which persons are to express their opinion that an answer would criminate them. I think, when the matter is fully examined into, it is intended that there shall be a personal protection against any man being compelled to answer any question tending to criminate him.

“No one is bound to answer any question if the answer thereto would, in the opinion of the judge, have a tendency to expose the witness . . . to any criminal charge, or to any penalty or forfeiture which the judge regards as reasonably likely to be preferred or sued for.”

This passage from my own book (**STEPHEN’S DIGEST OF THE LAW OF EVIDENCE** (3rd Edn.), p. 121) illustrates what I understand by the expression “criminating oneself.” I do not think the privilege is so narrowly restricted as counsel for the plaintiff contends it is.

In my opinion the proper extent of the principle is as follows. If I am aware that a person is going to bring a criminal charge against me, or I reasonably think

A a criminal charge is going to be brought against me, I can say: "I shall hold my tongue; prove your case yourself, and not out of my mouth." The court who has to decide the question must be certified on the oath of the witness that he objects on the ground that the answer to the question will tend to criminate him.

In the well-known case of *R. v. Boyes* (1) COCKBURN, C.J., said (1 B. & S. at pp. 329, 330):

B "It was also contended that a bare possibility of legal peril was sufficient to entitle a witness to protection; nay, further, that the witness was the sole judge as to whether his evidence would bring him into danger of the law, and that the statement of his belief to that effect, if not manifestly made mala fide, should be received as conclusive. With the latter of these propositions we are altogether unable to concur. Upon a review of the authorities we are clearly
C of opinion that . . . to entitle a party called as a witness to the privilege of silence the court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer."

D In this case the defendant is asked if he published these libels. The answer in the affirmative would tend to criminate him. I cannot say an indictment for libel in this case is an imaginary danger which might befall the defendant. I think the appeal ought to be dismissed.

Appeal dismissed.

Solicitors: *Palmer & Bull; W. Brewer.*

[*Reported by W. P. EVERSLEY, Esq., Barrister-at-Law.*]

F

Re ANDROS. ANDROS v. ANDROS

[CHANCERY DIVISION (KAY, J.), July 18, 23, 1883]

[Reported 24 Ch.D. 637; 52 L.J.Ch. 793; 49 L.T. 163; 32 W.R. 30]

G *Conflict of Laws—Legitimacy—Legitimacy of child according to law of father's domicile—Will—Bequest of personalty for "great-nephews, sons of deceased nephew"—Nephew domiciled in Guernsey—Child born before marriage—Legitimation under Guernsey law per subsequens matrimonium—Right of child to share in bequest.*

H A testator bequeathed his residuary personal estate to trustees in trust for his great-nephews, the sons of his deceased nephew, T.G.A., in equal shares. T.G.A. was a native of Guernsey. The plaintiff was a son of T.G.A., born before the marriage of his parents, who were domiciled in Guernsey both at the time of the plaintiff's birth and of their subsequent marriage. By the law of Guernsey children born out of wedlock became legitimated by the subsequent marriage of their parents. Other children were born after the marriage; and the plaintiff claimed to share with them in the property bequeathed by
I the will.

Held: a bequest of personalty in an English will to the children of a foreigner meant to his legitimate children; by international law, as recognised in this country, those children were legitimate whose legitimacy was fixed by the law of the father's domicile; and, therefore, the plaintiff was entitled to share in the gift as a legitimate child of his father.

Per KAY, J.: It must now be treated as settled that any person, legitimate according to the law of the domicile of his father at his birth, is legitimate

everywhere within the range of international law, for the purpose of succeeding to personal property. A

Notes. The principle of legitimation by the subsequent marriage of the parents of a child born out of wedlock was introduced into the law of England by the Legitimacy Act, 1926, s. 1 (1) (2) HALSBURY'S STATUTES (2nd Edn.) 493).

Followed: *Re Grey's Trusts*, *Grey v. Stamford*, [1892] 3 Ch. 88. Considered: *Re Bischoffsheim, Cassel v. Grant*, [1947] 2 All E.R. 830. Referred to: *Re Ferguson's Will*, [1902] 1 Ch. 483; *Re Hurrell, Angelini v. Dick*, [1952] 2 All E.R. 322; *Re Wilson, Grace v. Lucas*, [1954] 1 All E.R. 997; *Re Marshall, Barclay's Bank, Ltd. v. Marshall*, [1957] 3 All E.R. 172. B

As to right of illegitimate relations to take under wills, see 39 HALSBURY'S LAWS (3rd Edn.) 1070 et seq.; and for cases see 3 DIGEST (Repl.) 420 et seq.

Cases referred to: C

(1) *Birtwhistle v. Vardill* (1840), 7 Cl. & Fin. 895; 4 Jur. 1076; 7 E.R. 1308; sub nom. *Doe d. Birtwhistle v. Vardill*, 6 Bing.N.C. 385; West, 500; 1 Scott, N.R. 828, H.L.; 3 Digest (Repl.) 424, 203.

(2) *Re Goodman's Trusts* (1880), post; 14 Ch.D. 619; 49 L.J.Ch. 805; 43 L.T. 14; on appeal (1881), 17 Ch.D. 266; 50 L.J.Ch. 425; 44 L.T. 527; 29 W.R. 586. C.A.; 3 Digest (Repl.) 424, 208. D

(3) *Boyes v. Bedale* (1863), 1 Hem. & M. 798; 3 New Rep. 290; 33 L.J.Ch. 283; 10 L.T. 131; 10 Jur.N.S. 196; 12 W.R. 232; 71 E.R. 349; 3 Digest (Repl.) 424, 209.

(4) *Re Wilson's Trusts* (1865), L.R. 1 Eq. 247; 35 L.J.Ch. 243; 30 J.P. 163; 14 W.R. 161; sub nom. *Re Wilson's Trusts, Ex parte Shaw*, 13 L.T. 576; 12 Jur.N.S. 132; affirmed sub nom. *Shaw v. Gould* (1868), L.R. 3 H.L. 55; 37 L.J.Ch. 433; 18 L.T. 833, H.L.; 44 Digest 808, 6613. E

(5) *Goodman v. Goodman* (1862), 3 Giff. 643; 6 L.T. 641; 8 Jur.N.S. 554; 66 E.R. 565; 3 Digest (Repl.) 421, 190.

(6) *Skottowe v. Young* (1871), L.R. 11 Eq. 474; 40 L.J.Ch. 366; 24 L.T. 220; 19 W.R. 583; 3 Digest (Repl.) 425, 212. F

Special Case stated, by consent, for the opinion of the court, pursuant to R.S.C., Ord. 34.

William Andros, who died on Jan. 23, 1882, by his will, dated Aug. 13, 1879, gave one-third of his residuary personal estate to his trustees, Amias Charles Andros and Edwyn Brenton Andros, upon trust to pay and divide the same between such of his great-nephews, the sons of his deceased nephew, Thomas Godfrey Andros, as should survive him and should attain the age of twenty-five years, in equal shares; but he gave to his trustees absolute discretion to pay to his great-nephews, or either of them, the whole or any portion of the capital of the shares or share to which they or he might be presumptively entitled, at any time his trustees might consider it expedient so to do. And the testator declared that his great-nephews should, on attaining the age of twenty-one years, be entitled to receive the income of the share or shares to which they, or either of them, should then be presumptively entitled. The plaintiff, Thomas Godfrey Andros, was the son of the testator's nephew, Thomas Godfrey Andros, and of Sarah Emma Andros, formerly Sarah Emma Forbes, spinster. The plaintiff was born in the island of Guernsey on Dec. 1, 1860. The testator's nephew (the plaintiff's father) was born in Guernsey, and was domiciled there at the date of the plaintiff's birth. The plaintiff's mother was also domiciled in Guernsey at that date. The testator's nephew was not married to Sarah Emma Forbes at the time when the plaintiff was born, but, subsequently to the plaintiff's birth, viz., on Jan. 21, 1865, he duly intermarried with her. G H I

According to the law of Guernsey a child born before the marriage of its parents becomes legitimate on, and by reason of, his parents' subsequent marriage, and for the purposes of succession to personal property, and for all other purposes, is deemed to be a legitimate child of its father and mother as fully as if it had been

A born in lawful wedlock. The plaintiff, therefore, according to the law of Guernsey, became legitimate on Jan. 21, 1865, and from that date was, according to that law, entitled to be deemed a legitimate child of the testator's nephew. After the testator's nephew had married he had four more children, such four children being defendants, and all under the age of twenty-one years.

B The testator's nephew lived in Guernsey during the greater part of his life, and died there on Nov. 12, 1875. He was domiciled in Guernsey when he died.

C The defendants, Amias Charles Andros and Edwyn Brenton Andros, as trustees of the testator's will, had in their possession securities on which they had duly invested one-third part of the testator's residuary personal estate, upon the trusts declared in favour of the testator's great-nephews. The plaintiff claimed to be entitled to a share of such third part of the testator's residuary personal estate, and after attaining the age of twenty-one years he applied to the trustees to pay the same to him. The trustees were, however, advised that they could not safely do so until the court had expressed its opinion that the plaintiff ought to be deemed a legitimate great-nephew of the testator.

D The following questions were accordingly submitted for the opinion of the court: Whether the plaintiff ought, under the circumstances, to be deemed a legitimate son of the testator's nephew, Thomas Godfrey Andros, for the purposes of the testator's will, and as such entitled to a share of one equal third part of the testator's residuary personal estate; and whether the trustees were at liberty to pay to the plaintiff his proper share of such one-third part.

Graham Hastings, Q.C., and Bardswell for the plaintiff.

Hatfield Green for the defendants.

Cur. adv. vult.

F July 23, 1883. **KAY, J.**—The Special Case states the will of an English testator bequeathing personal property to the testator's great-nephews, the sons of his deceased nephew, Thomas Godfrey Andros. The plaintiff is a son of T. G. Andros, who intermarried with the plaintiff's mother after his birth, and by the law of Guernsey, of which island the father was a native, and where he and the mother were domiciled both at the time of the plaintiff's birth and their subsequent marriage, the plaintiff became legitimate when the marriage took place. Other children were born after the marriage. The will, being an English will, must of course be construed according to English law. That law requires that all who take under a gift to sons of a named father should be legitimate offspring.

G It must now be treated as settled that any person, legitimate according to the law of the domicile of his father at his birth, is legitimate everywhere within the range of international law, for the purpose of succeeding to personal property. The well-known case of *Birtwhistle v. Vardill* (1), which introduced a distinction in this respect in the case of a person claiming to succeed as heir to real property in England, by requiring such a person to establish his legitimacy according to English law—that is, as though the father had been domiciled in England at the time of the birth of the child—treats this as an exceptional case, and recognises that the rule of succession to personal estate is otherwise; and this has been recently more expressly decided by the Court of Appeal in *Re Goodman's Trusts* (2). If, then, a child of a foreigner, legitimate according to the law of his father's domicile, though illegitimate if his father had been an Englishman, can succeed as next-of-kin to personal estate in England, why should he not take a bequest of personalty by the description of the son of his father in the will of an English testator? On principle, it seems to me very difficult to see why he should not.

I However, in *Boyes v. Bedale* (3) LORD HATHERLEY, in a considered judgment, decided that such a person could not take under a gift to the children of his father. The will, and every term in it, his Lordship held, must be construed according to English law. If, he said, in a Canadian will there were a gift of £100, that would mean £100 Canadian currency, not £100 sterling; so that the testator “must be taken to mean a child in the sense in which the law of England understands the

term." Speaking with all deference, the illustration seems to me to be inapt and wanting in analogy. If two countries happen to have the same name for their monetary currency, no one for a moment could suppose that a testator in one of them, using the familiar name of the currency of his own country, meant by that the currency of different value of the foreign country which happened to have the same name; but how does it follow from this that a gift to the children of a foreigner means such children only as would be legitimate if he had been a domiciled Englishman? A bequest in an English will to the children of A. means to the legitimate children, but the rule of construction goes no further. The question remains, who are the legitimate children? That certainly is not a question of construction of the will; it is a question of status. By what law is that status to be determined? That is the question of law. Does that comity of nations, which we call international law, apply to the case or not? That may be a matter for consideration, but I do not see how the construction of the will has anything to do with it.

The matter may be put in another way. What did the testator intend by this gift? That is answered by the rule of construction. He intended A.'s legitimate children. If you ask the further question, did he intend his children who would be legitimate according to English law, or his actual legitimate children? How can the rule of construction answer that? LORD HATHERLEY considered that the bequest must be read, to such children as would be legitimate, according to the law of England, if their father had been a domiciled Englishman at their birth. But is that according to the English rule of construction, that "children" means "legitimate children?" Try it thus: Suppose the same rule of construction to prevail in Guernsey, and that in the will of a Guernsey testator there were a bequest to the children of an Englishman. According to *Boyes v. Bedale* (3) children would mean such children as would be legitimate according to the law of Guernsey. By this construction ante nati of the English father would share with his children legitimate according to English law, because they would have been legitimate if the father had been domiciled in Guernsey, though they were in fact illegitimate by English law, and of course by international law. This would not carry out, but contravene, the rule of construction.

KINDERSLEY, V.-C., in *Re Wilson's Trusts, Ex parte Shaw* (4), expressed his readiness to follow *Boyes v. Bedale* (3). The facts of that case, however, were not the same. A domiciled Englishman had married an English woman. He went to Scotland, and, without having a Scottish domicile, he sued for and obtained a Scottish divorce, which was not sufficient to dissolve the English marriage. The woman married in Scotland a domiciled Scotsman, and had children by him, and the question was whether they could be considered legitimate in England. The decision of KINDERSLEY, V.-C., was supported in the House of Lords (*Shaw v. Gould* (4)) on the ground that international law did not require the English courts to recognise such a divorce, and therefore the children were not by that law legitimate. That decision does not apply, because it cannot be denied that the children in this case would be recognised as legitimate, for some purposes at any rate, by every other state in Christendom. These are the two cases most nearly in point on the one side.

On the other hand, there are two decisions of STUART, V.-C., viz., *Goodman v. Goodman* (5) and *Skottowe v. Young* (6). SIR GEORGE JESSEL, M.R., observed of the former that the point was not there really considered and decided: see *Re Goodman's Trusts* (2). But, according to the reports it certainly was argued, and the decision was, that ante nati born in England while the father was domiciled here, could not take under a gift to them, but that an ante natus born in Holland when the father was domiciled there might take in conjunction with the post nati by the same mother when he married in that country, thus legitimating the ante nati there. *Skottowe v. Young* (6) was a question of legacy duty, but the same point was involved. Besides these two cases there is the analogy, which I have referred to, derivable from the decisions showing that a child, legitimate by the

A law of his father's domicile, may take as next-of-kin in a succession to personal estate in England.

But, in addition to these considerations, there is the opinion of COTTON and JAMES, L.JJ., in *Re Goodman's Trusts* (2). The former says (17 Ch.D. at p. 295):

B "In *Boyes v. Bedale* (3) the question was on the construction of a bequest in the will of a domiciled Englishman to the children of a person named. The Vice-Chancellor held that a child exactly in the same position as Hannah Pieret was not entitled under the bequest. He said that the will, being that of a domiciled Englishman, must be construed according to English law, which, in my opinion, is correct so far as to require that this word 'children' shall be construed 'legitimate children.' But he held that English law recognised as legitimate only those children born in wedlock. This, though correct as regards C the children of persons domiciled in England at the time of their birth, is, in my opinion, erroneous as to children born of parents who, at the time of their birth, were domiciled in a country by the law of which the children were legitimate."

JAMES, L.J., says (*ibid.* at pp. 299, 300) the decision in *Boyes v. Bedale* (3)

D "was on the ground that, in an Englishman's will, the child of a nephew must mean children who would be lawful children if they were English children. That seems to me a violent presumption. It was an accident in that case that the testator was an Englishman. But supposing it had been the will of a Frenchman, dying domiciled in England, and made in favour of his French relations and their children, or of his own children, there being children legitimate and legitimated, what would have been said of such a presumption and E such a construction?"

The decision of the Court of Appeal in *Re Goodman's Trusts* (2) overruled SIR GEORGE JESSEL, M.R., and was dissented from by LUSH, L.J.

This conflict of authority leaves me free to decide this case according to my own opinion, which is in favour of the plaintiff's claim. I observe that the testator F describes the objects of his bounty, not merely as the sons of his deceased nephew Thomas Godfrey Andros, but also as his own great-nephews; but that, in my opinion, makes no difference. The law of this country, by the comity of nations, recognises the plaintiff as legitimate; and therefore he is as much the lawful nephew of the testator as he is the lawful son of T. G. Andros. The law, as I G understand it, is that a bequest of personalty in an English will to the children of a foreigner means to his legitimate children, and that, by international law, as recognised in this country, those children are legitimate whose legitimacy is fixed by the law of the father's domicile. Thus, *ante nati*, whose father was domiciled in Guernsey at their birth, and subsequently married the mother, so as to make *ante nati* legitimate by the law of Guernsey, are recognised as legitimate by the law of this country, and can take under such a gift.

H Solicitors: *Burton, Yeates, Hart & Burton.*

[Reported by E. A. SCRATCHLEY, ESQ., Barrister-at-Law.]

GLEADOW *v.* LEETHAM

[CHANCERY DIVISION (Kay, J.), December 11, 1882]

[Reported 22 Ch.D. 269; 52 L.J.Ch. 102; 48 L.T. 264;
31 W.R. 269]*Income Tax—Annuity*—"Clear yearly sum free from all deductions and abatements whatsoever"—*Liability to tax.*

A testator directed his trustees to stand possessed of his residuary personal estate upon trust, by and out of the income thereof, to pay to his wife "the clear yearly sum of £600" for life, if she should remain his widow, but if she should marry again, an annuity of £100 in lieu of the annuity of £600, "the said annuities of £600 and £100, as the case may be, to be paid free from all deductions and abatements whatsoever." By a codicil an annuity of £1,000 was given in lieu of the £600.

Held: the annuity was not given free of income tax.

Notes. Distinguished: *Re Buckle, Williams v. Marson* (1893), 70 L.T. 115. Applied: *Re Crawshay, Crawshay v. Crawshay* (1915), 60 Sol. Jo. 275. Considered: *Re Musgrave, Machell v. Parry* (1916), 115 L.T. 149. Applied: *Re Loveless, Farrer v. Loveless*, [1918-19] All E.R.Rep. 403. Considered: *Re Shrewsbury Estate Acts, Countess of Shrewsbury v. Earl of Shrewsbury*, [1923] All E.R.Rep. 666. Referred to: *Re Parker-Jervis, Salt v. Locker*, [1895-9] All E.R.Rep. 439; *Re Wells, Public Trustee v. Wells*, [1940] 2 All E.R. 68; *Re Skinner, Milbourne v. Skinner*, [1942] 1 All E.R. 32; *Re Hooper, Phillips v. Steel*, [1944] 1 All E.R. 227; *Re Wright, Barclays Bank, Ltd. v. Wright*, [1952] 2 All E.R. 698.

As to income tax on annuities, see 32 HALSBURY'S LAWS (3rd Edn.) 573 et seq.; and for cases see 39 DIGEST 166-168.

Cases referred to:

- (1) *Festing v. Taylor* (1862), 3 B. & S. 235; 1 New Rep. 32; 32 L.J.Q.B. 41; 7 L.T. 429; 27 J.P. 281; 9 Jur.N.S. 44; 11 W.R. 70; 122 E.R. 89, Ex. Ch.; 28 Digest (Repl.) 199, 830.
- (2) *Lord Lovat v. Duchess of Leeds (No. 1)* (1862), 2 Drew. & Sm. 62; 31 L.J.Ch. 503; 6 L.T. 307; 10 W.R. 397; 62 E.R. 545; 28 Digest (Repl.) 198, 829.
- (3) *Re Bannerman's Estate, Bannerman v. Young* (1882), 21 Ch.D. 105; 51 L.J.Ch. 449; 39 Digest 167, 583.
- (4) *Lethbridge v. Thurlow* (1851), 15 Beav. 334; 21 L.J.Ch. 538; 51 E.R. 567; 39 Digest 166, 575.
- (5) *Abadam v. Abadam* (1864), 33 Beav. 475; 33 L.J.Ch. 593; 10 L.T. 53; 10 Jur.N.S. 505; 12 W.R. 615; 55 E.R. 452; 39 Digest 167, 580.
- (6) *Sadler v. Rickards* (1858), 4 K. & J. 302; 31 L.T.O.S. 396; 6 W.R. 532; 70 E.R. 126; 39 Digest 166, 576.
- (7) *Turner v. Mullineux* (1861), 1 John. & H. 334; 70 E.R. 775; 39 Digest 167, 579.
- (8) *Wall v. Wall* (1847), 15 Sim. 513; 16 L.J.Ch. 305; 11 Jur. 403; 60 E.R. 718; 39 Digest 166, 574.

Also referred to in argument:

- Peareth v. Marriott* (1882), 51 L.J.Ch. 449; 46 L.T. 800; 30 W.R. 884; on appeal, 22 Ch.D. 182; 52 L.J.Ch. 221; 48 L.T. 170; 31 W.R. 68, C.A.; 39 Digest 166, 577.
- Floyer v. Banks* (1863), 3 De G.J. & Sm. 306; 3 New Rep. 16; 33 L.J.Ch. 1; 9 L.T. 353; 27 J.P. 743; 9 Jur.N.S. 1255; 12 W.R. 28; 46 E.R. 654, L.C.; 21 Digest (Repl.) 159, 917.

A **Administration Action** in respect of the estate of William Leetham deceased, in which the question arose upon further consideration whether an annuity given by his will to his widow was given free of income tax.

William Leetham, who died on Jan. 14, 1875, by his will, dated Sept. 1, 1864, after appointing executors and trustees, and after giving directions respecting the management and conversion of his estate, declared that his trustees should stand possessed of his residuary personal estate, and of the funds in which the same should be invested, and the income thereof, upon trust, by and out of the said income, to pay to his wife "the clear yearly sum of £600 for life, if she should so long remain his widow, in half-yearly portions, but if she should marry again, then the trustees were to pay her during her life, for her sole and separate use, an annuity of £100 in lieu of the annuity of £600: "the said annuities of £600 and £100, as the case may be, to be paid free from all deductions and abatements whatsoever"; and, subject thereto, he gave and bequeathed his residuary personal estate to the trustees upon certain trusts in favour of his children. By a codicil, dated April 3, 1869, the testator revoked the appointment of one of the executors and trustees appointed by the will, and gave and bequeathed to his wife "an annuity of £1,000 in lieu of the annuity of £600"—given to her by his will. In all other respects he confirmed his will.

This was an action by the sole executor and trustee of the will against the widow (the annuitant named in the will and codicil), and the eldest son of the testator, praying that the trusts of the will might be carried into execution and the real and personal estate of the testator administered by the court. The action now came on upon further consideration, when the question was raised whether the widow was entitled to have the income tax on her annuity of £1,000 paid out of the residuary personal estate of the testator, or ought to pay it herself.

W. W. Karlake, Q.C., and Bramwell Davis for the plaintiff trustee.

Graham Hastings, Q.C., and Curtis Price for the defendant, the widow.

Northmore Lawrence for the defendant, W. Leetham, the eldest son.

W. Pearson, Q.C., and Borthwick for parties in the same interest.

Davenport and Seaton for other parties in the same interest.

KAY, J.—There are two classes of cases in reference to this question. One, where by will a testator gives an annuity, and then directs that it shall be free from all deductions in respect of any taxes, and of this class of cases the principal examples are *Festing v. Taylor* (1), a decision of the Exchequer Chamber; *Lord Lovat v. Duchess of Leeds* (No. 1) (2), and *Re Bannerman's Estate, Bannerman v. Young* (3). In all these cases, the word "deduction" was construed by the "taxes" which was associated with it, and it seems to have been held that the annuity was to be paid free of income tax.

The other class of cases are those in which the words are "to be paid without any deduction," or "free from legacy duty and other deductions," and in those cases the income tax was held to be payable by the annuitants, because income tax, as it seems to have been stated over and over again, is not, properly speaking, a deduction, and there must be something else besides the word "deduction" to make the gift of an annuity free of income tax. It was only where the word "deduction" was coupled with the word "taxes," or there was some other indication that it was meant to include income tax, that it was so construed. Of this second class of cases the principal examples are *Lethbridge v. Thurlow* (4), *Abadam v. Abadam* (5), and *Sadler v. Rickards* (6).

In *Turner v. Mullineux* (7), the gift was in this way; a demise by the testator to trustees upon trust, out of the rents and profits, to pay his widow during widowhood an annuity of £350, "free from income or property tax, or any other deduction," and after a declaration that it was to be in full of all claims for dower, there was a further trust out of the rents and profits "to pay to each of the testator's daughters an annuity of £100 apiece," to be paid "free from all deductions," and after the second marriage of the widow, which had happened,

to pay to one of the daughters "the further annuity of £150 free from deduction." A
It was the last words which had to be construed, and Wood, V.-C., said (1 John. &
H. at p. 835):

"This court always holds that income tax is not a deduction; but here the
testator in the first instance speaks of 'income or property tax and all other
deductions,' which explains that he understood the word 'deduction' as extend- B
ing to income tax. When he afterwards goes on to give other annuities, he
shortens his form of expression to, in the last gift, 'free from deduction.'
The true way of construing the will is, not to interpret the last gift and carry
back that construction of the word 'deduction' to the earlier clauses, but to
read the word throughout in the sense in which it is first used."

In other words, the testator by his will put on the word "deduction" a meaning
which evidently showed that he intended it to include income tax, and accordingly C
it was held that it was included in the subsequent words, "free from all deductions,"
and "free from deductions."

One other case on this point I desire to refer to specially, that of *Sadler v.*
Rickards (6), where the words of gift, which was by will, were upon trust to invest
the proceeds as therein mentioned, and the trustees were, out of the income arising D
from the investments, to pay the annual sum of £500 "free from legacy duty and
other deductions," to the testator's wife during her life, and, subject thereto,
to apply the income for the benefit of his children, and Wood, V.-C., said (4 K. & J.
at p. 804):

"Without going into the question how I should have decided the point in the
absence of those authorities [*Wall v. Wall* (8), and *Lethbridge v. Thurlow* (4)] E
I must hold that this annuity is subject to income tax under the recent Act
[Income Tax Act, 1853] and the tax must be paid out of the annuity itself."

In the present case the words are not quite like those I have read in the two cases
from which I have quoted. The question is, within which of the two classes of cases
the gift in this case comes. It is to be "the clear yearly sum" . . . "free from all
deductions and abatements whatsoever." I may observe that there is no use of F
the word "tax," or anything of the kind. It is contended that this case is dis-
tinguishable from the latter class of cases, for the reason that the annuity was
given by the testator to his wife,—“to pay to his wife the clear yearly sum of.”
If, however, income tax be not a deduction, but a payment which she has to make
herself, not out of the annuity, but because she receives the annuity, I do not
consider that the word "clear" carries the matter any further. If it be not a G
deduction, then the annuity is paid to her clear of any deduction. I do not think
that it is well for judges to make fine distinctions of this kind. It is much better
and more beneficial to the world in general that the broad line of demarcation
should be adhered to and not departed from. It seems to me that this case comes
within the latter of the two classes of cases to which I have referred, it being a
case in which there is no reference to the word "tax," but merely a direction that H
the annuity shall be paid free from all deductions and abatements, and of the clear
yearly sum mentioned.

I confess that, but for the authorities referred to, I should have felt a little more
difficulty than I do, because, the annuity being given by the testator to his wife,
I do not see what deduction was aimed at if not the income tax. The widow
would not have had to pay legacy duty, therefore the testator could not have I
meant that. It is possible to give a meaning to the word "abatements," because,
although not likely in this case, the income might not be enough to pay the annuity,
and in that case the word "abatements" might mean that it should come out of
the capital. But it seems difficult to give a meaning to the word "deductions"
when coupled with "abatements," in the case of an annuity to a wife. I cannot
help thinking that it is possible, if the testator had been asked what he meant,
that he would have said that he intended to refer to income tax, and that it
should be paid out of his estate; but without speculating upon what the testator

A might have meant, I must adhere to the rule of construction laid down in the decisions, and consequently I am not at liberty to treat income tax as being a deduction. I, therefore, hold that the widow must pay the income tax—that the annuity was not given free of it.

Solicitors: *Chester, Urquhart, Mayhew & Holden*, for *Holden, Sons & Hodgson*, Hull; *Rollit & Sons*, for *Rollit & Sons*, Hull; *A. R. Oldham*.

[Reported by J. G. ALEXANDER, ESQ., Barrister-at-Law.]

JENNINGS v. JORDAN AND ANOTHER

D [HOUSE OF LORDS (Lord Selborne, L.C., Lord Blackburn and Lord Watson), June 23, 24, 27, 28, August 3, 1881]

[Reported 6 App. Cas. 698; 51 L.J.Ch. 129; 45 L.T. 593;
30 W.R. 369]

Mortgage—Consolidation—Mortgage of one property not created until after equity of redemption of other property parted with.

The rule that a mortgagee holding mortgages upon two different estates of the same mortgagor may consolidate them, so that one cannot be redeemed without the other, does not apply to a case in which the mortgage of one property was not created till after the equity of redemption of the other property had been parted with. In such a case the purchaser seeking to redeem is not subject to any equity arising from acts done by his vendor subsequently to the sale, and there is, as against him, no equity to consolidate the two mortgages.

Tassell v. Smith (1) (1858), 2 De G. & J. 713, overruled.

Mortgage—Redemption—Action—Parties—Cestuis què trust—Representation by trustees of equity of redemption.

In a redemption suit cestuis que trust are sufficiently represented under R.S.C., 1875, Ord. 16, r. 7 [now R.S.C., 1962, Ord. 15, r. 14] (which provides that trustees may sue and be sued as representing the trust estate without joining the beneficiaries whom they shall be considered as representing), by the trustees of the equity of redemption in the absence of any direction by the court to the contrary.

Notes. Considered: *Harter v. Colman* (1882), 19 Ch.D. 630. Applied: *Doble v. Manley* (1885), 54 L.J.Ch. 636. Considered: *Bird v. Wenn* (1886), 33 Ch.D. 215. Distinguished: *Francis v. Harrison* (1889), 43 Ch.D. 183. Considered: *Griffith v. Pound* (1890), 45 Ch.D. 553; *Wavell v. Mitchell* (1891), 64 L.T. 560. Explained: *Pledge v. White*, [1895–9] All E.R.Rep. 615. Considered: *Riley v. Hall* (1898), 79 L.T. 244; *Hughes v. Britannia Permanent Benefit Building Society*, [1906] 2 Ch. 607. Referred to: *Andrews v. City Permanent Benefit Building Society* (1881), 44 L.T. 641; *Atherley v. Barnett* (1885), 52 L.T. 736; *Mutual Life Assurance Society v. Langley* (1886), 32 Ch.D. 460; *Harris v. Tubb* (1889), 60 L.T. 699; *Minter v. Carr*, [1894] 3 Ch. 498; *Biddulph v. Billiter-street Offences Co.* (1895), 72 L.T. 834; *Young v. Bristol Aeroplane Co.*, [1944] 2 All E.R. 293.

As to the redemption and consolidation of mortgages, see 27 HALSBURY'S LAWS (3rd Edn.) 231–244, 320–326, 397–403, and s. 93 of the Law of Property Act, 1925, 20 HALSBURY'S STATUTES (2nd Edn.) 631; and for cases see 35 DIGEST (Repl.) 394 et seq., 480 et seq., 673 et seq.

Cases referred to :

- (1) *Tassell v. Smith* (1858), 2 De G. & J. 713; 27 L.J.Ch. 694; 32 L.T.O.S. 4; 4 Jur.N.S. 1090; 6 W.R. 803; 44 E.R. 1166, L.J.J.; 35 Digest (Repl.) 485, 1700.
- (2) *Beevor v. Luck*, *Beevor v. Lawson* (1867), L.R. 4 Eq. 537; 36 L.J.Ch. 865; 15 W.R. 1221; 35 Digest (Repl.) 483, 1686.
- (3) *White v. Hillacre* (1839), 3 Y. & C.Ex. 597; 4 Jur. 102; 160 E.R. 839; 35 Digest (Repl.) 481, 1672.
- (4) *Baker v. Gray* (1875), 1 Ch.D. 491; 45 L.J.Ch. 165; 33 L.T. 721; 24 W.R. 171; 35 Digest (Repl.) 488, 1739.
- (5) *Titley v. Davies* (1743), 2 Y. & C.Ch. Cas. 399, n.; 63 E.R. 177; 35 Digest (Repl.) 489, 1757.
- (6) *Palk v. Lord Clinton* (1805), 12 Ves. 48; 33 E.R. 19; 35 Digest (Repl.) 411, 1064.
- (7) *Thorneycroft v. Crockett* (1848), 2 H.L.Cas. 239; 9 E.R. 1082, H.L.; 35 Digest (Repl.) 484, 1689.
- (8) *March v. Lee* (1670), 3 Rep. Ch. 62; 1 Cas. in Ch. 162; 21 E.R. 729; sub nom. *Marsh v. Lee*, 2 Vent. 337; sub nom. *Anon.*, Hard. 173, n.; 35 Digest (Repl.) 491, 1777.
- (9) *Brace v. Duchess of Marlborough* (1728), 2 P.Wms. 491; Mos. 50; 24 E.R. 829; 35 Digest (Repl.) 492, 1783.
- (10) *Wortley v. Birkhead* (1754), 2 Ves. Sen. 571; 3 Atk. 809; 28 E.R. 364; 35 Digest (Repl.) 493, 1794.
- (11) *Pope v. Onslow* (1692), 2 Vern. 286; 23 E.R. 784; 35 Digest (Repl.) 480, 1665.
- (12) *Ex parte King* (1750), 1 Atk. 300.
- (13) *Willie v. Lugg* (1761), 2 Eden, 78; 28 E.R. 825, L.C.; 35 Digest (Repl.) 481, 1671.
- (14) *Jones v. Smith* (1794), 2 Ves. 372; 30 E.R. 679; reversed (1798), 2 Ves. 380n., H.L.; 35 Digest (Repl.) 482, 1676.
- (15) *Cator v. Charlton* (1775), cited in 2 Ves. at p. 377; 30 E.R. 681; 35 Digest (Repl.) 487, 1733.
- (16) *Collet v. Munden* (1786), cited in 2 Ves. at p. 377; 30 E.R. 681; 35 Digest (Repl.) 487, 1734.
- (17) *Ireson v. Denn* (1796), 2 Cox, Eq. Cas. 425; 30 E.R. 197; 35 Digest (Repl.) 487, 1736.

Appeal by the defendant in the action from a decision of the Court of Appeal (JAMES, BAGGALLAY and COTTON, L.J.J.), reversing a decision of BACON, V.-C., G reported sub nom. *Mills v. Jennings*, 13 Ch.D. 639.

The action was brought by Mills (since deceased) and the respondent Jordan, trustees of a settlement made in 1838, against the appellant, to redeem a mortgage and further charge on certain property at Cheltenham, created by one Thomas Tale in 1836. The appellant claimed a right to consolidate with the mortgage of 1836 a mortgage on other property created by Thomas Tale in 1839. The respondent Price was added as a defendant as representing the equity of redemption in all the mortgaged property not included in the settlement of 1838.

Davey, Q.C., Bompas, Q.C., and Townsend for the appellant.

North, Q.C., and Selfe for the respondent Jordan.

Millar, Q.C., and R. Gaskell for the respondent Price.

Their Lordships took time for consideration.

Aug. 3, 1881. The following opinions were read.

LORD SELBORNE, L.C.—The action in this case was to redeem a mortgage of copyhold property at Cheltenham, executed on Oct. 6, 1836, to secure £500 and interest to one John Merrett, to which a further charge of £250 and interest was added in the following year. The equity of redemption, not of the whole, but of some cottages which were part of the mortgaged property, was, on Dec. 3, 1838,

A settled by Thomas Tale, the mortgagor, for valuable consideration on the marriage of his daughter, subject, as between himself and the parties interested under the settlement, to the charge of £250 and interest thereon, and with a covenant by him to keep the settled cottages indemnified from the residue of the mortgage debt of £500 and interest. The plaintiffs, of whom the respondent Jordan is the survivor, were the trustees of that settlement. Another mortgage, upon distinct property, B consisting of freehold land at Cheltenham, had been made, in 1834, by the same mortgagor, Thomas Tale, to one Middleton, upon which there was due at the time of the settlement of the cottages, £500 and interest including a further charge made in 1836. On Dec. 16, 1836, the property so mortgaged to Middleton, and the copyhold property other than the cottages included in Merrett's security, were mortgaged by Thomas Tale to John Tale, to secure £500 and further advances, not exceeding altogether £1,000, with interest thereon. At the date of the settlement, C therefore, Merrett's was the only direct charge upon the cottages; but they were not redeemable separately from the rest of the copyhold property mortgaged first to Merrett, and, secondly, to John Tale; and, as against John Tale, the mortgage of that copyhold property was not redeemable separately from the freehold of which he was second mortgagee, and was then entitled to redeem from Middleton. On D Oct. 30, 1839, after the date of the settlement, Thomas Tale mortgaged certain other copyhold property belonging to him in Union Street, Cheltenham, to the same John Tale, to secure £400 and interest. In 1849 John Tale's and Middleton's mortgages became vested, after certain mesne assignments, in the predecessor in title of the appellant Jennings, and, in September, 1857, Merrett's mortgage was also transferred to him.

E At the hearing before BACON, V.-C., the action was dismissed, not upon the merits, but because the Vice-Chancellor thought that the persons properly entitled to redeem the mortgages vested in the appellant Jennings were not all before the court, leave to amend by adding parties having been previously given. On appeal, the lords justices differed from the Vice-Chancellor, and made a decree for redemption of which the appellant Jennings now complains. I postpone the consideration F of the objections to the suit which were urged at your Lordships' Bar, and, in my opinion, ought not to prevail. For the present, I address myself solely to the question whether, assuming all necessary parties to have been before the court, the decree now under appeal is right, or ought in any respect to be varied.

The appellant claimed by his pleadings a right to consolidate against the plaintiffs all his securities, including the mortgage of the property in Union Street, G Cheltenham, originally made to John Tale on Oct. 30, 1839, after the equity of redemption of the cottages had become absolutely vested in the trustees of the marriage settlement of Dec. 3, 1838. The lords justices held that he was entitled to consolidate all the other mortgages which were prior to that settlement, but that this right did not extend to the Union Street mortgage, and they decreed accordingly. Upon this, which was the principal question in the cause, I agree H with the lords justices. A mortgagee, who holds several distinct mortgages under the same mortgagor, redeemable not by express contract, but only by virtue of the right which, in English jurisprudence, is called "equity of redemption," may, within certain limits, and against certain persons entitled to redeem all or some of them, "consolidate" them—that is, treat them as one, and decline to be redeemed as to any unless he is redeemed as to all. This doctrine of consolidation is well I established, and cannot now be altered except by the legislature, whether it originally rested on a sound equitable foundation or not.

The present question is as to its proper limits. There is no difficulty in its application when all the mortgages, whether originally made to the same mortgagee, or having come into a single hand by subsequent assignments, are redeemable at the same time by the same person. Its extension to a case in which, after that state of things has once existed, the equities of redemption have become separated by the act of the person in whom they had been combined, though it may perhaps be open to objection on some practical grounds, rests upon an intelligible principle.

The purchaser of an equity of redemption must take it as it stood at the time of his purchase, subject to all other equities which then affected it in the hands of his vendor, of which the right of the mortgagee to consolidate his charge on that particular property with other charges held by him on other property at the same time redeemable under the same mortgagor was one. The mortgagee cannot lose that right because the mortgagor thinks fit to separate the equities of redemption. The two mortgages having already become virtually one, the purchaser of part of the equity of redemption is no more entitled to escape from this position than the present plaintiffs would have been to redeem the cottages only without also redeeming the rest of the copyhold property included in Merrett's mortgage. In the present case the rights of redemption, existing at the date of the settlement of 1838 could not, in my opinion, have been properly worked out, unless by some voluntary arrangement between the parties interested, otherwise than by consolidating all the mortgages now vested in the appellant Jennings, which were prior in their creation to Dec. 3, 1838; as they have been in fact consolidated by the decree of the Court of Appeal.

I have much more difficulty in following, or satisfactorily explaining, the principle of some other authorities, such as *Beevor v. Luck* (2), which have held, contrary to the decision of ALDERSON, B., in *White v. Hillacre* (3), that a mortgagee's right to consolidate as against the purchaser of the equity of redemption of property mortgaged to him is capable of being enlarged after the date of that purchase, by a transfer to the mortgagee of other mortgages which were then in other hands, with the equity of redemption of which, if there were no consolidation, the purchaser would have nothing to do. I do not, however, think it necessary or proper now to determine whether this enlargement of the doctrine has been, as some eminent judges have thought, conclusively settled by authority. The explanation of it which has been offered is that at the date of the purchase of the equity of redemption, the doctrine of consolidation was potentially applicable to any two or more mortgages then in existence, and redeemable by the same person, although then in separate hands, if they should afterwards come together.

I cannot say that this commends itself to my mind as reasonable or equitable; but the contention of the appellant in the present case goes much further. He seeks to consolidate with securities, which were in existence on Dec. 3, 1838, a mortgage of later date on property not included in any of those securities. It is against all principle that a vendor should be enabled, after parting with his whole interest in particular property, to impose an additional burden upon it without the purchaser's consent—not by any express contract which might, in some cases, prevail if protected by a legal estate without notice, but indirectly, and without any contract at all. For my own part I cannot conceive anything more inequitable; and there is no authority for it, unless it be *Tassell v. Smith* (1). If that case is distinguishable upon its particular circumstances, it is no authority for that proposition. If not so distinguishable, it is inconsistent with the decision of HALL, V.-C., in *Baker v. Gray* (4), and of the lords justices in the case now before your Lordships. The observations of LORD HARDWICKE in *Titley v. Davies* (5), are, as it seems to me, in accordance with sound principle, and with the decisions of HALL, V.-C., and of the lords justices in the present case. I cannot, therefore, regard *Tassell v. Smith* (1) as an authority which ought to be followed on this occasion, great as was the eminence of the judges who decided it.

The decree, therefore, of the Court of Appeal was, in my opinion, right in refusing the consolidation claimed by the appellant, so far as relates to the Union Street mortgage. In consolidating the other mortgages held by the appellant it gave effect to a claim which he had made by his pleadings which was never disputed by the plaintiffs. The appellant's counsel did not retract that claim either before or after the judgment of the Court of Appeal; but when the decree had been drawn up, passed, and entered, it seems for the first time to have occurred to him that unless he could consolidate all, it was not for his interest to consolidate, as against the plaintiffs, any of his securities, the Union Street mortgage being, as he now

A suggests (though it does not appear by any evidence in the cause), the only one of his securities which is deficient, and the account being directed against him as mortgagee in possession, which he and his predecessors in title have for many years been.

Something was said at the Bar about the possibility of his being able to set up the Statute of Limitations against the respondent Price, who represents the equity of redemption in all the mortgaged property, except the cottages of which the respondent Jordan is trustee; and it was insisted that the effect of the decree is to deprive him of the right, which he would have had otherwise, to consolidate the Union Street mortgage, if still redeemable by Price, with the other securities as against Price, though he could not do so as against Jordan. To avoid these apprehended results of the decision against him, the appellant, on May 29, 1880, after C of the decree had been formally completed, gave notice of a motion before the Court of Appeal to "correct" that decree by omitting the declaration contained in it that he was entitled to consolidate his other securities, prior to the settlement of Dec. 3, 1838, with the mortgage and further charge originally made to Merrett, and by limiting the consequential directions to an account, first of what was due to him for principal and interest, not generally on Merrett's securities, but only in D respect of the £250 and interest, which was to be borne, under the terms of the settlement of Dec. 3, 1838, by the settled cottages, as between the settlement and Thomas Tale; and, secondly, of the rents and profits of the settled cottages only, which the appellant or his predecessors in title, had, or might have, without his or their wilful default, received. This motion was properly refused by the lords justices on the ground that what was sought was not a correction or alteration of any E slip in the decree, but a substantial change in it not asked for at the hearing, and contrary to what was then intended and understood by the court and all the parties.

The present appeal is not only against the decree made on Feb. 14, 1880, but is also against the order refusing that motion made on June 5, 1880; and it has been contended at your Lordships' Bar that the decree ought to have left it open to the appellant to make an election whether he would consolidate or not. Your F Lordships did not think it necessary to hear the respondent's counsel on that point, being of opinion that if the appellant had ever possessed the right of election which the agreement assumed, he had made his election, and it was too late to retract it after judgment and decree; that the decree was, in this respect, right at the time when it was made, and could not become erroneous by reason of any subsequent change in the appellant's view of his own interest; and that when such a G decree for consolidation had once been properly made, the parties entitled to redeem, as well as the encumbrancers, had acquired a right of which they ought not to be deprived without their own consent, to any benefit which might result to them from it.

It is not necessary to determine whether under the circumstances of this case the appellant had a right, at or before the hearing, to take at his election such a H decree as was asked for by his notice of motion of May 29, 1880. As at present advised I do not think that he had that right. A suit for redemption must be so constituted in respect of parties and otherwise, and the decree made in it, unless varied by consent of all parties interested, must be such as to enable the court to do complete justice, not only to the plaintiffs and to the encumbrancers whom they seek to redeem, but to all other parties before or behind them whose redemption or foreclosure may be necessary to work out the equities of the case. To split I Merrett's encumbrance as to the £500 and the £250 thereby severed, and to limit the accounts to that part only of the property included therein, of which the plaintiffs were trustees under the settlement of Dec. 3, 1838, as was asked by the notice of May 29, 1880, would seem to be inconsistent with the principles laid down and acted upon in *Palk v. Lord Clinton* (6) and *Thornycroft v. Crockett* (7). If the plaintiffs redeemed Merrett's securities, they were entitled also to clear that part of the property included in them which was not included in the settlement from John Tale's second mortgage of Dec. 16, 1836, and if they did this it would

seem to follow that they were at the same time entitled to redeem all the property A included in that mortgage to John Tale, among which was the freehold land previously mortgaged to Middleton.

It appears to have been the intention of the lords justices that a decree should be drawn up, according to the ordinary course of the court, for the dismissal of the action if the respondent Jordan should not redeem the appellant's mortgages other than that on the Union Street property, and if he should redeem those B mortgages for subsequent redemption or foreclosure as to the property other than the settled cottages, between Jordan and the respondent Price. With such subsequent redemption or foreclosure JAMES, L.J., said that the appellant would have nothing to do. The decree as actually drawn up provides only for redemption or C dismissal as between Jordan and the appellant. It could not have been drawn up in that form without consent before the registrar by all parties whom he considered interested, to the waiver and omission of all accounts and directions for fore- D closure or redemption as between Jordan and Price. I think your Lordships must assume that those accounts and directions were in fact waived by such mutual consent between Jordan and Price, though it does not so appear on the face of the decree. Whether the appellant consented to or acquiesced in such waiver may be doubtful. In his notice of motion to alter the decree he did not object to it E on this ground, though, if he had a right to do so, the omission of such accounts and consequential directions, necessary according to the ordinary course of the court, would have been an error, not of the court but of the registrar, and might properly have been set right upon a motion of that kind. As, however, JAMES, L.J., considered this to be a matter with which the appellant had nothing to do, I think it was open to him upon the present appeal to object to the decree on that F ground if he could show that he had in fact such an interest as entitled him to make the objection. If he has no such interest, it would not be according to the usual course of your Lordships' House to determine at his instance any question concerning the respondents only, neither of whom has appealed. But I think it right to say that, having regard to the position and character of both the respondents, who represent here absent parties for whom they are respectively trustees, I doubt whether this is a case in which the decree ought to have been drawn up G in the form in which it stands, even by consent, and I shall propose to your Lordships that certain words should be added to it which may prevent it from becoming the occasion of future questions, and possibly of new litigation between these trustees and parties now absent from the record.

The conclusion to which I have come, after consideration, is that the decree as H between the appellant and the respondents is right in form as well as in substance, and that the appellant had no interest in any further accounts or directions which might properly have been added to that decree, and consequently that he has no title or interest now to complain of their omission. The effect of consolidation is to make the consolidated mortgages practically one; and the right of the respondent Jordan, if he pays what is due to the appellant upon the account directed by I the decree, to have a conveyance from the appellant of the whole mortgaged property, is clear. Any question as to the application, as between the different estates included in the consolidated mortgages, of the rents and profits which may be charged against the appellant in taking the account is *res inter alios*, with which the encumbrancer, after he has been paid off, will have nothing to do. The case is really the same even if it should appear upon the result of the account that nothing at all is due to him. Jordan is still entitled to the benefit of his right of redemption, and, therefore, to a conveyance of the whole property included in the consolidated securities.

As against those who stand behind him and are entitled to redeem from him part of that property he will have a right to charge upon everything which is so redeemable his costs of suit, which may be considerable. Equities of some complexity may arise in such a state of things; but they are equities to which the first encumbrancer, who will have been wholly paid off, must be a stranger. It is a

- A fallacy to suppose that under such circumstances he can in any possible event retain a right to consolidate the Union Street mortgage with the securities which will have been redeemed, against the persons entitled to ulterior equities of redemption. Consolidation can only take place when there are two or more encumbrances at the same time subsisting united in the hands of the same encumbrancer. *Baker v. Gray* (4), before HALL, V.-C., in which the decree provided for consolidation against one of the defendants, and refused it as against others, was different from the present case.
- B There the right to consolidate was claimed by the mortgagee, who was plaintiff in the suit, against all the defendants. It is clear that in such a case the decree might be, and ought to be, so made as to give the plaintiff what he was entitled to against each defendant. If he should be redeemed by a person against whom he had no right to consolidate, he must, of course, be redeemed without consolidation.
- C But if the person to whom the right of redemption either belonged in the first place, or might afterwards come in default of redemption by those standing before him, was one against whom he had a right to consolidate, then the decree ought to be made accordingly. In the present case the plaintiffs were persons against whom the appellant had no right to consolidate the Union Street mortgage; and if they did not redeem the other property their action would be simply dismissed, and no question as to any posterior right of redemption would arise. If they did redeem, the securities which they redeemed would necessarily, and for ever, pass out of the appellant's hands, and none of them could afterwards be consolidated with the other mortgage which he retained.

- I have now to state my reasons for thinking that the objections to the constitution of the suit which were urged at your Lordships' Bar ought not to prevail. They were four in number. The first and second were in effect that the ultimate equity of redemption of the mortgaged premises was not properly represented upon the record by the respondent Price, who claims it as the trustee of a settlement made by Thomas Tale on May 6, 1868, on the ground that Thomas Tale on Oct. 6, 1845, presented a petition to the Bristol Court of Bankruptcy, under the then Insolvent Debtors Act, and that all his interest in the mortgaged premises thereupon became
- F vested in the official assignee of that court; and that he also executed, on Oct. 9, 1845, an indenture by which, if he had then any equity of redemption in the premises, he conveyed it to John Brend Winterbotham in trust for George Tale, who had previously acquired the title of the mortgagees. The petition presented by Thomas Tale to the Bristol Court of Bankruptcy was produced from the proper custody.
- G On the back of it the word "dismissed" is written in the handwriting of one Turner, who was then an officer of the court. Nothing was ever done upon that petition beyond the initial steps necessarily and always taken in such cases; it plainly died a natural death thirty-three years before the commencement of the present action. Under these circumstances the presumption of fact is in accordance with the endorsement. The equity of redemption in the mortgaged premises, if it had for a time become vested in the official assignee, ceased to be so on the dismissal of that petition. This objection to the title of the respondent Price, therefore, fails.
- H As to the deed alleged to have been executed by Thomas Tale on Oct. 9, 1845, it has not been produced, nor has its absence, if it was ever executed, been properly accounted for. The only evidence of its execution consists in certain entries in the books of Messrs. Winterbotham, Bell & Co., solicitors, of Cheltenham, who

- I prepared a draft for that purpose, and had it engrossed. Mr. John Brend Winterbotham, the intended trustee, who was a member of that firm, has made an affidavit in which he states his belief that the intended deed was never executed, nor in any way acted upon. The entries in these books would not be evidence at all apart from the evidence of Mr. Winterbotham, and, if taken in connection with what he says, they certainly do not establish the execution of the deed, the burden of proving which rested upon the appellant. The title, therefore, of the respondent Price is not displaced, either by the petition in insolvency, or by the supposed deed of Oct. 9, 1845.

The next objection was that the cestuis que trust of Price under the settlement of May 6, 1868, ought to have been brought before the court. Having regard, however, to R.S.C., 1875, Ord. 16, r. 7, I think that Price sufficiently represented his cestuis que trust for the purposes of this suit, no direction having been given by the court to the contrary. A

The last objection related to the absence from this record of the assignee in bankruptcy of George Tale, from whom the title of the Gloucestershire Banking Co. was originally derived, who afterwards became bankrupt in February, 1849, before the sale and transfer by the Gloucestershire Banking Co. to William Jennings, the appellant's predecessor in title. The action was commenced more than twenty-seven years after the date of that transfer, and neither in his pleadings, nor before either of the courts below, was any objection made by the appellant to the constitution of the suit on the ground that the assignee in bankruptcy of George Tale had, as between himself and the appellant, a subsisting equity of redemption in respect of which he ought to have been made a defendant. There is no trace of any such point having been argued before the Court of Appeal. The appellant may well be conceived to have had reasons for not taking any such objection. If it had been taken in due time, the plaintiffs might have been able to meet it without difficulty. Whatever might have been its weight if sooner taken, I think it would be against sound principle, and contrary to the practice of your Lordships' House, now to give effect to it. B C D

It only remains for me to add that I would propose to your Lordships that the decree appealed from should be varied by reserving liberty to the respondents, or either of them, or to any of the cestuis que trust, under the deeds of Dec. 3, 1838, and May 6, 1868, respectively, in case of redemption of the mortgaged premises included in the decree by the respondent Jordan, to apply to the Chancery Division of the High Court of Justice for the addition to the decree of any further accounts and directions consequential thereon which by reason of such redemption the court may think just. I do not consider that this variation in the form of the decree, in which the appellant has no interest, ought to affect the costs of the appeal. I, therefore, move your Lordships that, subject only to that variation, the decree be affirmed; and that the appellant pay the costs of the appeal. E F

LORD BLACKBURN stated the facts, and continued: The Court of Appeal had to determine the question whether the position contended for by the plaintiff in his amended statement of claim, or that contended for by the defendant, truly represents the law of England as administered in the courts of equity. *Tassell v. Smith* (1)—a decision by two equity lawyers of great experience, KNIGHT BRUCE and TURNER, L.JJ., in 1858—was relied upon, and the question for the Court of Appeal was whether this decision was right, or at least was binding upon them. They decided the question in favour of the plaintiff, and the first and most important question brought before the House is whether they were right in that decision. The Court of Appeal had not to inquire whether the defendant had or had not a right to consolidate the earlier mortgages, nor, as I apprehend, is any question on that now before this House. Should it be contended hereafter that the plaintiff's counsel conceded more than he was bound to do, the decision of the Court of Appeal will not stand in his way, though other decisions may. G H

I take it that the only question before this House is whether, where the mortgage on one property is not created till after the equity of redemption in the other property has been parted with, there is, as against the purchaser, an equity to consolidate the two. I do not think it conclusive that the alleged equity was one which, if the matter were *res integra*, could not be maintained, nor even that it was such as in the name of equity would work injustice. Some of the rules acted on in courts of equity in the kindred subject of tacking securities on the same property are founded upon this, that a mortgage, after the time specified for redemption had expired, was an absolute estate, which no doubt it was at law, and that the equity of redemption was only a personal equity to take away the I

A legal estate from him in whom it was vested, which, perhaps, it originally was. It would seem that now after equitable estates have been treated and dealt with for a very long time as to all other intents estates, any rules founded on the antiquated law ought to be no longer applicable, and that cessante ratione, cessare debet et lex; but some rules apparently founded on this antiquated law have been so uniformly and long acted upon that they must be treated as still binding.

B The rule was first laid down in *Marsh v. Lee* (8) that if there was a subsequent mortgagee, who, as the legal estate was in another, could only be a mortgagee of the equity of redemption, whose claim being prior in time to that of a third mortgagee would be satisfied before it, yet if the third mortgagee acquired the legal estate, even with full knowledge of the existence of the second mortgage, he should be entitled to squeeze out the second mortgage. In *Brace v. Duchess of Marlborough* (9) (2 P.Wms. at p. 492) in 1728, SIR JOSEPH JERKILL, M.R., thought that the rule of equity was so settled,

“not, however, without great appearance of hardship; for still it seems reasonable that each mortgagee should be paid according to his priority, and hard to leave a second mortgagee without remedy, who might know when he lent his money that the land was of sufficient value to pay the first mortgage and his own also; to be defeated of a just debt by a matter inter alios acta, a contrivance between the first mortgagee and the third, is great severity.”

Yet notwithstanding these, as it seems to me, unanswerable objections to the rule, he considered it established. In *Wortley v. Birkhead* (10) LORD HARDWICKE intimates, I think pretty plainly, that, if it were then to be settled for the first time, he would have decided the other way, but that it was settled; and in *Titley v. Davies* (5), in 1743, he acted upon it. Now, after the lapse of nearly a century and a half more, I think only the legislature can do away with this rule, which however does not apply to this case, which is not the case of tacking or gaining priority for a puisne incumbrance on the same property, but a case of consolidating encumbrances on two different properties.

F But though a rule, even if it works what is not justice, may be established by a long series of decisions to be the rule of equity, yet, when it is alleged that a rule producing such a lamentable result exists in a particular case, the burden of proof lies strongly on those who assert it to show that it is established either by decided cases or by evidence of such a long-continued practice as shows that there are not cases only because the rule has never been disputed. Although I cannot doubt

G that the lords justices thought that the rule on which they acted in *Tassell v. Smith* (1) was already established; and though it is reasonable to suppose that two judges who had such long and great experience in courts of equity had grounds for so thinking, yet the discussion at your Lordships' Bar convinced me that they made a mistake. The earliest case cited is *Pope v. Onslow* (11). In *Ex parte King* (12), before LORD HARDWICKE in 1750, that case was cited as establishing

H that where A. had two mortgages upon different independent estates of the mortgagor, one a deficient security and the other more than sufficient, the mortgagor should not redeem the last without making good the deficiency of the other security; but the Lord Chancellor said that he was not satisfied that this was the established rule of the court. Both HALL, V.-C., in *Baker v. Gray* (4) and COTTON, L.J., in the present case, say that LORD HARDWICKE afterwards changed his opinion. I

I suppose they are right, though I have not been able to discover the case in which he said so. I have read *Titley v. Davies* (5) with attention, and it appears to me that LORD HARDWICKE there thought that Titley, having an equitable mortgage on one portion of property mortgaged to Shephard, had a right, as against Shephard and all who claimed under him, to redeem the whole property; and that then, having done so, Titley, who had the legal estate in the whole, had got a right, as against both Shephard and those who claimed under him, to retain the whole till his equitable mortgage, though only on a part, was paid off. This, like *Brace v. Duchess of Marlborough* (9), may be unquestionable equity, though, to say the

least, questionable justice; but, as it seems to me, it has nothing to do with consolidation, and indeed *Ex parte King* (12) was subsequent in date to *Titley v. Davies* (5). A

It is not, however, I think, important whether LORD HARDWICKE changed his opinion or not, if, as I think is the case, the rule as far as laid down in *Pope v. Onslow* (11) has since that time been recognised as the settled rule in equity. In *Willie v. Lugg* (13) in 1761, LORD NORTHINGTON, L.C., said that the principle upon which the court proceeds continued as long as the equity of redemption remains united, but, he said (2 Eden, at p. 80), B

"There seems to be also a manifest distinction between this case and the case of a purchase subject to a mortgage, for there the purchaser acquires a right to redeem that particular mortgage, and when he comes to redeem he offers to equity pay off all that his estate is a debtor for." C

Certainly he was not of opinion that the equity subsequently laid down in *Tassell v. Smith* (1) then existed. In *Jones v. Smith* (14), in 1794, SIR PEPPER ARDEN, M.R. (later LORD ALVANLEY) says (2 Ves. at pp. 376, 377):

"*Pope v. Onslow* (11) followed by two modern cases, has settled the point that as against the mortgagor or his assignee, and, therefore, I must suppose against all the creditors, if there are two legal mortgages which at law are become absolute, for that must be the principle, the mortgagee shall insist on being redeemed as to both or neither." D

The "two modern cases," which he cites from the registrar's book are *Cator v. Charlton* (15), June 21, 1775, decided, I suppose, by LORD BATHURST, and *Collet v. Munden* (16), in 1786, decided by LORD KENYON on the authority of the first. In *Cator v. Charlton* (15) the different mortgages were all made while the mortgagor was owner of the equity of redemption of the whole; and it was insisted that the plaintiff, who afterwards purchased the equity of redemption, had at the time of his purchase notice of the other mortgages. E

In *Ireson v. Denn* (17), in 1796, LORD ALVANLEY is reported to have said (2 Cox, Eq. Cas. at pp. 425, 426): F

"He did not know why such a rule was ever laid down, but it had been decided by many cases that a mortgagee of two distinct estates upon distinct transactions from the same mortgagor was entitled to hold both, even as against the purchaser of the equity of redemption of one of the mortgaged estates without notice of the other mortgage until the payment of the whole money due on both mortgages." G

But the case before him, like the cases which he mentions in *Jones v. Smith* (14), was a case of two mortgages made to the same person while the equity of redemption belonged to the same person, who afterwards assigned the equity of redemption in one of the estates. Even if it was established that in such a case the right to consolidate would be good against the assignee, it does not seem to me to follow that it would be good against an assignee of the equity of redemption in one of the estates made while the two mortgages were not yet vested in the same person, still less as against one made before the mortgage of the other estate existed. H

The next reported decision is that of *White v. Hillacre* (3), before ALDERSON, B., sitting in equity. The facts, as stated in the judgment, were that James Hillacre mortgaged M., and died leaving the equity of redemption to Thomas Hillacre in fee; at that time the mortgage was vested in Clark, and so continued till after Thomas Hillacre's death. Thomas, who was owner in fee of W., mortgaged it to Clitsome in 1812, and at his death in 1815 devised M. to one set of devisees and W. to another. ALDERSON, B., said (3 Y. & C.Ex. at p. 608): I

"This being the state of facts, Clark in 1816 assigns to Clitsome the mortgage on M., and then for the first time the mortgages are united in one person. I am of opinion that the plaintiff has no right to tack under these circumstances.

- A The right seems to have been established upon this principle, that where a mortgagee is in possession of the legal estate in two properties as a security for money lent on them, a court of equity will not allow the person entitled to the equity of redemption to redeem either unless he redeem both, and allows the mortgagee a lien on the whole for his whole debt. But this principle manifestly cannot apply to a case where the equity of redemption belongs to different persons. Here that is so; and these persons, though volunteers, as it is said, became entitled under Thomas Hillacre's will before the assignment of the mortgage on M. was made to Clitsome."
- B

Notwithstanding the observations of WOOD, V.-C., in *Beevor v. Luck* (2), I must own that the judgment of ALDERSON, B., has at least an appearance of good sense, and of furthering justice or perhaps I should say of refusing to further injustice, that, to my mind, is very persuasive. It is not, however, necessary in the present case to form any opinion on this point.

- C *White v. Hillacre* (3) was not cited in *Tassell v. Smith* (1), which is to be lamented, for if it had been the lords justices would have, no doubt, explained why and how it was just that the purchaser of the equity of redemption of Blackacre should be under any obligation to fulfil the equities which his vendor had, after the sale, become liable to fulfil in respect of Whiteacre, with which the purchaser of the equity of redemption of Blackacre never had anything to do, for this does not, I think, evidently follow, even if it was settled that, if the two mortgages had been united before the sale of the equity of redemption so that the vendor was then liable to fulfil them, that equity should prevail; and if, as is very likely, they had said that the objections to them were not stronger than those against tacking stated in *Brace v. Duchess of Marlborough* (9), but that long-settled rules ought not to be departed from, they would have had to consider whether there was any settled rule, or indeed any decision at all that the purchaser of Blackacre was under any obligation to fulfil an equity of his vendor in respect of a debt first incurred after the sale of Blackacre and secured on Whiteacre, which might not even have been the property of the vendor at the time of the sale of the equity of redemption. All that appears by the report to have been said by TURNER, L.J., is, that
- D
- E
- F

"one who comes to redeem a security cannot do so without redeeming any other security which the defendant holds upon property of his."

- He does not notice that the estate which the vendor pledged after he had sold the equity of redemption could in no natural sense of the words be called the property of the purchaser, and he cites no authority to show that an artificial rule was established by which it was to be treated as his.
- G

- HALL, V.-C., in *Baker v. Gray* (4) searched for such an authority and found none. The lords justices in the present case could find none. The experienced counsel who argued for the appellant at your Lordships' Bar could find none but those on which I have already commented; and of those it seems to me that what is said by LORD ALVANLEY in *Ireson v. Denn* (17) is the only authority prior to *Tassell v. Smith* (1) that has any bearing on the case, and that, I think, does not go so far as is required. I think that the doctrine of consolidation of mortgages ought not to be carried farther than it has been, and that *Tassell v. Smith* (1) did, at least as far as regards a mortgage made on another property after the equity of redemption in the first mortgage had been parted with, carry it further than ever had been done before, and should not be followed. The decree was made as it was asked for by the defendant, and not objected to by the plaintiff, consolidating the mortgages prior to the settlement of 1888. After it had been drawn up as the parties asked, and as the court meant it to be, the defendant found reason to fear that he had, under the belief that it was for his benefit, asked for a consolidation which it would have been more prudent for him not to ask for, and he sought to set aside the whole proceedings, and make the plaintiff redeem only Merrett's mortgage, as the plaintiff originally asked, not on the ground that there had been any mistake on the part of either himself or the court, but because he feared he had been
- I

injudicious. I think he should have thought of all this before, and that the Court of Appeal properly rejected his application. A

There remains only the question whether the order to carry out the decree of the Court of Appeal requires amendment. The appellant has not, I think, anything of which to complain. The order as it stands does not subject him to anything to which he ought not to be liable, or deprive him of anything to which he is entitled. But as it is possible, though I think not probable, that the state of the accounts may turn out to be such that those who are beneficially interested in the equities of redemption of the different properties may require some further protection, I agree that the order should be varied as proposed. I entirely agree that this variation should make no difference in the costs. B

LORD WATSON concurred.

Appeal dismissed. C

Solicitors: *Bompas, Bischoff & Dodgson*, for *E. & E. Waugh*, Cockermouth; *Waterhouse & Winterbotham*, for *Winterbotham, Bell & Co.*, Cheltenham.

[Reported by C. E. MALDEN, Esq., Barrister-at-Law.] D

LONDON AND COUNTY BANKING CO. v. RATCLIFFE E

[HOUSE OF LORDS (Lord Selborne, L.C., Lord Blackburn and Lord Watson), May 19, 20, 23, June 14, 1881]

[Reported 6 App. Cas. 722; 51 L.J.Ch. 28; 45 L.T. 322;
30 W.R. 109] F

Money—Payment on account—Appropriation—Payments into banking account—Banker's lien extending over whole account.

Mortgage—Bank overdraft—Security—Deposit of deeds—Sale of property by mortgagor—Account overdrawn at time of contract—Before conclusion of sale payments in greater than amount of overdraft—Further advances continuing overdraft—Right of banker to charge on estate as against purchaser. G

The rule in *Clayton's Case* (1) (1816), 1 Mer. 572, applies to payments into a banking account, notwithstanding that the banker's lien extends over the whole account.

B. deposited the title deeds of real estate in the hands of the appellants, with a written memorandum, to secure the then present and future general balance of his account with them. He afterwards sold a part of the real estate to the respondent. At the time of the contract of sale his account with the appellants was overdrawn. The appellants had notice of the sale to the respondent, and the respondent had constructive notice of the appellants' charge. Before the payment of the final instalment of the purchase money B. paid to the appellants sums amounting in the aggregate to more than the amount of his debt to them at the date of the sale, but they had made further advances to him after that date, and the whole balance of the account was never turned in his favour. H

Held: the respondent was not liable for such further advances as a charge on the estate. I

Notes. Considered: *Glyn, Mills, Currie & Co. v. East India Dock Co.* (1882), post p. 674; *Deeley v. Lloyds Bank*, [1910] 1 Ch. 648. Referred to: *Parkinson v. Wakefield* (1889), 5 T.L.R. 562; *Deeley v. Lloyds Bank*, [1912] A.C. 756.

A As to appropriation of payments, see 8 HALSBURY'S LAWS (3rd Edn.) 214-216; and for cases see 12 DIGEST (Repl.) 536 et seq. As to appropriation in case of mortgage to secure current account, see 27 HALSBURY'S LAWS, 436, and cases there cited.

Cases referred to :

- B** (1) *Devaynes v. Noble, Clayton's Case* (1816), 1 Mer. 529, 572; 35 E.R. 767, 781; 12 Digest (Repl.) 547, 4156.
 (2) *Hopkinson v. Rolt* (1861), 9 H.L.Cas. 514; 34 L.J.Ch. 468; 5 L.T. 90; 7 Jur.N.S. 1209; 9 W.R. 900; 11 E.R. 829, H.L.; 35 Digest (Repl.) 498, 1858.
 (3) *Shaw v. Foster* (1872), L.R. 5 H.L. 321; 42 L.J.Ch. 49; 27 L.T. 281; 20 W.R. 907, H.L.; 35 Digest (Repl.) 295, 152.
C (4) *Gordon v. Graham* (1716), 2 Eq. Cas. Abr. 598; 7 Vin. Abr. 52, pl. 3; cited in 9 H.L.Cas. at p. 524; 22 E.R. 502, L.C.; 35 Digest (Repl.) 498, 1857.

Also referred to in argument :

- Chapman v. Chapman* (1851), 13 Beav. 308; 20 L.J.Ch. 465; 17 L.T.O.S. 70; 15 Jur. 265; 51 E.R. 119; 35 Digest (Repl.) 297, 170.
D *Eyre v. Burmester* (1862), 10 H.L.Cas. 90; 6 L.T. 838, H.L.
Hiern v. Mill (1806), 13 Ves. 114; 33 E.R. 237; 35 Digest (Repl.) 512, 2000.
Pickard v. Sears (1837), 6 Ad. & El. 469; 2 Nev. & P.K.B. 488; Will. Woll. & Dav. 678; 112 E.R. 179; 35 Digest (Repl.) 537, 2169.
Lucas v. Dorrien (1817), 1 Moore, C.P. 29; 7 Taunt. 278; 129 E.R. 112; 3 Digest (Repl.) 322, 996.

E **Appeal** from a decision of the Court of Appeal (JAMES, BRETT and COTTON, L.JJ.), reversing a decision of BACON, V.-C., reported 51 L.J.Ch. 29, 33.

Benjamin, Q.C., Davey, Q.C., and Russell Roberts for the appellants.

J. Pearson, Q.C., Horton Smith, Q.C., and Ingle Joyce for the respondent.

Their Lordships took time for consideration.

F June 14, 1881. The following opinions were read.

LORD SELBORNE, L.C.—The appellants in this case claim under an equitable mortgage of certain real estate at Earley, near Reading, given to them by one of their customers, named Batten, to secure the then present and future general balance of his banking account with them. The conveyance of that estate to him from a vendor named Spokes was deposited by Batten with the bank, the purpose
G of the deposit being declared by a memorandum in writing, dated Jan. 17, 1873, by which Batten engaged to give the bank, whenever required, legal mortgages of this property, and, as I collect, of other properties, the deeds or documents relating to which were also at the same time deposited, and declared that the security should not be considered satisfied by the payment or liquidation of any sums to be thereafter from time to time due on the balance of the account, but should
H extend to cover all future sums which should at any time be or become due. This memorandum was afterwards cancelled, and another security in the same terms, except the date and an unimportant variance in the description of part of the property, was signed in lieu of it, and was given by Batten to the bank on June 19, 1874. One of the questions in the case might be whether this cancellation and substitution of 1874 did not put an end to the security of 1873, under
I which alone the appellants would be entitled to make any claim against the respondent. But I prefer to consider the case upon its merits, as if no such cancellation or substitution had taken place.

On April 28, 1873, an agreement in writing was signed by Batten and the respondent, his brother-in-law, for the sale by Batten to the respondent of part of the real estate at Earley comprised in the conveyance deposited with the bank. The purchase money, £3,200, was treated as divisible into three sums—£1,500 for one part called "Canterbury Villas," £900 for another part called "Woodbine Villas," and £800 for the remaining part called "Twyford Villas." A deposit of

£25 was paid, and May 24, 1873, was fixed for payment of the rest of the purchase money, and for conveyance and completion of the purchase, possession to be given to the purchaser as from that date. Batten agreed in the ordinary way to make a good title, which would, of course, be a title free from incumbrances, and he was to retain all deeds and documents in his possession relating to any property other than that sold to the respondent, covenanting in the usual way for their production. The effect of this last stipulation was that the respondent, as purchaser, could not claim possession of the deed of conveyance from Spokes, which had been deposited with the bank, and related to other property as well as to that sold to him. In addition to the terms embodied in this agreement of April 28, 1873, it was stipulated between Batten and the respondent, by letters, that two debts then due from Batten to the respondent and his wife for sums exceeding together £800 should be set off against the purchase money of £3,200. A B C

The appellants and the respondent had respectively notice, the former of the contract of sale from Batten to the respondent; the latter of the appellants' security of Jan. 17, 1873. The contract and the notice of it to the appellants were, or may for the present purpose be treated as having been, contemporaneous. The amount then due to the appellants on the balance of their banking account with Batten was £1,779 6s. 7d., and of this the respondent must be deemed to have had notice. The contract, so far as relates to Canterbury Villas, was completed by conveyance, and payment of the £1,500 apportioned to that part of the property on May 28, 1873, with the knowledge of the appellants, who received £1,100, part of this £1,500, on June 6 from Batten's solicitor, the remaining £400 being received, without objection from the appellants, by Batten himself. Another conveyance in fee simple of all the rest of the property agreed to be sold was at the same time executed, and was left with Batten's solicitor until the rest of the purchase money should have been paid, as it eventually was in several instalments by the respondent to Batten. The latest of these payments was made on Mar. 25, 1876, after which the conveyance from Batten was delivered up to the respondent. The appellants had no notice of the execution of this conveyance, or of any of the payments made by the respondent to Batten in respect of the property comprised in it, until some time after the last payment. D E F

Under these circumstances it results from the decision of your Lordships' house in *Hopkinson v. Rolt* (2) that, as against the title of the respondent, the purchaser under the contract of April 28, 1873, no further charge on the real estate comprised in that contract could be created in addition to the balance of £1,779 6s. 7d. at that time due, by any subsequent advances which the bank might make to Batten. Nor can I discover anything in the nature or terms of the appellants' security of Jan. 17, 1873, to prevent the extinction of that debt due on April 28, 1873, by means of payments afterwards made by Batten to the general credit of his banking account upon the principle of *Clayton's Case* (1) (1 Mer. at p. 585). In point of fact those payments were, before the end of the same year 1873, more than sufficient to extinguish the whole of that debt; and although in the continuation of the account there was always a considerable balance due to the bank, the whole debt subsequent to 1873 was for advances later than April 28, 1873. The continued possession by the appellants of the deed of conveyance from Spokes to Batten, relating as it did to other property besides that sold to the respondent, makes, in my opinion, no difference in the case. G H

Upon the statement of claim in the action the appellants' case appears to me to be rested on grounds inconsistent with the decision in *Hopkinson v. Rolt* (2). But a different view was presented in the argument at your Lordships' Bar, which it is now necessary to consider, assuming it to be open to the appellants notwithstanding the form of their pleading. It was contended that the security of Jan. 17, 1873, extended to every interest which Batten, the mortgagor, had, or at any time during its continuance might have, in any part of the land to which the deposited deed of conveyance related; that, although by the contract of sale it necessarily became limited as to the land itself to the debt of £1,779 6s. 7d. I

A then due, which was afterwards paid off, it continued operative against the purchase money payable under that contract to Batten so as to bind that purchase money, except the £400 paid with the appellants' knowledge, by all the subsequent advances from time to time made; that the respondent was bound to inquire whether there were or were not any such subsequent advances before he could be discharged from any part of the purchase money by any payment to Batten; and that, having failed to make such inquiry, he is now liable to pay the money over again to the appellants to the full extent to which advances were actually made. The result of the appellants' contention is to ascribe to the contract for sale of April 28, 1873, with the notice which they had of it, the effect of dividing what was before a single mortgage security operating upon one subject and for one debt, into two distinct securities operating upon different subjects, upon one for a present debt, and upon the other for a merely possible future liability. The original security was the land, the debt secured was such balance as might happen to be due whenever the security should be put in force. But after April 28, 1873, the real estate, according to this argument, continued to be a security only for the amount then due, and at the same time the personal debt from the respondent to the mortgagor, which had then for the first time come into existence, and the vendor's lien for that debt, became a security for all those future advances by which the real estate could be no longer bound.

I agree with the lords justices in thinking that any such prospective division of the security, any such mortgage of a subject not then in existence for further advances which the appellants were under no obligation to make, was not within the contemplation of the parties to the memorandum of Jan. 17, 1873, nor really within the scope of that instrument. When the mortgagor exercised, with notice to the mortgagee, the right which according to *Hopkinson v. Rolt* (2), he undoubtedly possessed of selling the mortgaged estate subject to the then existing charge of the bank, and making his own bargain with the purchaser on his own terms and in his own way without any concurrence of the bank, a line was in my opinion drawn, which was applicable to the security as a whole, and the bank could not make further advances so as to prevent or intercept, without any new agreement with Batten, or any notice to the respondent beyond that which he had of the original security, the fulfilment in the ordinary course of the terms of the contract between Batten as vendor and the respondent as purchaser. If the respondent had bought a mere equity of redemption subject to the appellants' charge, and had paid off that charge, it seems to me quite impossible to contend that he would not have been at liberty to pay the balance of the purchase money to his vendor without making any inquiry as to subsequent advances by the appellants. If it were otherwise, he could not be entitled without the appellants' consent to stipulate, as he did, that the pre-existing debts due to himself and his wife from Batten should be set off against the purchase money.

It makes, in my judgment, no difference that by the terms of the contract it was Batten's duty, as between himself and the respondent, to clear the estate sold from the appellants' incumbrance. In point of fact he did so, and indeed he did more. The sums paid by him from time to time into the bank after the date of the contract exceeded the whole amount of the purchase money received by him from first to last from the respondent. This would, no doubt, be immaterial to the present controversy if the appellants had the rights which they claim; for they received those moneys, except the £1,100 paid on June 6, 1873, from Batten, without knowing from what source they came. But from the terms of the respondent's contract, of which the bank had notice, the fair and reasonable inference was that the settlement of the purchase money was intended to, and would, take place according to the ordinary course between vendor and purchaser—i.e., by payment to the vendor subject to his obligations to clear the title from the then existing charge. Notice to the respondent of the security of Jan. 17, 1873, was notice of the existing charge, but it was not notice that, after the amount of that charge had been fixed once for all as against the land by the sale of the estate,

further advances, which the appellants were under no contract or obligation to make, would voluntarily be made by them to Batten, much less that such advances would be made upon the footing of an equitable assignment to the bank of the unpaid purchase money. Until these advances were actually made there was not, and there could not be, any existing charge for them, and even if such a charge arose as between Batten and the bank when they were in fact made, this was not a charge of which notice by anticipation can be imputed to the respondent, or into the existence or non-existence of which he was bound to inquire. It was for the appellants, when those facts happened which in their view resulted in such a charge, to give notice of it. A

A question not dissimilar to this arose and was decided by this House in *Shaw v. Foster* (3). There Pooley had contracted with Foster to purchase certain real estate, and had afterwards given a security by depositing the contract and an accompanying memorandum with the Birmingham Banking Co. The memorandum contained, among other things, a stipulation that he would, on request, assign to them his contract with Foster. Of this security, and of the fact that it was regarded by the bank as a charge upon the property, Foster had express notice, but it was held by the Court of Appeal in Chancery, and by this House, that, not having notice that the bank had made the necessary request to Pooley on which the assignment of the contract by way of security was made contingent by the terms of the memorandum, he was under no obligation to make any inquiry on that subject, though he would have learned, if he had done so, that the request had in fact been made, and that he was at liberty to convey the estate to Pooley without communicating with the bank, when the time for completion arrived. The principle of that decision seems to me to be applicable to the present case. I am, therefore, of opinion that the judgment under appeal is right, and ought to be affirmed; and I move your Lordships that the appeal be dismissed with costs. B C D E

LORD BLACKBURN stated the facts, and continued: The bank were given distinct notice that the agreement of April 28, 1873, was signed, which was the fact. The bank were not given any notice that it was part of the bargain that £824 11s. was to be paid by way of set-off, and that Batten's vendor's lien was only good for the balance, or a little less than £2,400, which, however, was more than enough to discharge all that was then due to the bank. Even if those acting for the bank had seen the agreement, they would not have found any stipulation as to how the price was to be paid. I think it most likely that Batten had led the bank to believe that the whole £3,200 was to be paid in cash, and would pass through his hands; and it is not unlikely that his solicitor, Graham, was not at all anxious to disabuse them of an expectation that must have tended to make them more liberal to Batten; but I see nothing to show that Ratcliffe at any time, or Graham while acting as Ratcliffe's solicitor, did anything to foster this belief. The bank asked no questions, and I think they had no right to assume that the price was not to be paid in any way which Batten and Ratcliffe might find most convenient. But Ratcliffe had notice, through his solicitor, that the deeds were pledged, as is universally the case with deposits with banks, not only for its existing balance, which on May 2, 1873, appears from the pass book to have been between £1,700 and £1,800, but also for the general balance that might at any time become due, which might be very much larger. F G H

The question arises: What was the effect of this last notice? The further facts necessary to raise it are briefly these. Graham procured some one to take a mortgage of the Canterbury Villas for £1,100, and I suppose had in some way or other informed the bank that he had done so, and that this £1,100 would be forthcoming. From that time the Canterbury Villas estate is out of the case; and by this payment of £1,100 the balance which was owing to the bank on May 2, 1873, was reduced to between £600 and £700. I do not think that anything is proved which amounted to notice, either actual or constructive, to Ratcliffe, or to Graham when acting as his solicitor, after that date, May 2, 1873: I

A but in fact the bank continued their account with Batten, receiving payments from him and making advances to him just as they might have done if there had been no notice of the sale to Ratcliffe. The balance of the account was never turned in Batten's favour. It is struck in the pass book at the end of each three months, and it is obvious from the figures that if what is called "the rule in *Clayton's Case* (1)" is to be applied, the old balance due on July 1, 1873, was wholly paid off during the two quarters ending on Dec. 31 and that the balance due on Jan. 1, 1874, consisted entirely of advances made after June 30, 1873, which was some time after the bank had notice of the sale.

B Ratcliffe paid to Batten at various times moneys, and gave him credit, which, on the whole amounted to £3,200, the last of these payments being on Mar. 25, 1876. He made these various payments without any inquiry whether Batten had paid off the charge the bank had on the property, which was not imprudent on his part, as he did not personally know that such charges existed, Batten and Graham not having informed him of that fact. But it is not, and could not be, disputed that, notice having been given to Graham while acting as his solicitor that the charge to this amount existed at the time when notice of his purchase was given on his behalf to the bank, no subsequent payments to Batten could avail against that charge. He must show that the amount was paid to the bank. £1,100 was in every sense paid to the bank on June 6, 1873. The balance of between £600 and £700 is only accounted for if the rule in *Clayton's Case* (1) applies. BACON, V.-C., thought it did not. He says (51 L.J.Ch. at p. 30) :

E "In my opinion no such principle is applicable to the case of deposit made with a banker. It has no application, because, as has been truly said, a banker's lien upon all matters deposited with him, or which come into his possession, extends over the whole of the account. When the relation of debtor and creditor subsists between the parties the lien is operative and active."

F The lords justices were of a different opinion. JAMES, L.J., briefly says (*ibid.* at p. 35) : "It is clear from the bank accounts that all that was due at that time was long since paid off."

I agree with the lords justices. I think that BACON, V.-C., is quite right in saying that, as between the banker and the customer, the lien is operative whenever the relation of debtor and creditor exists. If the payments made to the bank had been at any time so great as to turn the balance in favour of Batten, so that his account had been a solvent one, and afterwards advances had been made by the bank so great as to turn the balance the other way, it would be quite accurate to say that the lien for this new balance, as between the bank and Batten, was as effective as if the balance had never been turned; but could it then be contended that the old balance had not been discharged, or that, though Ratcliffe never had been told that the balance had for a time been turned, his property could have been held liable to make good part of the new balance because it had been subject to a charge for that which was paid off? I take it such a contention would have been obviously untenable. And I do not see why the discharge by the application of the rule in *Clayton's Case* (1) should have less effect. The bank might, if they pleased, have taken the payments on such terms as to prevent the application of the rule, but, they not having done so, it seems to me that the old balance I was paid off before the end of the year 1873.

But this leaves the question to be determined whether, as against the purchaser Ratcliffe, he having had notice—though I think only constructive notice—that the title deeds had been pledged to the bank on the usual terms—that they should be a security for all moneys which should at any time be due upon general balance—the bank had a security on the property after it had become Ratcliffe's for advances made in the ordinary way, but after they had notice that the property had become Ratcliffe's. BACON, V.-C., by his decree, makes Ratcliffe a trustee of all these sums. I do not think that in his judgment he clearly indicates why he so thought,

but I conjecture that he recollected what was at one time believed by many practitioners to have been the law settled by *Gordon v. Grakam* (4), and thought it applied to this case, and that it was not brought to his notice that a majority of this House had, in *Hopkinson v. Rolt* (2), determined that, contrary to the opinion of LORD CRANWORTH, who dissented, *Gordon v. Graham* (4) had been misunderstood, and that a mortgage to secure future advances not exceeding a certain amount, though perfectly good as against the mortgagor, gave him no equity to postpone advances made by a second mortgagee with notice of the first to advances made by the first mortgagee after notice of the second mortgage. I do not inquire whether, if the doctrine for which LORD CRANWORTH contended had been adopted by the House, and was the law as to advances made by a second mortgagee, it would have applied to payments by a purchaser—I doubt it; but, it being decided by this House that it was not law as to a second mortgagee, it follows, a multo fortiori, that it is not law as to a purchaser. In this I agree with the lords justices.

One more point was made at your Lordships' Bar, which I think was not suggested before the lords justices, and at all events was not dealt with by them. It was said that Batten, not having been paid the full price when he sold, still held the land as an unpaid vendor, with an unpaid vendor's lien against Ratcliffe for this unpaid amount. The sum could be afterwards ascertained, but it certainly was considerable; and Batten could pledge this unpaid vendor's lien to the bank, and if he did so, and notice was given to the purchaser of such a pledge, the purchaser could no longer safely pay Batten, who could not give him a discharge without the concurrence of the pledgee. In all this I agree. It was further argued that the deeds having been deposited with the bank as a security for future advances, that did, ipso facto, pledge as a security for those future advances his interest as an unpaid vendor which arose on the sale; and that Ratcliffe, having constructive notice of the terms of the deposit, was in the same position exactly as if he had actual notice that Batten had agreed to pledge his unpaid vendor's lien for future advances, and in paying Batten took the risk, not only of whether the previous advances had been paid off, but also of whether there had been any subsequent advances. This, in effect, raises the question whether anyone purchasing land, with notice that the title deeds have been deposited with a bank, is bound to inquire whether the bank has, after receiving notice of the purchase, made fresh advances on the security of the unpaid vendor's lien, or whether the burden does not lie on the bank advancing on the security of the unpaid vendor's lien to give notice to the purchaser that it has so done, or intends so to do. No case was cited in which any such point had been discussed, but I think that both convenience and principle strongly point to the burden of giving notice lying on the bank, and not on the purchaser, whose inquiries might often be annoying and impertinent. I am, therefore, of opinion, that this appeal should be dismissed with costs.

LORD WATSON concurred.

Appeal dismissed.

Solicitors: *Harries, Wilkinson & Raikes; Ingle, Cooper & Holmes.*

[Reported by C. E. MALDEN, ESQ., Barrister-at-Law.]

CASTELLAIN v. PRESTON AND OTHERS

[COURT OF APPEAL (Brett, Cotton and Bowen, L.JJ.), March 12, 1883]

[Reported 11 Q.B.D. 380; 52 L.J.Q.B. 366; 49 L.T. 29;
31 W.R. 557]

Insurance—Subrogation—Fire—Sale of insured premises—Damage by fire after contract, but before completion—Insurance money and full purchase money received by assured—Right of insurers to recover.

After the date of a contract for the sale of a house which had been insured by the vendors against fire and before completion of the purchase the house was damaged by fire, and the insurance company, in ignorance of the contract, paid the vendors for the damage. The purchase was subsequently completed, the vendors receiving the full amount of the purchase money, and also retaining the moneys paid to them by the insurance company. In an action by the insurance company to recover the amount paid to the vendors,

Held: the contract of insurance was a contract of indemnity only, and, therefore, the receipt of the purchase money by the vendors must be taken into account in calculating the amount of the loss sustained by them, and, as it had the effect of extinguishing the loss, the company was entitled to recover.

Notes. Applied: *Sea Insurance Co. v. Hadden* (1884), 13 Q.B.D. 706; *Law Fire Assurance Co. v. Oakley* (1888), 4 T.L.R. 309. Followed: *West of England Fire Insurance Co. v. Isaacs* (1896), 66 L.J.Q.B. 36. Distinguished: *Gausson v. Whatman* (1905), 93 L.T. 101. Followed: *Assicurazioni Generali de Trieste v. Empress Assurance Corpn.*, [1907] 2 K.B. 814; *British Dominions General Insurance Co. v. Duder*, [1914-15] All E.R.Rep. 176. Considered: *Edwards v. Motor Union Insurance Co.*, [1922] 2 K.B. 249; *Page v. Scottish Insurance Corpn.* (1929), 98 L.J.K.B. 308. Applied: *Re Millar, Gibb & Co.*, [1957] 2 All E.R. 266; *Yorkshire Insurance Co., Ltd. v. Nisbet Shipping Co., Ltd.*, [1961] 2 All E.R. 487. Referred to: *Re Denton's Estate, Licenses Insurance Corpn. and Guarantee Fund v. Denton* (1904), 52 W.R. 484; *Grover and Grover v. Mathews*, [1910] 2 K.B. 401; *Reliance Marine Insurance v. Duder*, [1913] 1 K.B. 265; *Re Law Guarantee Trust and Accident Society, Liverpool Mortgage Insurance Co.'s Case*, [1914] 2 Ch. 617; *Thames and Mersey Marine Insurance Co. v. British and Chilian Steamship Co.*, [1915] 2 K.B. 214; *Wilson Shipping Co. v. British and Foreign Insurance Co.*, [1920] 2 K.B. 25; *Matthey v. Curling*, [1922] 2 A.C. 180; *Williams v. Atlantic Assurance Co.* (1932), 37 Com. Cas. 304; *Sutherland v. German Property Administrator* (1933), 149 L.T. 47; *Morley v. Moore*, [1936] 2 All E.R. 79; *Meacock v. Bryant & Co.*, [1942] 2 All E.R. 661; *Elcock v. Thomson*, [1949] 2 All E.R. 381.

As to subrogation, see 22 HALSBURY'S LAWS (3rd Edn.) 160-163, 260-264, as to indemnity, see *ibid.* 180-182, as to insurable interests and assignment of interest, see *ibid.* 310-316, as to amount recoverable, see *ibid.* 317-319. For cases see 29 DIGEST (Repl.) 68, 450 et seq.

Cases referred to:

- (1) *Rayner v. Preston* (1880), 14 Ch.D. 297; 43 L.T. 18; 28 W.R. 808; affirmed (1881), 18 Ch.D. 1; 50 L.J.Ch. 472; 44 L.T. 787; 45 J.P. 829; 29 W.R. 547, C.A.; 29 Digest (Repl.) 448, 3282.
- (2) *Burnand v. Rodocanachi* (1881), 6 Q.B.D. 633; 50 L.J.C.P. 284; 44 L.T. 538; 29 W.R. 460, C.A.; affirmed (1882), 7 App. Cas. 333; 51 L.J.Q.B. 548; 47 L.T. 277; 31 W.R. 65; 4 Asp.M.L.C. 576, H.L.; 29 Digest (Repl.) 340, 2586.
- (8) *Randal v. Cockran* (1748), 1 Ves. Sen. 98; 27 E.R. 916; 29 Digest (Repl.) 339, 2581.
- (4) *Blaauwpot v. Da Costa* (1758), 1 Eden, 130; 28 E.R. 633; 29 Digest (Repl.) 339, 2582.

- (5) *Simpson v. Thomson* (1877), 3 App. Cas. 279; 38 L.T. 1; 3 Asp.M.L.C. 567, **A**
H.L.; 29 Digest (Repl.) 837, 2564.
- (6) *Darrell v. Tibbitts* (1880), 5 Q.B.D. 560; 50 L.J.Q.B. 33; 42 L.T. 797;
44 J.P. 695; 29 W.R. 66, C.A.; 29 Digest (Repl.) 451, 3296.
- (7) *Simpson v. Scottish Union Insurance Co.* (1863), 1 Hem. & M. 618; 1 New
Rep. 537; 32 L.J.Ch. 329; 8 L.T. 112; 9 Jur.N.S. 711; 11 W.R. 459; 71
E.R. 270; 29 Digest (Repl.) 491, 3503. **B**
- (8) *Collingridge v. Royal Exchange Assurance Corpn.* (1877), 3 Q.B.D. 173; 47
L.J.Q.B. 32; 37 L.T. 525; 42 J.P. 118; 26 W.R. 112; 29 Digest (Repl.) 454,
3316.
- (9) *King v. State Mutual Fire Insurance Co.* (1851), 7 Cush. (Mass.) 1.
- (10) *Ætna Fire Insurance Co. v. Tyler*, 16 Wend. (N.Y.) 385. **B**

Also referred to in argument : **C**

Aitchison v. Lohre (1879), 4 App. Cas. 755; 49 L.J.Q.B. 123; 41 L.T. 323; 28
W.R. 1; 4 Asp.M.L.C. 168, H.L.; 29 Digest (Repl.) 278, 2082.

*North British and Mercantile Insurance Co. v. London, Liverpool and Globe
Insurance Co.* (1877), 5 Ch.D. 569; 46 L.J.Ch. 537; 36 L.T. 629, C.A.; 29
Digest (Repl.) 150, 890.

Brooks v. MacDonnell (1835), 1 Y. & C.Ex. 500; 4 L.J.Ex. Eq. 60; 160 E.R. 204; **D**
29 Digest (Repl.) 349, 2676.

Edwards v. West (1878), 7 Ch.D. 858; 47 L.J.Ch. 463; 38 L.T. 481; 26 W.R. 507;
40 Digest (Repl.) 203, 1653.

Marriot v. Hampton (1797), 7 Term Rep. 269; 2 Esp. 546; 101 E.R. 969; 12
Digest (Repl.) 630, 4858.

Suffolk Fire Insurance Co. v. Boyden, 9 Allen (Mass.) 123. **E**

Sussex Mutual Insurance Co. v. Woodruff, 2 Dutcher (New Jersey) 541.

Kernochan v. New York Bowery Fire Insurance Co., 2 Duer (N.Y.) 1; affirmed,
17 N.Y. 428.

Appeal by the plaintiff from a decision of CHITTY, J., in favour of the defendants,
reported 8 Q.B.D. 613.

On July 31, 1878, the defendants entered into a contract with Messrs. Rayner for
the sale to them of a house and premises in Liverpool for the sum of £3,100. At
the date of the contract the house was insured against fire by the defendants with the
Liverpool and London and Globe Insurance Co., but no mention of the insur-
ance was made in the contract. After the date of the contract, but before the
completion of the purchase, the house was damaged by fire to the extent of £330,
which sum was paid to the defendants by the insurance company, who at that
time were not aware of the contract for the sale of the premises. As the defendants
refused to hand over the £330 to the purchasers, or allow it to be deducted from
the purchase money, or to expend it in reinstating the premises, the purchasers
brought an action against the vendors for a declaration that they were entitled to
the benefit of the moneys received by the defendants from the insurance
company, and to have them paid or allowed to them accordingly, or otherwise
to have the money laid out towards reinstating the premises; the action was dis-
missed by SIR GEORGE JESSEL, M.R., and his decision was affirmed on appeal:
Rayner v. Preston (1). The chairman of the Liverpool and London and Globe
Insurance Co. now brought this action against the defendant to recover £330 with
interest thereon from September 25, 1878, or, alternatively, for a declaration that
the defendants were trustees of that sum for the company. CHITTY, J., gave judg-
ment for the defendants. The plaintiff appealed. **F**
G
H
I

Charles Russell, Q.C., and Tobin for the plaintiff.

Gully, Q.C., and W. R. Kennedy for the defendants.

BRETT, L.J.—In this case an action was brought by the plaintiff as representa-
tive of the Liverpool and London and Globe Insurance Co. in respect of certain
money which had been paid to the defendants on account of damage done to a

A building by fire. The defendants were the owners of the property so damaged, and they had made a contract for the sale of it to third persons, which contract, on the giving of certain notice as to time of payment, would oblige those third persons to pay the agreed price. The ^{purchase} vendors would have to pay the price whether the house were burned or not. After the making of the contract and before the day of payment the house was burned. It was insured by the defendants with the insurance company which the plaintiff represents, and it could not be suggested that the defendants had no insurable interest; for, in the first place, they were the legal owners of the property; and secondly, the vendees might never carry out the contract, and the vendors, the defendants, would then suffer the loss. The defendants made a claim upon the insurance company, and were paid the amount of the damage occasioned by the fire. After that the contract of sale was carried out, and the full price paid to the defendants, notwithstanding the fire. The plaintiff now sues the defendants, not, properly speaking, to recover back the money actually paid to the defendants, but in respect of the money so paid, claiming that the insurance company is entitled to have the benefit of that money.

The question to be decided is, can he recover? The case was tried before CHITTY, J., and he has come to the conclusion that the plaintiff cannot recover.

D It seems to me that the foundation of his judgment is this: He does not consider that the doctrine of subrogation can be applied to the present case. What we have to consider is, do we agree with this view or not? In order to give my opinion on this question I feel obliged to revert to what is the foundation of every rule with regard to insurance law, which is this: Every contract of marine or fire insurance is a contract of indemnity, and of indemnity only, the meaning of which

E is that the assured in case of a loss is to receive a full indemnity, but is never to receive more. Every rule of insurance law is adopted in order to carry out this fundamental rule, and if ever any proposition is brought forward, the effect of which is opposed to this fundamental rule, it will be found to be wrong. There are many propositions bearing on the question, and many rules may be glanced at which are well known in insurance law. The doctrine in marine insurance law of

F constructive total loss is adopted solely in order to carry out the fundamental rule. It is a doctrine which is in favour of the assured, because where the loss is not an actual total loss, but is what, as a matter of business, is treated as equivalent to a total loss, this rule is adopted to carry out the fundamental doctrine and give the assured a full indemnity. Grafted on that doctrine came the doctrine of abandonment, which is only applicable to cases of constructive total loss, and is

G introduced in favour of the underwriters, so that they may have to pay no more than an indemnity. So it appears that these two doctrines were introduced in order to carry out the two limits of the fundamental doctrine to which I have referred, namely, that the assured shall get a full indemnity, and that he shall get no more.

As I stated in the course of the argument, the doctrine as to notice of abandonment seems more difficult to support in principle than the other rules of insurance law. It was introduced in favour of the underwriters, in order that they might not by means of any fraud be obliged to pay more than a full indemnity. It is a technical doctrine, because, if there was no notice of abandonment, although there was a constructive total loss, the assured did not recover for the loss. Probably the rule was originally adopted by merchants for the purpose of carrying on business.

I for otherwise it seems to me that the introduction of it by the courts would be an encroachment. The doctrine of subrogation is another proposition which has been introduced in order to carry out the fundamental rule. It was introduced in favour of the underwriters, in order to prevent their having to pay more than a full indemnity, not on the ground that the underwriters were sureties, for they are not so always, although their rights are sometimes similar to those of sureties, but in order to prevent the assured recovering more than a full indemnity.

The question is whether the doctrine as applied in insurance law can be limited. Can it be limited to putting the underwriters in the place of the assured in order

to enable them to enforce a contract or a right of action? Why should we limit it to this, if the effect of so doing would be to entitle the assured to more than a full indemnity? That is the fault of the judgment of CHITTY, J., in the court below; it is limited to the enforcement of a right of action. In order to apply the doctrine properly we must go into the full meaning of subrogation, which is the placing of the assurer in the position of the assured. In order fully to carry out the fundamental principle we must carry the doctrine of subrogation so far as to say that, as between the underwriter and the assured, the underwriter is entitled to every right, whether of contract fulfilled or unfulfilled, or in tort, enforced or capable of being enforced, or to any other right, legal or equitable, which has accrued to the assured, whereby the loss can be or has been diminished. That is the largest form in which I can put the rule. I use the words "every right" because I think the doctrine requires to be carried to that extent.

I think the decision in *Burnand v. Rodocanachi* (2) went on this foundation. In that case what was paid by the American government was not salvage, but a gift, and the persons who received the money so paid had no right to it until it had actually come into their hands. I am aware that the cases as to reprisals (*Randal v. Cockran* (3) and *Blaauwpot v. Da Costa* (4)) have been stated to be cases of a gift, but it seems to me that they came within the same rule of law, because, although there was no obligation to make the payment, the government always made it, so that, as a matter of business, it came to be considered as a right. This shows that the doctrine goes much further than to extend only to what could have given a cause of action. Where the contract has been fulfilled the right of action is gone. Again, take the case of a tortfeasor who makes good the damage occasioned by his tort; there again the right of action is gone, and there is no right of action into which the insurer can be subrogated; but the insurer could not be subrogated until he had paid the loss, and therefore to confine the doctrine as suggested would take out innumerable cases. If the right exists in the assured, although there may never be a right of action, it seems contrary to the fundamental doctrine to say that the loss is not to be diminished. For myself I cannot see why, if the defendants would have had a right against a third party to enforce the contract of sale, the insurers should not have been subrogated into that right; but COTTON, L.J., is not satisfied as to this, so I will pass by the question, which it is unnecessary to decide, because here there was a right to have the contract fulfilled by the third party, and the assured has received from the third party the money payable under that contract. I cannot conceive any right by which the assured has his loss diminished, which would be other than a right affecting the loss.

In the present case the right affects the loss, enabling the assured to get the same money which he would have got notwithstanding the loss. The present case is the case of a contract relating to real property, and, therefore, is somewhat peculiar in its nature. We are asked to say that where the contract is that a person will pay if the property is lost, that is to be brought into the account, but where it is to pay though the property is lost, that is not to be brought in. I cannot see that it rests on so fine a distinction. In the course of his judgment, in the court below, CHITTY, J., says (8 Q.B.D. at p. 617):

"I know of no foundation for the right of underwriters, except the well-known principle of law, that where one person has agreed to indemnify another, he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against, or reimbursed himself for, the loss."

This passage is quoted from the judgment of LORD CAIRNS in *Simpson v. Thomson* (5) (3 App. Cas. at p. 284). Then CHITTY, J., goes on:

"What is the principle of subrogation? On payment, the insurers are entitled to enforce all the remedies, whether in contract or in tort, which the insured

- A has against third parties, whereby the insured can compel such third parties to make good the loss insured against."

It seems to me that he is there confining the principle of subrogation to rights which the insured is entitled to enforce; that is to say, that he is confining it to the remedies of the insured. Then he goes on and gives instances:

- B "Where the owner of a building insures, and the building is destroyed by a riot, the insurers, on payment, are subrogated to their right against the hundred. Where the landlord insures, and he has a covenant by the tenant to repair, the insurance office, on payment, in like manner succeeds to the right of the landlord against the tenant. . . ."

- I would add, that if the tenant repairs the insurer is entitled to receive from the insured a benefit equivalent to that derived by the insured from such repairs. C Dealing with *Burnand v. Rodocanachi* (2), he says:

- D "There the underwriters, under a valued policy on the ship, which was destroyed by the *Alabama*, a cruiser, paid as on a total loss. The American government under a treaty with the British government provided a fund out of which the insured received a sum in respect of the destruction of the ship, and the question was whether that sum was part of the salvage. That point was put very clearly by BRAMWELL, L.J., in his judgment, and it was held that it was not; that in the circumstances the sum received by the shipowner was but a pure gift, and there was no right on the part of the insurers to recover any part of it over against him."

- E I would add to that—because there was no right in the assured to receive the money from the American government, but their payment to him was a pure gift.

The decision in *Darrell v. Tibbitts* (6) is in favour of the plaintiff in the present case. I shall not retract what I there said. In *Darrell v. Tibbitts* (6) the insurers were not subrogated into a right of action or a remedy, but into the advantage of the remedy which had been applied, whether it had been enforced or voluntarily administered by the person bound to administer it. I said there (5 Q.B.D. at p. 563):

- G "The doctrine is well established that where something is insured against loss either in a marine or a fire policy, after the assured has been paid by the insurers for the loss, the insurers are put into the place of the assured with regard to every right given to him by the law respecting the subject-matter insured."

That is one sentence, and is complete in itself, and so I intended it to be; then the same judgment continues,

- H "and with regard to every contract which touches the subject-matter insured, and which contract is affected by the loss or the safety of the subject-matter insured by reason of the peril insured against."

I fail to conceive any contract which gives a right which is not affected by the loss or the safety of the subject-matter insured. If it is necessary to bring this payment within those terms, I am of opinion that here the contract is affected because the money is paid in consequence of the contract.

In his judgment CHITTY, J., observes (8 Q.B.D. at p. 625),

- I "that the only principle applicable is that of subrogation, as understood in the full sense of that term, and that where the right claimed is under a contract between the insured and third parties, it must be confined to the case of a contract relating to the subject-matter of the insurance which entitled the insurers to have the damages made good."

I think it would be better to say, "which entitled the insured to be put by such third parties in as good a position as if the damage had not happened." The contract in the present case does enable the insured to be put in such a position,

and this arises from the contract alone. For these reasons it seems to me that, according to the true principle of insurance law, and carrying out the fundamental doctrine that a policy is a contract of indemnity and no more, the plaintiff must succeed. I am of opinion that the plaintiff in the present case is entitled to recover, and the judgment appealed from must be reversed. A

COTTON, L.J.—The plaintiff in this case represents a company, who were insurers of a house. Before any loss took place the house was sold. After the contract of sale was entered into there was a fire, and the insurers made a payment in respect of the loss caused by that fire. The plaintiff now seeks to recover the amount of such payment. Apparently the claim is for money paid, and if it rested on that ground I should be inclined to decide against the plaintiff's right to recover. But the case can be stated in another way, namely, that the payment under the policy has diminished the loss suffered by the assured. Looking at it from this point of view, in my opinion the plaintiff is in the right. The whole question turns on what a fire policy really is. It is a contract of indemnity, a contract only to pay the exact amount of the loss. To ascertain what that loss is one must take into account all that comes in to diminish it. When the point is stated in this way it is clear that the insurers are entitled to the benefit of anything received by the assured before the policy is paid. It does not matter, as is shown in *Darrell v. Tibbitts* (6), that the insurers do not insist on having a calculation made before the sum or benefit is received. If they do not insist on this they can still claim that what is received by the insured shall be held for the benefit of the insurers. B C D

The law is thus stated by LORD BLACKBURN in *Burnand v. Rodocanachi* (2) (7 App. Cas. at p. 389): E

"The general rule of law (and it is obvious justice) is that where there is a contract of indemnity (it matters not whether it is a marine policy or a policy against fire on land, or any other contract of indemnity), and a loss happens, anything which reduces or diminishes that loss reduces or diminishes the amount which the indemnified is bound to pay; and if the indemnifier has already paid it, then, if anything which diminishes the loss comes into the hands of the person to whom he has paid it, it becomes an equity that the person who has already paid the full indemnity is entitled to be recouped by having that amount back." F

In *Darrell v. Tibbitts* (6) the question was whether the insurers were entitled to the benefit of a covenant to reinstate the damaged building, but it was not intended in that case to limit the rights of the insurers to contracts relating to the same loss which makes them liable. It is true that in that case the contract, to the benefit of which the insurers were held entitled, did relate to the same loss; but the rights of insurers are not limited to that; the principle goes further, and comes to this, that if money or any other benefit comes to the assured, so that the loss is thereby diminished, the insurer who indemnifies against the loss is entitled to that benefit, and in order to ascertain to what the insurer is entitled, it is necessary to calculate what the ulterior loss is. G H

The difficulty arises when one has to consider what ought to be taken into account. We were pressed ingeniously with that difficulty in the present case, and it was urged that this payment of the purchase money had nothing to do with the fire; and it was said, if the money is recoverable, why should not a gift be recoverable? But this question may be answered thus: Generally a gift would be expressed to be for the benefit of the insured, and therefore it would be wrong to divert it from the purpose for which it was intended, and give it to the insurer. This was so in *Burnand v. Rodocanachi* (2). As to the case of a gift from the Crown, which has been suggested and discussed, it is not necessary now to decide whether the benefit of such a gift could ever in any case be recovered. It may be that the title of the assured to recover is rightly confined to some right or other incident which is incident to the property at the time of the loss. Here we must I

A consider whether this right to receive the purchase money was incident to property belonging to the owner at the time of the loss. Here property was insured against fire, and was damaged by fire after a contract of sale had been entered into, and the insured afterwards received the price. If the assured receives the whole price, it must be brought in for the purpose of ascertaining what the ulterior loss is for which he is to be indemnified. Here the purchasers paid the purchase money in full, and thus the vendors got the value of the property. It is clear, therefore, that anything which they get from the purchaser, and which they receive in addition to the £330 paid them by the insurance company, must diminish, or (as is the case here) extinguish the loss. The insurers cannot properly be said to be entitled to get back the money which they have paid, but the amount of such money must be taken into account in order to see what is the ulterior loss suffered by the assured. The insurers might have said that there was not any loss against which they were bound to indemnify the owner of the property, and that the amount payable by the purchaser ought to be taken into account in order to ascertain how this question stood; but they were not bound to say so, and their having paid under the policy cannot now affect their rights.

The conclusion is, that if there were any doubt as to how far the loss was diminished, it would be necessary to ascertain it, but if the purchase money for the property has been paid in full, the insurers are entitled to get back their money, not as recovering back what they have paid, but on the ground that the vendors must bring in the purchase money because it diminishes the loss against which the insurers covenanted to indemnify them. I am, therefore, of opinion that the judgment appealed from is erroneous, and ought to be reversed. CHITTY, J., said there was no right of subrogation because the insurance company could not have enforced the contract of sale. This need not be decided, because the vendors have insisted on the completion of the purchase, and the money which they have received must be taken into account in estimating the amount of the loss.

BOWEN, L.J.—I am of the same opinion. The answer appears to me to follow as a plain deduction from two propositions: first, that a policy of fire insurance is a contract of indemnity; and, secondly, that on a contract of indemnity no more can be recovered than the amount of the loss sustained. It is clear that a fire policy is as much a contract of indemnity as a marine policy; the difference is only in the subject-matter. In both cases only a person who has an insurable interest can recover. In the able arguments of counsel for the defendants it was sought to establish a distinction. It was said that a fire policy is not quite a contract of indemnity; but there is no justification for that proposition to be found in the authorities, and I can see no reason why it should be so. What is insured in a fire policy? Not the bricks and mortar and timber of the house, but the interest of the owner. Why should this interest be different in a fire policy and in a marine policy? It is a fallacy to suppose that more may be obtained than the amount of the loss.

H We must recollect the ordinary business rules of insurance. It is well known that a person who has a limited interest in the thing insured may insure and recover the total value, subject to this: first, that the form of the policy is correct; and, secondly, he must intend to insure the full value. He may insure to cover his own interest only, or to cover his own interest and that of others, but he can only hold so much as he intended to insure. Take, for instance, the cases of carriers and wharfingers, or, to illustrate the proposition more exactly, the case of a mortgagee. He is entitled to insure for all the value of the property, but if he only intends to insure his own interest, he can only hold the insurance money to the extent of his own interest. If he intended to insure all the property he can hold the insurance money for the others who are interested in it, but he cannot hold for himself beyond the value of his own interest. Take the case of a ship. The mortgagee lends £500 on a ship which is worth £10,000, and insures his own interest. Can it be said that he could hold £10,000? That would make the policy a wager policy, and a speculation, not a contract of indemnity. Or take the case

of several mortgagees; there each can recover for himself, and hold only the amount of his own loss. Is there any real distinction between such a case and the case of a mortgagee of a house? I can see none. In each case we must go back to the doctrine of indemnity to solve the question. A

In the case of a tenant from year to year we are asked to believe that he can insure the property to its full value, and recover all the insurance money. There may be some justification for this contention, drawn from the words of JAMES, L.J., in *Rayner v. Preston* (1), where he said (18 Ch.D. at p. 15): B

"In my view of the case it is perhaps unnecessary to refer to the Act of Parliament as to fire insurance. But that Act seems to me to show that a policy of insurance on a house was considered by the legislature, as I believe it to be considered by the universal consensus of mankind, to be a policy for the benefit of all persons interested in the property, and it appears to me that a purchaser having an equitable interest under a contract of sale is a person having an interest in the house within the meaning of the Act. I believe that there is no case to be found in which the liability of the insurance office has been limited to the value of the interest of the insured in the house destroyed. If a tenant for life, having insured his house, has the house destroyed or damaged by fire, I have never heard it suggested that the insurance office could cut down his claim by showing that he was of extreme old age, or suffering from a mortal disease." C D

I wish to speak with the highest respect and reverence in commenting on anything said by so great a judge, but I confess I cannot follow those observations. It is true that in practice insurance offices do not take the trouble to inquire as to the interest of persons proposing to insure, but the reason is that generally the policy is intended to cover all interests, and also there usually are covenants to repair, so that there no question can arise. Suppose a weekly tenant insures, only meaning to cover his own interest; could he recover the full value of the house? It is true that the insurer cannot satisfy the claim upon him by handing over to the insured tenant the marketable value of his term; but the reason for this is that the insured loses more. That is all that is meant by WOOD, V.-C., in *Simpson v. Scottish Union Insurance Co.* (7). I pass on to the case of a life tenant, because it is urged that he does more than insure his own interest. It is important to have the facts before us when we apply the law. Take the hypothesis of a very old man being tenant, and assume that he meant to insure only his own interest. I do not say that he may not have the house put back in the same state in which it was before the fire; but if he insures intending to insure his own interest only, and he dies a week after the fire, I doubt whether the court would give the full value of the house to his representatives. E F G

In each case we must go back to the broad principle. Here the case is one of vendor and vendee, and *Rayner v. Preston* (1) was decided on the ground that the vendors were not trustees for the purchasers of the money secured by the policy. What, then, is the insurable interest of the vendor which entitles him in the first instance to receive the money? It is the beneficial interest of an unpaid vendor, who has agreed to sell the property, but still retains the legal estate, and has not received the price. In the first instance he can obviously recover on the policy, as was decided in *Collingridge v. Royal Exchange Assurance Corpn.* (8). Then can he keep the whole of the insurance money, having only lost a part, say half, of what he has insured? Suppose, to take an extreme case, a man were injured to the extent of £50, and he recovered £10,000 on a policy of insurance; that would be a windfall, coming to him in consequence of the fire; the insurance would be not an indemnity, but a speculation. A person who recovers for a total loss must treat it as a total loss; he cannot take with both hands. In *Simpson v. Thomson* (5), LORD CAIRNS said (3 App. Cas. at p. 234): H I

"I know of no foundation for the right of underwriters, except the well-known principle of law that where one person has agreed to indemnify another, he

A will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss."

B Is there any distinction here on the ground that the present case is one of fire, while that was one of marine insurance? CHITTY, J., and the judges who decided the American cases on which he seems to have relied, have fallen into the mistake of relying upon a distinction between fire and marine insurance, whereas there is no real distinction except in the diversity of the subject-matter insured. In his judgment, CHITTY, J., says (8 Q.B.D. at p. 618):

C "An obvious distinction exists between the case of marine insurance and of insurance of buildings annexed to the soil. In the case of marine insurance, where there is a total constructive loss, the thing is considered as abandoned to the underwriters, and as vesting the property directly in them. But this doctrine of abandonment cannot be applied to the insurance of buildings annexed to the soil. Although the buildings annexed are destroyed there cannot be a cession of the right to the soil itself."

D There seems to be a certain cloudiness in the way in which the judge deals with the doctrine of constructive total loss. The practice of abandonment is based on the doctrine of indemnity, and has only become universal since policies have ceased to be wager policies. The same principle applies both to marine and to fire insurance, although it has to be worked out differently in the two cases. If buildings annexed to the soil are destroyed it is not a constructive, but an absolute total loss. The same remarks apply to the language used by SHAW, C.J., in delivering the opinion of the court in *King v. State Mutual Fire Insurance Co.* (9 (7 Cush. (Mass.), at p. 12), where he says (commenting on *Ætna Fire Insurance Co. v. Tyler* (10):

F "Looking at the analogies and illustrations on which the reasoning of the learned Chancellor is founded, it may be a question whether he has not relied too much on the cases of marine insurance, in which the doctrines of constructive total loss, abandonment, and salvage are fully acknowledged, but which have slight application to insurances against loss by fire."

G That the cases have only a slight application is true, but that is not because a contract of fire insurance is not a contract of indemnity, but because the subject-matter of the two classes of cases is different.

H CHITTY, J., goes on to consider this question of subrogation. I will add very little to what BRETT, L.J., has said on that point. In speaking of the position of insurers, it creates a certain amount of confusion to call them sureties, for sureties guarantee the carrying out of a contract or performance of a duty by someone else. They undertake "to answer for the debt, default, or miscarriage of another person," but the insurer guarantees that no loss shall happen. If there are any means of diminishing the loss the underwriters may pursue them, whether they do so by asking to have a contract carried out or not, whether they are seeking to enforce a contract or are suing to recover damages for a tort. Counsel for the defendants say they can only recover in respect of an act arising out of the loss; but I think the true test is, whether the enforcement of the right I which they seek to enforce will diminish the loss. If the payment diminishes the loss it comes within the doctrine of indemnity. I will consider the definition given by BRETT, L.J. It is just what I want to express, except for one small appendage, viz., that if a case occurs which is outside the definition, regard must be had to the general rule of indemnity. I also think there may be a little difference as to gifts, and as to the true meaning and effect of the decision in *Burnand v. Rodocanachi* (2).

What has to be considered is, whether the loss is reduced, and although no doubt it is hard to think that a voluntary gift would have the effect of reducing

the loss, still it is possible that a case might arise in which it would. I think, therefore, that the voluntariness of the payment is not the root of the decision in *Burnand v. Rodocanachi* (2), but the fact that it did not reduce the loss. Suppose a man loses money by a fire, and his brother writes and sends him a cheque. In such a case, if the person who sends the cheque knows that his brother is insured, and sends the cheque, intending to benefit both the insurer and insured, then I should think the insurer would be entitled to the benefit of the cheque to the extent to which it had the effect of diminishing the loss falling on the insured; but if he does not know of the insurance, or intend to benefit the insurer, this would not be so. On the other side of the line is *Randal v. Cockran* (3). The vendors here have been paid the whole amount of the purchase money, and having also received the amount secured by the policy; on what principle can they keep it? The lien of the vendors on the property was worth something. As to the right to enforce specific performance of the contract I will not add anything to what has been said by CORTON, L.J., who understands that subject better than I do. But why should not the insurers insist on the vendors' lien, and say that the vendors shall not let the purchasers off their contract? To hold otherwise would make the contract more than a contract of indemnity. CHITTY, J., says (8 Q.B.D. at p. 621):

"The contract of sale was not a contract, either directly or indirectly, for the preservation of the buildings insured. The contract of insurance was a collateral contract wholly distinct from and unaffected by the contract of sale."

The answer is, what does it matter? for the beneficial interest depends on the contract being fulfilled; its fulfilment diminishes the loss. If we look at the definition given by BRETT, L.J., in *Darrell v. Tibbitts* (6) (5 Q.B.D. at p. 563), I think the present case comes within it as it stands, but to the word "affected" I would perhaps add "or which affects."

CHITTY, J., goes on to say:

"The attempt now made is to convert the insurance against loss by fire into an insurance of the solvency of the purchaser."

I would answer that in the same way. The insurers do not guarantee the solvency of the purchaser, but it affects the loss against which they have to indemnify the vendor. Finally, CHITTY, J., says (8 Q.B.D. at p. 621):

"Take the case of a landlord insuring, and the tenant under no obligation to repair, a case which I had before me the other day, where, under an informal agreement evidently drawn by the parties themselves, the large rent of £700 was reserved, and the tenant, notwithstanding the fire, was bound to pay the rent. I stay here to say that a lease, as has been often held, is but a sale pro tanto. Now assume that the building in such a case was ruinous, and would last the length of the term only. Could the insurers recover a proportionate part of each payment of the rent as it was made, or could they wait until the end of the term, and then say in effect, You have been paid for the whole value of the building, and, therefore, we can recover against you? Or, to vary the case somewhat again, suppose the building at the end of the term was only half the value, could the insurers then recover half of the sum they had paid? I think not. I think all these questions must be answered in the negative, but if the plaintiffs are right in their contention, the insurers could recover in all those cases."

The difficulty diminishes if we ask what it is that is insured? Is CHITTY, J., supposing that the insured intend to insure all other interests besides their own? If so, there is no difficulty. If they do not it is an odd case, but to solve it we must try it by the broad principle that the contract is a contract of indemnity. and

A there is the answer to the difficulty. I have nothing further to add, and I should not have given judgment at such length if it were not for the very great importance of taking the true view of the nature of the contract in such cases as the present.

Appeal allowed.

Solicitors: *Gregory, Rowcliffe & Co., for Laces, Bird, Newton & Richardson, Liverpool; Torr & Co., for Anthony & Imlach, Liverpool.*

[*Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.*]

NORMANTON GAS CO. v. POPE AND PEARSON, LTD.

[COURT OF APPEAL (Sir Baliol Brett, M.R., Lindley and Fry, L.JJ.), June 8, 1883]

[*Reported 52 L.J.Q.B. 629; 49 L.T. 798; 32 W.R. 134*]

D *Gas—Pipes—Subjacent support—Right of support—Compensation—Gasworks Clauses Act, 1847 (10 & 11 Vict., c. 15), s. 6—Gasworks Clauses Act, 1871 (34 & 35 Vict., c. 41), s. 11.*

E The defendants were entitled to work the minerals under the surface of a road which had been laid down under an Inclosure Act. In 1874 a gas company, with the consent of the highway surveyors, but without the consent of the lord of the manor, laid down mains and gas pipes under the road. In 1878 the gas company was dissolved by a local Act of Parliament (which incorporated the Gasworks Clauses Acts, 1847 and 1871), the plaintiff company was formed, and the property of the dissolved company was vested in it. Power was given to the plaintiff company to maintain or extend the existing gasworks and to do such acts as it might think fit for making, stowing and supplying gas. The working of the minerals under the road by the defendants caused damage to the mains and gas pipes.

F **Held:** the Act of incorporation had given the plaintiff company a right of support for all their gas pipes, including those laid down before the Act, and, therefore, they were entitled to recover for the damage occasioned by the workings after the date of the Act; but, the defendants, having been deprived of their right to work the minerals to the extent to which it became necessary to leave them for the support of the gas pipes, were entitled to compensation under the Gasworks Clauses Act, 1847, s. 6; such compensation not being recoverable by counterclaim in the action by the company, but only assessable by arbitration.

G **Notes.** The Gasworks Clauses Act, 1847, s. 6, was amended by the Public Utilities Street Works Act, 1950, Sch. 5, which provided that the words "under such superintendence as is hereinafter specified" should be omitted from the section. The Gasworks Clauses Act, 1871, s. 11, was replaced by the Gas Act, 1948, Sch. 3, para. 8.

I Considered: *Newcastle-under-Lyme Corp'n. v. Wolstanton, Ltd.*, [1947] 1 All E.R. 218. Referred to: *Truman v. London, Brighton, and South Coast Rail. Co.* (1883), 25 Ch.D. 423; *South Staffordshire Waterworks Co. v. R. Mason & Sons*, [1886-90] All E.R.Rep. 162; *Jordeson v. Sutton, Southcoates and Drypool Gas Co.*, [1898] 2 Ch. 614; *Schweder v. Worthing Gas Light and Coke Co.*, [1911-13] All E.R.Rep. 866; *West Midlands Joint-Electricity Authority v. Pitt, Minister of Transport v. Pitt*, [1932] All E.R.Rep. 861.

As to support to gas works and pipes, see 18 HALSBURY'S LAWS (3rd Edn.) 838; as to ownership and rights over subsoil, see 19 HALSBURY'S LAWS (3rd Edn.) 69; as to rights on acquisition by statutory powers, see 26 HALSBURY'S LAWS (3rd Edn.)

350-351; as to compensation clauses, see 30 HALSBURY'S LAWS (3rd Edn.) 692; A and for cases see 25 DIGEST (Repl.) 526-527. For the Gas Act, 1948, Sched. III, Paras. 1, 8, see 10 HALSBURY'S STATUTES (2nd Edn.) 957, 962.

Case referred to:

- (1) *Re Dudley Corpn.* (1881), post p. 565; 8 Q.B.D. 86; 51 L.J.Q.B. 121; 45 L.T. 733; 46 JP. 340, C.A.; 11 Digest (Repl.) 170, 410.

Also referred to in argument:

Benfieldside Local Board v. Consett Iron Co. (1877), 3 Ex.D. 54; 47 L.J.Q.B. 491; 38 L.T. 530; 26 W.R. 114; 11 Digest (Repl.) 66, 910.

Hammersmith and City Rail. Co. v. Brand (1869), L.R. 4 H.L. 171; 38 L.J.Q.B. 265; 21 L.T. 238; 34 J.P. 36; 18 W.R. 12, H.L.; 11 Digest (Repl.) 106, 29.

Thompson v. Sunderland Gas Co. (1877), 2 Ex.D. 429; 46 L.J.Q.B. 710; 37 L.T. 30; 42 J.P. 198; 25 W.R. 809, C.A.; 25 Digest (Repl.) 525, 49.

Appeal by the defendants from a decision of FIELD and WATKIN WILLIAMS, JJ., on a Special Case, reported 48 L.T. 666, holding that the plaintiffs, the Normanton Gas Co., were entitled to compensation for the damage to their mains and pipes caused by the withdrawal of support by the defendants.

The material parts of the Special Case were as follows: In 1878 an Act, known as the Normanton Gas Act (41 & 42 Vict., c. clxi) was passed for the purpose of incorporating and conferring powers on the plaintiffs, the Normanton Gas Co. By this Act a limited company formed in the year 1869 under the name of the Normanton Gas and Water Co. (Ltd.) was dissolved, and the proprietors of the undertaking of the company were thereby united into a company for the purposes thereafter mentioned, and were incorporated by the name of the Normanton Gas Co. This Act formed part of the case. By s. 2 of the Act the Gasworks Clauses Act, 1847, and certain parts of the Companies Clauses Act, 1863, and of the Lands Clauses Consolidation Acts, were, subject to the provisions of the Act, incorporated with and formed part of the Act, and the Gasworks Clauses Act, 1871, applied to the then existing undertaking of the limited company as if the same had been authorised by the Act.

By s. 6, subject to the provisions of the Act, all the lands, gasworks, erections, buildings, rights, and easements which immediately before the passing of the Act were vested in the limited company, or to which the limited company were in any wise entitled, and all mains, pipes, plant, effects, matters, and things which had been by them purchased, provided, laid down, erected, or placed in any place or house, within the limits of the Act, or which immediately before the passing of the Act were the property of the limited company, were vested in the Normanton Gas Co., and for the same estate and interest as the same were previously to the passing of the Act vested in the limited company, and might, according to the provisions of the Act, be held and enjoyed, maintained, altered, discontinued, removed, dealt with, and disposed of by the Normanton Gas Co. as they might think fit.

By s. 44, the Normanton Gas Co. might maintain or extend the existing gas works upon the land on which they were then erected, and the section continued:

"They may also erect, lay down, and from time to time maintain, alter, improve, enlarge, extend, and renew, or discontinue additional and other gas works, retorts, gasometers, receivers, drains, sewers, mains, pipes, meters, lamps, lamp posts, burners, stopcocks, machinery and other works and apparatus and conveniences, and may do all such acts as they might think proper for making and storing gas, and for supplying gas within the limits of this Act."

The defendants were incorporated on Oct. 27, 1874, as a limited company under the Companies Acts for the purpose of working extensive beds and seams of coal lying under lands in Normanton and other places. In October, 1874, they became the assignees of an indenture of sublease of the said coal granted in 1860 by the

A lessee thereof, who holds direct from the trustees of the Duke of Leeds, the owners thereof. The Duke of Leeds' rights thereto were reserved by the Normanton Common Inclosure Act, 1804 (44 Geo. 3, c. lxxii.), which formed part of the case. From the time of their incorporation, as aforesaid, until the year 1881, the defendants had from time to time worked and gotten in the usual way a large quantity of the coal so leased to them, as aforesaid, near to and underneath

B a certain public highway situate within the area described as the limits of the said Act, in s. 4 thereof, called "Normanton Common Road," and which passes over the common, or waste, called "Normanton Common." This road was set out as a public highway in the award under the Normanton Common Inclosure Act. In consequence of these mining operations of the defendants the support

C which the said road had previously derived from the subjacent soil and minerals was taken away, and by reason thereof the road, during the latter part of the year 1878, subsided along a considerable portion of its length, and sank below its original level to the extent, in many places, of three or four feet. Neither the plaintiffs, nor the Normanton Gas and Water Co., Ltd., were owners or occupiers of any allotments, lands, or grounds, whereon or wherein the mines or minerals so reserved to the Duke of Leeds as aforesaid were situate. In the year 1874 the

D Normanton Gas and Water Co., Ltd., with the knowledge and consent of the then surveyors of highways, opened the highway, and laid thereunder certain mains and gas pipes, which they so laid and used, without the consent of the defendants, for the purposes of their undertaking, and which were so used by them at the passing of the before-mentioned Normanton Gas Act, and which the plaintiffs continued afterwards to use without the consent of the defendants. The taking

E away by the defendants of support from the Normanton Common Road, as hereinbefore mentioned, and its consequent subsidence, caused the said mains and gas pipes to be broken and damaged in several places, whereby a quantity of gas escaped.

The defendants had sunk pits, and incurred great expense in working the said coal, and they still possessed a large tract of coal of great value under the said

F highway and adjacent thereto. If the defendants were obliged to leave coal in order to support the pipes and mains of the plaintiffs so placed in the highway, they would sustain great loss, and would have to incur great expense. On Dec. 12, 1881, the plaintiffs issued a writ claiming damages from the defendants for wrongfully taking away the support of certain land (being the said public highway and the adjoining land), and thereby injuring the gas mains of the plaintiffs, and

G otherwise causing damage to their property, and also claiming an injunction restraining the defendants from continuing the said wrongful acts or any of them. It was alleged by the defendants, by way of counterclaim, that if the plaintiffs were entitled to damages, and to an injunction restraining them from continuing to work their said coal, and, if the plaintiffs were entitled to support for the said pipes and mains, that the plaintiffs were bound to indemnify them against the

H loss which would be caused thereby in working their said coal, and affording such support. The defendants also contended that they are not liable for any damages occasioned more than six years before writ issued.

The questions for the opinion of the court were whether the plaintiffs were entitled to the support claimed, and whether the defendants wrongfully deprived them thereof, and whether they were entitled to the damages claimed, and for

I what period, and whether they were entitled to the injunction claimed, and whether the defendants were entitled to work the minerals as freely as if the pipes and mains had not been there, and whether the defendants were entitled to be indemnified against or compensated for any loss or injury that might be sustained by them in giving the support claimed to the pipes and mains of the plaintiffs under the said highway, and by reason of the burden imposed upon them. Any damages awarded were to be afterwards assessed.

FIELD and WATKIN WILLIAMS, JJ., gave judgment for the plaintiffs. The defendants appealed.

By the Gasworks Clauses Act, 1847, s. 6 :

"The undertakers, under such superintendence as is hereinafter specified, may open and break up the soil and pavement of the several streets and bridges within the limits of the special Act, and may open and break up any sewers, drains, or tunnels within or under such streets and bridges, and lay down and place within the same limits, pipes, conduits, service pipes, and other works, and from time to time repair, alter, or remove the same, and also make any sewers that may be necessary for carrying off the washings and waste liquids which may arise in the making of the gas, and for the purposes aforesaid may remove and use all earth and materials in and under such streets and bridges, and they may in such streets erect any pillars, lamps, and other works, and do all other acts which the undertakers shall from time to time deem necessary for supplying gas to the inhabitants of the district included within the said limits, doing as little damage as may be in the execution of the powers hereby or by the special Act granted, and making compensation for any damage which may be done in the execution of such powers."

By the Gasworks Clauses Act, 1871, s. 11 :

"The undertakers shall, upon being required so to do by the owner or occupier of any premises situate within twenty-five yards from any main of the undertakers, or such other distance as may be prescribed, give and continue to give a supply of gas for such premises under such pressure in the main as may be prescribed, and they shall furnish and lay any pipe that may be necessary for such purpose (subject to certain prescribed conditions)."

Section 34 of the Normanton Common Inclosure Act, 1804 (44 Geo. 4, c. lxxii.) is, as far as material :

"Provided always, and be it further enacted, that nothing in this Act contained shall be construed to alter, defeat, or impeach the right or title of the said Duke of Leeds, his heirs or assigns, to the mines and minerals lying under the said common or waste ground called Normanton Common, or under any other the waste grounds within the said manor of Normanton; but that the said Duke of Leeds, his heirs and assigns, shall and may from time to time, and at all times hereafter, have, hold, win, work, and enjoy all mines, veins, beds, or seams of coal, and other mines and minerals of what nature or kind soever, within or under the said common and waste grounds, with all convenient and necessary ways, way-leaves, roads and passages, and liberty of laying, making, and repairing waggon ways and other ways in, over and along the said common and waste grounds, or any part thereof, and of searching for, winning, and working the said coal mines, and other mines, and of loading and carrying away the coals and minerals so to be won and gotten; and of making pits, shafts, pit-rooms, and heap-rooms, drifts, levels, ways, and watercourses, and of erecting and using fire engines and other engines, and of altering, changing, pulling down, and carrying away the same, or any of the materials thereof; and to have and use any stone got in the course of sinking pits or shafts, or otherwise in working or getting the said coal mines so reserved as aforesaid, at his and their own free will and pleasure respectively, and to do all such other acts and things, either now in use or hereafter to be invented, as may be necessary and convenient for the full and complete enjoyment thereof, in as ample and beneficial a manner as he or they respectively could or might have done in case this Act had not been made, they, the said Duke of Leeds, and his heirs and assigns, making, allowing, and paying to the owners and occupiers of the allotments, lands, or grounds, whereon and wherein such mines or minerals shall be searched for, won, gotten, or taken away, full satisfaction for the damages which may be done, occasioned, or sustained on the premises, by reason of such searching for, winning, getting, or taking away, or of erecting, continuing, or removing any

A engines, buildings, or materials, or of laying coals or rubbish, or of making or using any waggon ways, roads, or passages, or by reason of any other matter or thing whatsoever, relative to the searching for, winning, or taking away such mines or minerals; such satisfaction and recompense to be in proportion to the loss and damage sustained by such owners and occupiers respectively, according to their several and respective rights and interests in such allotments, lands, or grounds respectively."

B *Sir Farrer Herschell, Q.C., and H. D. Greene* for the defendants.

Forbes, Q.C., and C. M. Atkinson for the plaintiffs.

SIR BALIOL BRETT, M.R.—In this case an action is brought by the Normanton Gas Co. against the defendants, who, by virtue of a lease from the trustees of the Duke of Leeds, who was the lord of the manor, have a right to work the mines under certain land which was inclosed under an inclosure Act. By this Act a highway was to be set out, and the right was reserved to the lord of the manor to work the minerals under the highway, and under the inclosed land. Afterwards a gas company, which was registered under the Companies Act, laid pipes under the highway. In 1878 this company was at work, and was using these pipes, but they had then no rights or liabilities under the Gasworks Clauses Act. They had no Parliamentary authority to lay the pipes, and how they came to lay them is not expressly disclosed by the Special Case. They had the permission of the highway authority to lay the pipes, but they do not appear to have had the permission of the lord of the manor, though it would seem that he did not object.

In 1878 a new company was formed by the Normanton Gas Act of that year, and took over all the property of the old limited company, a part of which property consisted of the gas works and the pipes laid in the highway. It has been suggested on behalf of the defendants that, as the former company laid the pipes in the highway without authority, these pipes were not the property of the limited company, but of the lord of the manor, and, therefore, the Gas Act did not pass the property in the pipes to the plaintiffs. In answer to this, I think we ought to consider the ordinary course of business in obtaining a private Act of Parliament. The plaintiffs must have been proposing to acquire powers to enable them to take over these pipes; if they did not propose this their application for an Act would be an absurdity, for how can it be supposed that the new company, the plaintiffs, intended to take over the works of the old company (limited), but not to take over these pipes, which formed a substantial part of the works? It is obvious that if the pipes had been supposed to belong to the lord of the manor, an application would have been made to transfer the property in the pipes from him to the new company. If the lord of the manor acquiesced in the pipes being laid and used, it might be assumed that he had given the old company a licence to lay and use them, and in that case no question as to right by user would arise, for it would not be an adverse user. If he gave such a licence I should think it would be irrevocable. It seems to me that both the new company and the legislature assumed that these pipes were part of the works of the old company, which were to be transferred to the new company.

The Normanton Gas Act, 1878 (41 & 42 Vict., c. clxi.) incorporates the Gasworks Clauses Act, 1847, and thus gives power to the plaintiffs to lay down pipes under the highway without obtaining the consent of the owner of the land. As to any new pipes so laid down under the Act, it seems to me that it would be unjust if the legislature were to allow pipes to be laid down without the landowner's consent, unless it also gave him compensation; for, by allowing pipes to be laid down without his consent, the legislature takes away the right to bring an action of trespass for laying down the pipes which he would otherwise have had. Therefore, if the words of the statute are doubtful as to whether the right claimed is given or not, I think it would be our duty to say that if no compensation is given, then the right is not given. The Gasworks Clauses Act, 1847, s. 6, gives a right to the company to lay down and maintain gas pipes.

The question then arises whether it is a correct inference that the company A laying down the pipes is entitled as against the landowner, without whose consent they are laid down, to subjacent support for those pipes when so laid. Subjacent support in this sense does not necessarily mean merely support from the soil directly underneath the pipe, measured as if with a plumbline, but a space wider than the actual breadth of the pipe may be required for its support; so that, if the pipe is on the very edge of one person's land, a right of support may be required B as against the owner of the adjoining land in which the pipe does not lie. The true rule of construction is to avoid attributing to the legislature a meaning which results in absurdity; and, therefore, when the legislature has given power to do something, the execution of which requires subjacent support from the land, I think it follows that the persons who have to do the act in question get a right to subjacent support as against the landowner. If this is so, the legislature has C imposed upon the landowner a burden, by preventing him from using his land as he might use it if he were not bound to afford this support. If there is any doubt as to the construction of the statute, I think if we find that the right to support is given, and a burden thereby imposed on the landowner, it must have been intended to give him compensation for the burden thus imposed.

As to new pipes, I think the true construction of s. 6 of the Gasworks Clauses D Act, 1847, is that the company have power to lay pipes under the highway without the consent of the landowner, and therefore the burden is imposed upon the landowner of using his land so as not to take away the support required for the pipes. If, then, the landowner has minerals under the pipes, the statute takes away from him the power of getting and selling those minerals, if by so doing the landowner would withdraw support from the pipes. It is impossible to say that this does not E cause him damage.

Then it is said no damage is done to him until he wants to work the minerals; but I think that is not correct, and that the damage which he suffers consists in not being able to work the minerals as soon as the pipes are laid. I think, therefore, the landowner is entitled to compensation in respect of being deprived of the free use of his own minerals, which he is prevented from working. In *Re F Dudley Corpn.* (1) this court held (and I must say I think rightly), that the compensation was not to be given in dribblets, but the landowner must obtain it once for all. This being so, then as to all the pipes laid down after the Act of 1878, the landowners would be entitled to compensation. If the landowner worked the minerals so as to cause injury to the pipes, the company would have a right of G action, and this right of action would not arise once for all, but as often as damage was done. The damages which would thus accrue to the company would not necessarily be commensurate with the compensation to be awarded to the landowner, nor is the one a condition precedent to the other, but there are independent rights and remedies

The next question is as to the pipes which were laid down before the passing H of the Normanton Gas Act, 1878. It was contended that by that Act the plaintiffs were only to have power to lay down pipes after the Act. Can we suppose it to have been intended that if the company were to take up the existing pipes and immediately relay them, then the Act, and the other Acts which it incorporates, would apply, but that, if they did not go through that farce, then the Acts would not apply? As a matter of business such a conclusion is absurd. I am of opinion I that the intention was that the powers of the Act should be applicable to pipes which were in existence before the Act, and had been used by the old company. The legal result is that the older pipes are to be treated in the same way as if they had been put down after the Act of 1878; and it seems to me that, on the true construction of the Normanton Gas Act, 1878, which incorporates the Gasworks Clauses Act, 1847, s. 6 of the public Act is applicable to the old pipes which were laid down before the Act of 1878 was passed, and, therefore, there is a right to support with regard to those pipes. It follows, therefore, that the defen-

A dants are entitled to the same compensation in respect of those pipes as if they had been laid down after the passing of the Act of 1878.

The conclusion at which I have arrived is that the plaintiffs are entitled to recover damages for workings done since the passing of the Normanton Gas Act only, and that for workings before that Act the defendants are not liable; but they cannot escape liability, if they worked before the Act and did no injury, and then worked after the Act and injury was done, which would not have been done but for the workings before the Act; in that case the plaintiffs would be entitled to damages. The result is that the plaintiffs, the gas company, are entitled to damages, and the defendants, as owners of the minerals, are entitled to compensation.

The question then arises whether the defendants' claim can be brought forward by counterclaim in this action. I am of opinion that it cannot, but must be enforced by arbitration under the statutes. If that is so, it follows that the plaintiffs are entitled to succeed, and to recover damages, and should have the costs of the action, and the defendants are entitled to compensation, which they must obtain by arbitration. The parties stated the Special Case as to both questions, and the appeal was argued as to both questions; therefore, both parties have partially succeeded and partially failed. The result is that the plaintiffs are entitled to recover damages, and the defendants are entitled to compensation, but they cannot recover it in this action, and must proceed to arbitration. Under these circumstances, I think each party ought to pay their own costs of this appeal.

LINDLEY, L.J.—I assume that the mains and pipes laid down by the old company are the property of the plaintiffs; this question is not raised by the Special Case. Up to 1878 neither the plaintiffs nor the old company had any right to support. Then came the Normanton Gas Act, incorporating the Gasworks Clauses Acts, and which I think put the plaintiffs in this position, that either they were left where they were, or were given a right to support, subject to the liability to make compensation. The right of the plaintiffs to support follows from this—the Normanton Gas Act gives the plaintiffs the right to lay down and maintain pipes, and the Gasworks Clauses Act, 1871, s. 11, imposes upon them the obligation of supplying gas. Therefore, the pipes were lawfully in the land; there was no right to let them down, and the right to support is a necessary consequence.

Then the question is raised whether the Act of 1878 applies to the pipes which were laid down by the old company before that Act was passed. No doubt there is a difficulty in saying that the Act in so many words says that it does so, but the Act leads to an absurd conclusion unless it does, and we must put such an interpretation on it as will make sense.

The next question is whether, assuming the plaintiffs have acquired a right to support, the defendants are entitled to compensation. The plaintiffs have got what they had not got before, which involves this consequence, that the mine owners are deprived of the right of working the minerals, and I think, therefore, that the defendants are entitled to compensation by the words at the end of s. 6 of the Gasworks Clauses Act, 1847. I agree that the decision appealed from is right as far as it goes, but it is defective in not dealing with the question of compensation. The true result will be that the plaintiffs are entitled to succeed in the action, and to recover damages, which are to be assessed hereafter; while the defendants are entitled to compensation, but they cannot recover it by counterclaim, they must go to arbitration. I also think there should be no costs of this appeal.

FRY, L.J.—I agree with the conclusion arrived at by the other members of the court. The first question is whether the plaintiffs are entitled to support for the pipes laid down before the Act of 1878. I do not quite agree with the Master of the Rolls as to these pipes, for I think that if they did not belong to the old

company before the Act of 1878 they did not become the property of the new company; but the point is immaterial, for it is not raised by the Special Case. I think that, on the true construction of the Act of 1878, the pipes laid down before that Act must be dealt with as if they had been laid down under that Act. I think it is scarcely straining the words of the Act to say that it puts the pipes which were down before in the same position as those laid down under the Act.

Then as to the obligation to leave support for the pipes. I think the general rule laid down in *Re Dudley Corpn.* (1) is to this effect, that where there is a statutory obligation to maintain something which requires support, or to do something, the result of which is that some structure will be required for which support will be necessary, and where there is compensation given for damage done in the exercise of the powers of the Act, then it will be held that the right of support exists. Apply this to the present case. Is there a statutory obligation to give support? If it rested on the Gasworks Clauses Act, 1847, alone, there might be some difficulty; but s. 11 of the Gasworks Clauses Act, 1871, imposes the obligation to supply gas, which necessitates the laying down of pipes, and the Act of 1847 gives authority to lay down pipes. It seems to me, therefore, that there is a statutory obligation to lay the pipes, and compensation is given by the latter words of s. 6 of the Act of 1847. For these reasons I am of opinion that the plaintiffs have a right to support, and that an obligation is imposed upon them to make compensation to the defendants.

Appeal dismissed.

Solicitors: *Badham & Williams*, for Marsden, *Williams & Co.*, Wakefield; *J. & W. Maude* for Butler & Middlebrook, Leeds.

[*Reported by P. B. HUTCHINS, ESQ., Barrister-at-Law.*]

EDGE v. BOILEAU AND OTHERS

[QUEEN'S BENCH DIVISION (Pollock, B., and Manisty, J.), November 20, 1885]

[Reported 16 Q.B.D. 117; 55 L.J.Q.B. 90; 53 L.T. 907;
34 W.R. 103; 2 T.L.R. 100]

Landlord and Tenant—Covenant—Quiet enjoyment—Breach—Service by landlord of notice requiring sub-tenant to pay rent to him.

Landlord and Tenant—Covenant—Quiet enjoyment—Independent of covenants by tenant to pay rent and keep premises in repair—Need for landlord's covenant to be observed despite breach of tenant's covenants.

By a lease it was provided that the lessors might re-enter the premises if the rent should be in arrear or the lessee should not keep the premises in proper repair. The lessors covenanted that, the lessee paying the rent when due and observing the other covenants on his part, should quietly enjoy the demised premises without interruption. The rent being in arrear, and the premises out of repair, the lessors served notices on sub-tenants of the lessee requiring them not to pay to the lessee any rent then due or to become due, but to pay the same to the lessors, and threatening legal proceedings in default of compliance with the notice. One sub-tenant of the lessee, in pursuance of the said notice, paid his rent to the lessors' agent. In an action by the lessee for breach of the covenant for quiet enjoyment,

Held: (i) the action of the lessors in issuing the notices to the lessee's sub-tenants was more than a mere idle threat and amounted to a breach of the

A covenant for quiet enjoyment; (ii) the covenant for quiet enjoyment was an independent covenant, and the fulfilment by the lessee of his covenants to pay rent and repair was not a condition precedent to his right to sue the lessors for breach of it.

Witchcot and Linesey v. Nine (1) (1612), 1 Brownl. 81, considered.

Dawson v. Dyer (2) (1833), 5 B. & Ad. 584, approved.

B **Notes.** Referred to: *Taylor v. Webb*, [1937] 1 All E.R. 590.

As to covenant for quiet enjoyment, see 23 HALSBURY'S LAWS (3rd Edn.) 601-609; and for cases see 31 DIGEST (Repl.) 131-132.

Cases referred to:

C (1) *Witchcot and Linesey v. Nine* (1612), 1 Brownl. 81; 123 E.R. 679; 31 Digest (Repl.) 144, 2830.

(2) *Dawson v. Dyer* (1833), 5 B. & Ad. 584; 2 Nev. & M.K.B. 559; 110 E.R. 906; 31 Digest (Repl.) 131, 2692.

Also referred to in argument:

Vicars v. Wilcocks (1806), 8 East, 1; 103 E.R. 244; 17 Digest (Repl.) 114, 270.

D *Child v. Stenning* (1879), 11 Ch.D. 82; 48 L.J.Ch. 392; 40 L.T. 302; 43 J.P. 479; 27 W.R. 462, C.A.; 31 Digest (Repl.) 148, 2873.

Bastin v. Bidwell (1881), 18 Ch.D. 238; 44 L.T. 742; 31 Digest (Repl.) 74, 2289.

Grey v. Friar (1854), 4 H.L.Cas. 565; 2 C.L.R. 434; 23 L.T.O.S. 334; 18 Jur. 1036; 10 E.R. 583, H.L.; 31 Digest (Repl.) 598, 7159.

E *Sanderson v. Berwick-upon-Tweed Corpn.* (1884), 13 Q.B.D. 547; 53 L.J.Q.B. 559; 51 L.T. 495; 49 J.P. 6; 33 W.R. 67, C.A.; 31 Digest (Repl.) 141, 2801.

Motion by the defendants, the landlords, that a verdict and judgment in favour of the plaintiff, the tenant, entered by MATTHEW, J., at Birmingham Assizes, be set aside, and for a new trial, or that judgment be entered for the defendants.

F On Aug. 19, 1882, six months before the expiry of a former lease, the defendants renewed a lease of premises to the plaintiff for a term of fourteen years, at a rent of £225 per annum. The lease provided for re-entry by the lessors if the rent should be in arrear for twenty-one days, and if on demand thereof there should not be sufficient distress upon the premises, or if the lessee should not duly observe the covenant to repair, and the other covenants on his part, after three months' notice in writing. The lessors covenanted that, the lessee paying the rent when due and observing the covenant to repair and the other covenants on his part, should peaceably and quietly enjoy the premises without interruption from the lessors or persons claiming through them. On Oct. 13, 1884, the plaintiff owed half a year's rent, due on June 24, 1884; but the same had not been demanded, and there was a sufficient distress upon the premises. No notice in writing had been given to the plaintiff as to any breach of covenant on his part. On Oct. 13, 1884, the defendants' agent, by their authority, served notices on several of the plaintiff's sub-tenants, requiring them not to pay to the plaintiff any rent then due or thereafter to become due to him, but to pay the same to the defendants, and threatening legal proceedings in default of compliance with the notice. On Oct. 21 the rent due from the plaintiff was demanded and paid. When the plaintiff heard of the notices that had been sent to his sub-tenants, he demanded their withdrawal by the defendants, but this was not done. On Dec. 5, 1884, the defendants demanded and received, in pursuance of their said notices, of a sub-tenant of the plaintiff £13 15s., being rent payable to the plaintiff. The plaintiff thereupon brought this action, alleging loss of rent and damage to the value of his property occasioned by the breach of the defendants' covenant for quiet enjoyment. The defendants brought into court £14, the amount received by them from the plaintiff's sub-tenant, with interest, without admitting any liability, and counter-claimed against the plaintiff for breach of his covenant to repair. The jury found

for the plaintiff on the claim, and assessed the damages at £100, and on the counter-claim they found that £23 were required to put the premises in repair, and judgment was entered for the plaintiff. The defendants now moved for a new trial.

Channell, Q.C., and *W. Graham* for the defendants.

Hugo Young and *Lindsell* for the plaintiff.

POLLOCK, B.—In this case all the arguments and authorities are very clearly before us. The case for the plaintiff is a claim for breach of a covenant for quiet enjoyment. The defendants deny that there has been any infringement of such covenant, and say, further, that there was a failure on the part of the plaintiff to perform conditions precedent—namely, to pay the rent and keep the premises in repair—and they say that no damages, except possibly nominal damages, are recoverable.

Let us consider those points. In my opinion, there has been a breach of the covenant for quiet enjoyment. Here the covenant for quiet enjoyment is in the terms that the lessee, paying the rent when due and observing the covenants on his part, should peaceably and quietly enjoy the premises without interruption from the lessors or persons claiming through them. The facts are as follows: During the plaintiff's term, there being some rent in arrear, the defendants, by their agent, sent notices to all the plaintiff's sub-tenants, requiring them to pay their rents then due or to become due to the defendants' agent, and not to pay them to the plaintiff, or legal proceedings would be taken against them. This, to my mind, is an interruption of the plaintiff's right to the quiet enjoyment of his premises. That notice is more than a false and idle claim or threat, and is a distinct breach of the covenant for quiet enjoyment. The only authority opposed to that view cited by counsel for the defendants is *Witchcot and Linesey v. Nine* (1). When the report of that case is looked at, it is very short, and simply says that the mere telling a man not to pay his rent is not a breach of the covenant for quiet enjoyment. There is nothing said as to the circumstances under which the man was told not to pay his rent. Moreover, in that case the notice had no effect, because the tenant paid the rent to the plaintiffs in spite of the defendant's prohibition, whereas here one of the plaintiff's sub-tenants actually paid his rent to the defendants' agent instead of to the plaintiff, so that here the notice had a distinct effect. I can understand that there might be circumstances under which such a notice might be treated as a mere idle threat, and as not amounting to a breach of the covenant for quiet enjoyment. Here, I think there is a substantial interference with the rights of the plaintiff, and one which might very well seriously reduce the value of his property.

Then there comes the second point. It is contended on behalf of the defendants that the covenants of the lessors and of the lessee must be read together, and that the covenants to pay rent and to repair are conditions precedent to the lessee's right to sue the lessors for an infringement of their covenant for quiet enjoyment. I should have thought that proposition untenable, even without authority. But there appears to be a case directly in point, namely, *Dawson v. Dyer* (2). In that case the same argument was put before the court as in the present case, and *DENMAN, C.J.*, and *PARKE, J.*, both gave their reasons. *DENMAN, C.J.*, there says (5 B. & Ad. at p. 587):

“According to that argument [i.e. that it cannot have been intended by the deed of demise that the plaintiff should have an action against the defendant for disturbance of his possession at the time when the defendant was entitled to treat him as a trespasser], the tenant, if evicted while the rent was so in arrear, could not have maintained an action though the landlord had waived the forfeiture.”

PARKE, J., in the same case, concludes by saying (*ibid.* at p. 588):

“The proviso in the present case is introduced to reserve a power to the landlord on the particular occasions specified. If he, or any person claiming under

A him, enters on the tenant, except by virtue of that power, the landlord is liable on the covenant for quiet enjoyment."

That seems to me to be an express authority, and consistent with the facts of the present case. This application must, therefore, be refused.

MANISTY, J., concurred.

B Motion dismissed.

Solicitors: *Burton & Co.*, for *Allen & Edge*, Birmingham; *Blake & Heseltine*, for *Field, Son & Pulley*, Norwich.

[Reported by F. A. CRAILSHEIM, Esq., Barrister-at-Law.]

D GREER v. YOUNG

[COURT OF APPEAL (Sir Baliol Brett, M.R., Cotton and Bowen, L.JJ.), July 10, 13, 1883]

[Reported 24 Ch.D. 545; 52 L.J.Ch. 915; 49 L.T. 224;
31 W.R. 930]

E Solicitor—Lien—Extent of lien—Recovery of trust property—Charging order not limited to extent of client's interest in property recovered.

F Adult and infant beneficiaries had interests in property settled by the will of a testator under which P. and Y. were the executors and trustees. Trust moneys were lost due to breaches of trust committed by P., who died insolvent. An administration action was begun by a stranger in respect of P.'s estate, and in that action Y., as the surviving executor of the testator, carried in a proof in respect of the breaches of trust and was declared entitled to a dividend. The adult beneficiaries then brought the present action, successfully claiming a declaration that P. and Y. were jointly and severally liable for P.'s breaches of trust even though Y. was not morally to blame, and a dividend was declared on Y.'s estate, who was bankrupt. In this action new trustees were appointed in place of P. and Y., and it was to the new trustees that the dividend on P.'s estate was paid. The solicitor employed by the adult beneficiaries in the present action claimed to be entitled to an order charging the dividends received or to be received by the new trustees from P.'s estate and from Y.'s estate with the payment of his costs. This was opposed by the new trustees representing the infant beneficiaries.

H Held: (i) the dividend to be received by the new trustees from Y.'s estate as a result of the present action was property recovered by the solicitor, and even though the solicitor was employed only by the adult beneficiaries, he was entitled to a charging order on the interests of the infants as well as on those of the adult beneficiaries, the court being able to make the order because—and only because—the infants had been represented; (ii) the dividend from P.'s estate which was received by the new trustees had not been preserved or recovered by the solicitor, and he was, therefore, not entitled to a charging order in respect of it, since the only effect of the present action was to cause this dividend to be paid to the new trustees instead of to Y.; but he might have been entitled to a charging order if Y. had been fraudulent and the present action had prevented this dividend from coming into his hands.

I Notes. The Attorneys and Solicitors Act, 1860, s. 28, has been repealed and replaced by the Solicitors Act, 1957, s. 72. As to the liability of a trustee for the acts of a co-trustee, see the Trustee Act, 1925, s. 30.

Considered: *Jackson v. Smith, Ex parte Digby* (1884), 53 L.J.Ch. 972. Applied: *A*
Keeson v. Luxmoore (1889), 61 L.T. 199; *Scholey v. Peck*, [1893] 1 Ch. 709; *Ex*
parte Tweed, [1899] 2 Q.B. 167; *Ridd v. Thorne*, [1902] 2 Ch. 344; *Re Turner, Wood*
v. Turner, [1907] 2 Ch. 126. Considered: *The Dirigo*, [1920] P. 425; *Re Clayton,*
Collins v. Clayton, [1940] 2 All E.R. 233. Referred to: *Charlton v. Charlton* (1883),
 52 L.J.Ch. 971; *Harrison v. Harrison* (1888), 13 P.D. 180; *Pelsall Coal and Iron Co. v.*
London and North Western Rail. Co. (No. 3) (1892), 8 Ry. & Can. Tr. Cas. 146; *Re B*
Thornhill, Thornhill v. Nixon (1892), 36 Sol. Jo. 218; *Re Humphreys, Ex parte Lloyd*
George and George, [1898] 1 Q.B. 520; *Redfern v. Rosenthal* (1901), 85 L.T. 313; *Re*
Horne, Horne v. Horne, [1906] 1 Ch. 271; *Wimbourne v. Fine*, [1952] 2 All E.R.
 681; *Wagg v. Law Society*, [1957] 2 All E.R. 274.

As to statutory lien and charging orders, see 36 HALSBURY'S LAWS (3rd Edn.) 184
 et seq.; and for cases see 42 DIGEST 290-305. For the Solicitors Act, 1957, C
 s. 72, see 37 HALSBURY'S STATUTES (2nd Edn.) 1116; and for the Trustee Act, 1925,
 s. 30, see 26 HALSBURY'S STATUTES (2nd Edn.) 92.

Cases referred to:

(1) *Bulley v. Bulley* (1878), 8 Ch.D. 479; 47 L.J.Ch. 841; 38 L.T. 401; 26 W.R.
 638, C.A.; 42 Digest 292, 3271.

(2) *Pinkerton v. Easton* (1873), L.R. 16 Eq. 490; 29 L.T. 364; 21 W.R. 943; D
 sub nom. *Pinkerton v. Easton, Re Pinkerton*, 42 L.J.Ch. 878, L.C.; 42
 Digest 294, 3288.

(3) *Catlow v. Catlow* (1877), 2 C.P.D. 362; 25 W.R. 866; 42 Digest 295, 3290.

Also referred to in argument:

Bonser v. Bradshaw (1860), 30 L.J.Ch. 159; 3 L.T. 545; 25 J.P. 483; 7 Jur.N.S. E
 231; 9 W.R. 229; on appeal (1862), 10 W.R. 481, L.J.J.; 42 Digest 291, 3265.
Re Keane, Lumley v. Desborough (1871), L.R. 12 Eq. 115; 40 L.J.Ch. 617; 24
 L.T. 57; 19 W.R. 498; 42 Digest 292, 3275.

Berrie v. Howitt (1869), L.R. 9 Eq. 1; 39 L.J.Ch. 119; 21 L.T. 414; 42 Digest
 292, 3269.

Bailey v. Birchall, Barnes v. Ratcliffe, Bailey v. Ratcliffe (1865), 2 Hem. & M. F
 371; 5 New Rep. 287; 11 Jur.N.S. 57; 71 E.R. 507; 42 Digest 292, 3268.

Twynam v. Porter (1870), L.R. 11 Eq. 181; 40 L.J.Ch. 80; 23 L.T. 551; 19
 W.R. 151; 42 Digest 294, 3285.

Scholefield v. Lockwood (1868), L.R. 7 Eq. 83; 38 L.J.Ch. 232; sub nom.
Scolefield v. Lockwood, 17 W.R. 184; 42 Digest 293, 3283.

Pritchard v. Roberts (1873), L.R. 17 Eq. 222; 43 L.J.Ch. 129; 29 L.T. 883; G
 22 W.R. 259; 42 Digest 297, 3311.

Appeal by Fanshaw and Harper, the new trustees of the will of William Greer
 deceased, from a decision of CHITTY, J., refusing to discharge an order made by him
 in chambers by which he had held that E. K. Blyth, who had acted as solicitor for
 the plaintiffs in the action, was entitled to a charging order for his costs, amounting
 to £354 9s. 9d., upon the dividends which had been or might be declared out of H.
 the estates of Pollock and the defendant Young, the original executors and trustees
 of the will, to which dividends the new trustees were entitled as compensation for
 breaches of trust for which Pollock (who had since died) and Young (a bankrupt)
 were liable.

By the Solicitors Act, 1860, s. 28:

"In every case in which an attorney or solicitor shall be employed to prose- I
 cute or defend any suit matter or proceeding in any court of justice, it shall be
 lawful for the Court or Judge before whom any such suit matter or proceeding
 has been heard, or shall be depending, to declare such attorney or solicitor
 entitled to a charge upon the property recovered or preserved, and upon such
 declaration being made, such attorney or solicitor shall have a charge upon and
 against and a right to payment out of the property of whatsoever nature tenure
 or kind the same may be, which shall have been recovered or preserved through
 the instrumentality of any such attorney or solicitor, for the taxed costs, charges

A and expenses of or in reference to such suit matter or proceeding; and it shall
be lawful for such court or judge to make such order or orders for taxation of
and for raising and payment of such costs, charges and expenses out of the said
property as to such court or judge shall appear just and proper; and all con-
veyances and acts done to defeat, or which shall operate to defeat such charge
or right shall unless made to a bona fide purchaser for value without notice, be
B absolutely void and of no effect as against such charge or right; provided always
that no such order shall be made by any such court or judge in any case in
which the right to recover payment of such costs charges and expenses is barred
by any Statute of Limitations."

C William Greer, who died on July 8, 1865, by his will dated Aug. 4, 1863,
appointed A. A. Pollock and F. Young executors and trustees, and bequeathed to
them his residuary personal estate upon trust to convert the same into money, and,
after paying his funeral and testamentary expenses and debts and the legacies
thereby given, to invest the same, and out of the income of the investments to
pay an annuity of £250 per annum to his wife, Isabella Robson Greer, during her
widowhood, and, in case she should marry, to pay her an annuity of £100 during
D her life for her separate use, and subject to such annuities, to pay the sum of £1,000
to his daughter for her separate use. The rest of the residue was given to the
trustees in trust for the testator's daughter during her life, and after her death,
as to one moiety, for her husband for life, and subject thereto in trust for her
children. The executors proved the will, and the daughter afterwards married
C. S. Napper, the £1,000 being paid to the trustees of her marriage settlement. Pollock
E died intestate in August, 1873, and letters of administration to his estate were granted
to his widow C. D. H. Pollock. Pollock's affairs were found to be greatly involved,
and in September, 1873, a suit of *Middleton v. Pollock* was instituted in the Court
of Chancery for administration of his insolvent estate. In this suit it was discovered
that Pollock had committed breaches of trust by which large sums belonging to
the estate of Greer had been lost. Young, as the surviving executor of Greer, made
F a claim in *Middleton v. Pollock* for £3,420 in respect of Pollock's breaches of trust
in connection with the estate of Greer.

In November, 1874, a suit of *Greer v. Young* was commenced by Mrs. Greer and
Mrs. Napper against Young, Mrs. Pollock, and Mr. Napper, in which it was alleged
that Mrs. Greer's annuity was in arrear, that Young was unable to pay the same,
and that the claim of Young in *Middleton v. Pollock* was for that of the actual
G liability of Pollock for the breaches of trust; and the plaintiffs prayed for a declara-
tion that Young and the estate of Pollock were jointly and severally liable for
Pollock's breaches of trust; for an account; that Young might be ordered to make
good the breaches of trust; and that new trustees of the will of Greer might be
appointed in the place of Young and Pollock, to receive the dividend coming from
Pollock's estate.

H By a decree made in *Greer v. Young* by SIR GEORGE JESSEL, M.R., on Feb. 11,
1876, Young & Co. and H. Pollock (as administratrix of A. A. Pollock) were declared
jointly and severally liable to make good the £3,420, and that the trust estate of
Greer was entitled to the benefit of the proof carried in by Young in *Middleton v.*
Pollock, and it was ordered that Young should pay the amount into court in
Greer v. Young and that two proper persons should be appointed trustees of Greer's
I will. Fanshawe and Harper were appointed trustees, and they obtained payment of
£1,035, the dividend certified in *Middleton v. Pollock* to be due to Greer's estate.
Young was afterwards adjudicated bankrupt, and a dividend of 1s. in the pound
was declared in his bankruptcy, the sum payable to the trustees in respect thereof
being £180 14s. 6d.

Mr. E. K. Blyth, the solicitor for the plaintiffs in *Greer v. Young*, took out a
summons for a charging order for his costs, amounting to £354 9s. 9d. in that suit
upon the dividends which had been or might be declared out of the estates of
Pollock and Young.

CHITTY, J., made the order asked in chambers, whereupon Fanshawe and Harper A moved to discharge the order. The motion was dismissed. From this decision the trustees appealed on behalf of the infant children of Mrs. Napper.

Whitehorne, Q.C., and Underhill for the trustees.
T. R. Warrington for Blyth.

SIR BALIOL BRETT, M.R.—In this case Young and Pollock were joint trustees B of William Greer. It appeared after Pollock's death that he had been guilty of breaches of trust. By these breaches of trust moneys belonging to Greer's estate have been lost, except so far as the losses have been or may be covered by the payment of a dividend from Pollock's insolvent estate and a dividend from the estate of Young. Young, though not morally, was legally as liable for the breach C of trust committed by his co-trustee as if they had been done by himself. Mr. Blyth, the solicitor who asks for a charge, was employed by the testator's wife and daughter to bring an action against Young to recover what the estate of Greer had lost by the breaches of trust. The relief in that action could only be by a decree declaring Young liable to make good the breaches. No decree in *Greer v. Young* could make anyone liable to pay dividends out of Pollock's estate; D *Greer v. Young* was not wanted for that purpose. The dividends out of Pollock's estate would have been recovered, whatever had been done in *Greer v. Young*. The decree would be for the benefit, among others, of the infants entitled in remainder.

The solicitor for the plaintiffs in *Greer v. Young* asks for a charging order on whatever is recovered by his exertions, and has obtained from CHITTY, J., an order E charging what is recovered either in *Greer v. Young* or *Middleton v. Pollock*. The question is whether that order can stand.

It has been argued elaborately that, even if the dividends from Pollock's estate had been recovered by the solicitor's action and the infants will ultimately get them, no charging order can be made on them because the fund will go to persons now infants. It was said, first, that the solicitor must be employed F by the person whose property was to be charged, and that an infant could not employ a solicitor; and it is true that an infant cannot employ a solicitor. It was admitted, however, that, although the infant did not employ the solicitor, someone else did, and that, when the infant came of age, if he adopted the proceedings he would have to pay the costs. The question depends entirely on the meaning of s. 28 of the Attorneys and Solicitors Act, 1860. I take the view taken G by BACON, V.-C., in *Bulley v. Bulley* (1) that the theory of the section is the theory of salvage. I do not adopt the exact analogy of salvage, but the fundamental theory of the section is that whatever is recovered or preserved by the solicitor's exertions is to be treated as a salvage, though not rescued, and that the solicitor is to be paid as if salvage services had been rendered. In *Pinkerton v. Easton* (2) LORD SELBORNE, L.C., although he does not actually make use of the word "salvage" H uses expressions relating to salvage. He says (L.R. 16 Eq. at p. 492):

"Here the legislature has given, not a charge, but a power to the court to create a charge for a solicitor's costs upon 'property recovered or preserved' when meritorious services of the solicitor have resulted in such recovery or preservation. I

He could scarcely have defined salvage services more correctly than as meritorious services undertaken, without any contract, in respect of something in danger. The charge is independent of contract when something in danger is saved by meritorious services; and if that is so, it is quite immaterial whether an infant can employ a solicitor, and whether the person whose property is recovered or preserved employed the solicitor. The section does not, of course, allow a solicitor to go in as a mere volunteer to recover or preserve property; but, if anyone has bona fide

A employed him to do so, there is nothing in the section to confine the charge to the interest of the employer in the property recovered or preserved. If, by means of the employment of the solicitor, property is recovered or preserved, all the persons interested in the property may be bound by the charge, though it is difficult to see how property could be recovered or preserved without all persons interested in it being directly or indirectly represented in the proceedings. Whether the property has
B been recovered or not by the proceedings taken, is a question of fact depending upon a knowledge of law; but, when it is found that the property has been recovered or preserved, it is no objection to giving a charge that the person whose property is recovered or preserved could not employ a solicitor—so that the fact that the person is an infant when the order is made affords no objection. I do not think that the charging order could be made, unless at the time the order was made the
C infant was represented; but he was represented in this case.

But, assuming that infancy constitutes no objection, was the suit of *Greer v. Young*, in which this solicitor was engaged, alone instrumental in recovering or preserving the dividend out of Pollock's estate? This action could only end in a decree against Young's estate, and, so far as that is concerned, there is recovery, and a charging order must be made in respect of the dividend on Young's estate.

D It is not, however, within the bounds of possibility to say that any part of Pollock's estate was recovered in *Greer v. Young*. It was said that the dividend on Pollock's estate was recovered or preserved by the appointment of new trustees in *Greer v. Young*. That might perhaps have been truly called recovery if Young had been charged as a fraudulent trustee and had been removed, and his removal
E had saved funds coming to his hands as trustee. But he was not removed or charged as a fraudulent trustee, and so far, therefore, as the charging order affects Pollock's estate it must be set aside. But it will stand against anything coming from Young's estate. That, however, is so small a part of the order, that the appeal must be considered as having substantially succeeded, and the appellant is entitled to costs. I may add that I am not prepared to say that *Catlow v. Catlow* (3) is incorrect. A question of fact only was involved, and, therefore, the
F case cannot be considered an authority.

COTTON, L.J.—The matter of substance in this case is whether the charging order can be made on the dividend recovered from Pollock's estate. Section 28 of the Attorneys and Solicitors Act, 1860, gives the court power to give a charge
G to the solicitor, but does not itself give him a charge. It cannot, in my opinion, be said that the fund recovered from Pollock's estate has been recovered or preserved in this action. The proof had, before this action was commenced, been carried in in *Middleton v. Pollock*, and in that suit the dividend has been recovered. It is said that if the fund had come to Young's hands it might have been lost, and that *Greer v. Young* was necessary to get new trustees appointed, and, therefore, by
H this suit the dividend was preserved; but it is a fallacy to say that it was preserved, within the meaning of the section, in this suit. If it had been proved that Young had intended, if he received this dividend, to misappropriate it, it might have been said that it had been recovered in this action, but that is not even suggested. The mere appointment of trustees in this suit to receive the dividend in *Middleton v. Pollock* is not recovery or preservation. Has the court, then, power to give a charge
I on that dividend for the costs in *Greer v. Young*? I am of opinion that it has not. No loss was saved by this action as regards Pollock's estate. If, however, anything is ever recovered against Young's estate, it will be by means of this suit; for it was necessary to establish his liability.

As to the point of infancy—which only relates to a small sum—it was said that, even if the property could be said to have been recovered, the court could not charge it in favour of the solicitor. One objection was that the court had only power to declare a charge as against the interest of the person who actually employed the solicitor. In my opinion, that is contrary to the words of s. 28, which

does not confine the power to charge to the interest of the employer, but says that the charge may be declared on "the property recovered or preserved." To decide in favour of the trustees on this point would be to repeal the section. The question as to the quantity of the plaintiff's interest is no doubt important. As a rule, the plaintiff's interest only is recovered, and it is, therefore, material to inquire what that interest is. For instance, if an action is brought to recover an annuity charged on an estate, the plaintiff recovers, not the estate, but the annuity. To that extent the inquiry as to the plaintiff's interest is material; but to say that only the interest of the plaintiff can be charged when he has recovered property on behalf of others as well as of himself, is fallacious. It has been said that this would lead to strangers suing. I do not see how it could. The courts do not entertain suits by strangers; but if a person has an interest in property enabling him to sue on behalf of himself and others, and recovers the whole property, I can see no reason why the solicitor employed should not have a charge on the whole property. Another objection is, that no charge can be made on the interest of an infant. I do not agree with that. In administration actions costs are often ordered to be paid out of a residue to which infants are entitled. A good deal of argument turned on certain cases, in which it was said that an infant could not employ a solicitor; and it was urged that this solicitor was acting on behalf of infants who could not employ him. But that is not quite the case. A solicitor is employed by someone on behalf of an infant. He has recovered the property, which generally entitles him to have a charge declared, and the mere fact that there are infants, does not, in my opinion, prevent the court from declaring a charge. The infants ought to be represented when the charge is made, and they were in this case. In my opinion the solicitor is entitled to a charge on anything to be recovered from Young's estate, and that part of the order ought to be affirmed.

BOWEN, L.J.—I am of the same opinion. It seems clear to me that the fund received from Pollock's estate has not been recovered within the meaning of s. 28 of the Attorneys and Solicitors Act, 1860, in the action of *Greer v. Young*. I do not think we arrive at anything in this case by referring to other cases. It is necessary, in order to charge the dividend from Young's estate, to put a construction on this important section. The difficulty in the way of counsel for the trustees is that he is endeavouring to read words not there into the section, which itself is perfectly plain. It appears to me that, whether the infant had or had not anything to do with the conduct of the action, the section applies to this case. The section is very general, and applies in terms to all cases in which a solicitor is employed, and enables a charge to be made, not on the mere interest of the plaintiff, but on all the property recovered, whether for the plaintiff alone, or for himself and others. It is a salvage section. The solicitor lawfully employed is treated as a salvor, and the very object of the section is that property recovered, or preserved, into whosoever hands it passes, passes subject to the charge. Counsel argued that the interest of an infant could not be charged, because he did not employ the solicitor; but the words of the Act are too wide for that. Take the case of a remainderman. If property is recovered for him, is there any reason why it should not be charged, although he has been no party to the action? He might be a mere stranger, and have no knowledge of the proceedings; but, if the property is recovered for him, there is nothing in the section to prevent a charge from being declared against his interest. If an infant were sui juris he would be bound by a charge. Why should the fact of his infancy save him from disability? I think the section gives the court a discretionary power to make the charge, and does not give the solicitor an absolute right to the order. The person whose interest is to be bound should, I think, have an opportunity of objecting to the order, but I think these infants have been heard. So far as Young's estate is concerned, I think the order should be affirmed. We have held that the dividend from Pollock's estate has not been recovered in *Greer v. Young*, and to that extent the appeal succeeds. It is not necessary to consider the cases which have been cited; but the current

A of authority seems to me to be in favour of a liberal construction of the section, which involves rewarding the meritorious conduct of the salvor, and *Bulley v. Bulley* (1) and *Pinkerton v. Easton* (2) show that great lawyers are in favour of such a construction.

Appeal allowed as to Pollock's dividend.

B Solicitors: *Wilkins & Fanshawe; F. Dutton.*

[Reported by FRANK EVANS, Esq., Barrister-at-Law.]

C

VALLANCE v. FALLE

[QUEEN'S BENCH DIVISION (Stephen and Mathew, JJ.), May 23, 1884]

[Reported 13 Q.B.D. 109; 53 L.J.Q.B. 459; 51 L.T. 158;
48 J.P. 519; 32 W.R. 770; 5 Asp.M.L.C. 280]

Shipping—Seaman—Discharge—Certificate—Refusal of master to give certificate—Seaman's right to damages—Merchant Shipping Act, 1854 (17 & 18 Vict., c. 104), s. 172, s. 524.

E By the Merchant Shipping Act, 1854, s. 172: "Upon the discharge of any seaman . . . the master shall sign and give him a certificate of his discharge . . . and if any master fails to sign and give to any such seaman such certificate of discharge he shall for each such offence incur a penalty not exceeding £10. . . ." By s. 524 of the Act: "Any court . . . imposing any penalty under this Act . . . may, if it . . . thinks fit, direct the whole or any part thereof to be applied in compensating any person for any wrong or damage which he may have sustained by the act or default in respect of which such penalty is imposed. . . ."

In an action for damages brought by the plaintiff, a seaman, against the defendant, the master of a ship, for his refusal to give a certificate of discharge,

G **Held:** upon the true construction of the Act, the penalty provided by s. 172 was the exclusive remedy for any damage suffered by the plaintiff and an action for damages would not lie.

Notes. Sections 172 and 524 of the Merchant Shipping Act, 1854, have been replaced by s. 128 and s. 699 (1) of the Merchant Shipping Act, 1894 (23 HALSBURY'S STATUTES (2nd Edn.) 395).

H Referred to: *Groves v. Lord Wimborne*, [1895-9] All E.R.Rep. 147; *Cutler v. Wandsworth Stadium, Ltd.*, [1949] 1 All E.R. 544.

As to discharge of seamen, see 35 HALSBURY'S LAWS (3rd Edn.) 147 et seq.; and for cases see 41 DIGEST 252 et seq.

Cases referred to:

(1) *Beckford v. Hood* (1798), 7 Term Rep. 620; 101 E.R. 1164; 13 Digest (Repl.) 121, 617.

I (2) *Atkinson v. Newcastle Waterworks Co.* (1877), 2 Ex.D. 441; 46 L.J.Ex. 775; 36 L.T. 761; 25 W.R. 794, C.A.; 13 Digest (Repl.) 319, 1268.

(3) *Wolverhampton New Waterworks Co. v. Hawkesford* (1859), 6 C.B.N.S. 336; 28 L.J.C.P. 242; 33 L.T.O.S. 366; 5 Jur.N.S. 1104; 7 W.R. 464; 141 E.R. 283; 42 Digest 752, 1768.

Also referred to in argument:

Hurrell v. Ellis (1845), 2 C.B. 295; 15 L.J.C.P. 18; 6 L.T.O.S. 128; 9 Jur. 1013; 135 E.R. 958; 42 Digest 852, 69.

Stevens v. Jeacocke (1848), 11 Q.B. 731; 17 L.J.Q.B. 163; 11 L.T.O.S. 101; A
12 Jur. 477; 116 E.R. 647; 42 Digest (Repl.) 750, 1739.

Rogers v. MacNamara (1853), 14 C.B. 27; 2 C.L.R. 569; 23 L.J.C.P. 1; 17
Jur. 1166; 2 W.R. 19; 139 E.R. 12; 42 Digest 852, 70.

Couch v. Steel (1854), 3 E. & B. 402; 2 C.L.R. 940; 23 L.J.Q.B. 121; 22 L.T.O.S.
271; 18 Jur. 515; 2 W.R. 170; 118 E.R. 1193; 42 Digest 750, 1739a.

Wright v. London General Omnibus Co. (1877), 2 Q.B.D. 271; 46 L.J.Q.B. 429; B
36 L.T. 590; 41 J.P. 486; 25 W.R. 647, D.C.; 36 Digest (Repl.) 110, 554.

Appeal from a decision of Weymouth County Court in an action in which the plaintiff, a seaman, sought to recover damages against the defendant, the master of a ship called the *Brighton*, trading between Weymouth and the Channel Islands, for improperly withholding and detaining from the plaintiff a certificate of discharge to which the plaintiff was entitled on the termination of his service on board the said ship, whereby the plaintiff was unable to obtain employment in other ships. The county court judge nonsuited the plaintiff on the ground that his only remedy was by summons before a court of summary jurisdiction under the Merchant Shipping Act, 1854.

By the Merchant Shipping Act, 1854, s. 170 :

"In the case of all British foreign-going ships, in whatever part of Her Majesty's dominions the same are registered, all seamen discharged in the United Kingdom shall be discharged and receive their wages in the presence of a shipping master duly appointed under this Act, except in cases where some competent court otherwise directs; and any master or owner of any such ship who discharges any seaman belonging thereto or except as aforesaid pays within the United Kingdom in any other manner shall incur a penalty not exceeding £10, and in the case of home-trade ships seamen may, if the owner or master so desires, be discharged and receive their wages in like manner."

By s. 524 :

"Upon the discharge of any seaman, or upon payment of his wages, the master shall sign and give him a certificate of his discharge in a form sanctioned by the Board of Trade, specifying the period of his service and the time and place of his discharge; and if any master fails to sign and give any such seaman such certificate of discharge he shall for each such offence incur a penalty not exceeding £10; and the master shall also upon the discharge of every certificated mate, whose certificate of competency or service has been delivered to and retained by him, return such certificate, and shall in default incur a penalty not exceeding £20."

By s. 524 :

"Any court, justice, or magistrate imposing any penalty under this Act for which no specific application is herein provided, may, if it or he thinks fit, direct the whole or any part thereof to be applied in compensating any person for any wrong or damage which he may have sustained by the act or default in respect of which such penalty is imposed, or to be applied in or towards payment of the expenses of the proceedings."

Francis Turner for the plaintiff.

Tindal Atkinson for the defendant.

STEPHEN, J.—I am of opinion that the judgment of the county court judge must be affirmed. The case has been well argued on both sides, and I believe every authority has been cited. I do not intend to follow the distinctions which have been drawn between the various decisions; but the general rule to be deduced from them seems to be that every particular enactment providing a summary remedy of this kind must be considered with respect to its provisions and object in order to discover whether the legislature intended to confer a general right, which might be the subject of an action, with a collateral remedy by summons at petty sessions,

A or whether the duty imposed was sanctioned only by the particular penalty, and therefore enforceable by no other than the summary remedy. We must, therefore, consider the provisions of this statute.

B Section 170 deals with foreign-going ships, and it appears to give a certificate in such cases more value than in coasting ships of the class in this case. The form authorised by the Board of Trade for foreign-going ships includes an entry as to character; but no effect of that kind is given by the form of certificate for coasters under s. 172, nor does any special value appear to attach to such certificate. Section 172 makes it the duty of the master, upon the discharge of any seaman, to sign and give him a certificate of his discharge in a form sanctioned by the Board of Trade, specifying the period of his service, and the time and place of his discharge, and the section goes on to provide that if any master fails to sign and give to any such seaman such certificate of discharge he shall for each such offence incur a penalty of £10.

D There is a provision later on in the Act (s. 524) that any court, justice, or magistrate, imposing a penalty for which no specific application is given, may direct the whole or any part thereof to be applied in compensating any person for any wrong or damage which he may have sustained by the act or default in respect of which such penalty is imposed. It appears, therefore, that this is an offence, created by the statute, for which a specific remedy is provided for any damage which may be the consequence of it.

E As to the cases cited, I have already said that I think every statutory remedy of this kind must depend upon itself, and can have but little authority with regard to others; it will be sufficient, therefore, if I allude only to one or two of those upon which counsel for the plaintiff relied. For instance, in *Beckford v. Hood* (1) the question decided was whether a small and inadequate penalty given to an informer precluded an aggrieved author from obtaining damages in an action for breach of copyright. LORD KENYON there said (7 Term Rep. at p. 627):

F "I cannot think that the legislature would act so inconsistently as to confer a right, and leave the party whose property was invaded without redress".

G That consideration can have no weight in the case before us, because s. 524 gives to the seaman aggrieved a right to apply to the court of summary jurisdiction for as much of the £10 penalty as may be considered adequate to the circumstances, and I cannot think that any damage he could suffer would be likely to exceed that amount. On the other hand, in *Atkinson v. Newcastle Waterworks Co.* (2) it was obvious that the defendants could never have been intended, by an obligation to supply water for fire engines, to be made insurers for the whole of a large town, when a specific penalty was imposed for failure to fulfil the obligation. That case is far stronger than this, and, to my mind, is no more an authority than the other; but the conclusion there arrived at seems to me more appropriate to this case than that of the copyright, and I think, having regard to the nature of the certificate, the injury likely to result from its omission, and all the provisions in relation thereto, that the remedy, and only remedy, for the wrong of which the plaintiff complains, is by summons before petty sessions. The county court judge, therefore, was right in nonsuiting the plaintiff in this action.

I **MATHEW, J.**—I am of the same opinion, and I must say I feel no doubt about it. With regard to a statutory remedy of this description, it was observed by WILLES, J., in *Wolverhampton New Waterworks Co. v. Hawkesford* (3) (28 L.J.C.P. at p. 246):

"There are three classes of cases in which a liability may be established by statute. There is that class where there is a liability existing at common law, and which is only re-enacted by the statute with a special form of remedy; there, unless the statute contains words necessarily excluding the common law remedy, the plaintiff has his election of proceeding either under the statute or at common law. Then there is a second class which consists of those cases

in which a statute has created a liability, but has given no special remedy for it; there the party may adopt an action of debt or other remedy at common law to enforce it. The third class is where the statute creates a liability not existing at common law, and gives also a particular remedy for enforcing it. Now it appears to me that the present case falls within such third class;"

and I would interpose in this quotation to express the same view with respect to the seaman's certificate here;

"and as with respect to that class it has been always held that the party must adopt the form of remedy given by the statute, so I think the company are bound here to follow the form given by this statute which creates the right."

Upon the true construction of the provisions of this Act, I think the proceeding for a penalty is the exclusive remedy for any damage of which the plaintiff can complain in this action, and therefore the action was misconceived.

Appeal dismissed.

Solicitors: *Coode, Kingdon & Cotton*, for *J. H. Jolliffe*; *Wainwright & Baillie*.

[*Reported by M. W. McKellar, Esq., Barrister-at-Law.*]

BARNES v. DOWLING

[QUEEN'S BENCH DIVISION (Lopes and Stephen, JJ.), May 30, 1881]

[Reported 44 L.T. 809; 45 J.P. 767]

Settlement—Waste—Permissive waste—Liability of tenant for life.

An action for permissive waste will not lie against a tenant for life.

Notes. Distinguished: *Davies v. Davies* (1888), 38 Ch.D. 499. Referred to: *Re Cartwright*, *Avis v. Newman* (1889), 41 Ch.D. 532.

As to liability of tenant for life for waste, see 34 HALSBURY'S LAWS (3rd Edn.) 649 et seq.; and for cases see 40 DIGEST (Repl.) 695 et seq.

Cases referred to:

- (1) *Powys v. Blagrove* (1854), Kay, 495; affirmed, 4 De G.M. & G. 448; 2 Eq. Rep. 1204; 24 L.J.Ch. 142; 24 L.T.O.S. 17; 2 W.R. 700; 43 E.R. 582, L.C.; 40 Digest (Repl.) 699, 1951.
- (2) *Gibson v. Wells* (1805), 1 Bos. & P.N.R. 290; 127 E.R. 473; 40 Digest (Repl.) 699, 1949.
- (3) *Herne v. Bembow* (1813), 4 Taunt. 764; 128 E.R. 531; 31 Digest (Repl.) 396, 5240.
- (4) *Lord Castlemaine v. Lord Craven* (1733), 2 Eq. Cas. Abr. 758; 22 Vin. Abr. 523; 22 E.R. 644; 40 Digest (Repl.) 699, 1947.
- (5) *Wood v. Gaynon* (1761), Amb. 395; 27 E.R. 263; 40 Digest (Repl.) 699, 1948.
- (6) *Caldwall v. Baylis* (1817), 2 Mer. 408; 35 E.R. 996; 40 Digest (Repl.) 701, 1972.
- (7) *Re Skingley* (1851), 3 Mac. & G. 221; 20 L.J.Ch. 142; 16 L.T.O.S. 405; 15 Jur. 958; 42 E.R. 246, L.C.; 40 Digest (Repl.) 701, 1974.
- (8) *White v. Cann*, 1 I.Ch.R. 205.

Also referred to in argument:

Cole v. Forth (1672), 1 Mod. Rep. 94; 86 E.R. 759; sub nom. *Cole v. Green*, 1 Lev. 309; sub nom. *Greene v. Cole*, 2 Wms. Saund. 228, H.L.; 31 Digest (Repl.) 393, 5181.

- A *Yellowly v. Gower* (1855), 11 Exch. 274; 24 L.J.Ex. 289; 156 E.R. 838; 31 Digest (Repl.) 396, 5242.
- Jones v. Hill* (1817), 1 Moore, C.P. 100; 7 Taunt. 392; 129 E.R. 156; 31 Digest (Repl.) 396, 5244.
- Harnett v. Maitland* (1847), 16 M. & W. 257; 4 Dow. & L. 545; 16 L.J.Ex. 184; 8 L.T.O.S. 346; 153 E.R. 1184; 31 Digest (Repl.) 395, 5223.
- B *Warren v. Ruddall, Ex parte Godfrey* (1860), 1 John. & H. 1; 29 L.J.Ch. 543; 2 L.T. 693; 6 Jur.N.S. 395; 8 W.R. 331; 70 E.R. 637; 40 Digest (Repl.) 766, 2498.
- Bacon v. Smith* (1841), 1 Q.B. 345; Arn. & H. 280; 4 Per. & Dav. 651; 10 L.J.Q.B. 119; 5 Jur. 549; 118 E.R. 1164; 40 Digest (Repl.) 700, 1961.
- Woodhouse v. Walker* (1880), 5 Q.B.D. 404; 49 L.J.Q.B. 609; 42 L.T. 770; 44 J.P. 666; 28 W.R. 765, D.C.; 40 Digest (Repl.) 701, 1973.
- C

Special Case. By his statement of claim, the plaintiff alleged that, in January, 1878, he purchased of the Rev. E. A. Ommanney the reversion of certain copyhold property, including a certain dwelling-house situate at Dundry, in the county of Somerset, and that, at the date of the purchase, the defendant was and was now in possession of the property as tenant for life; that the defendant neglected the property and caused it to waste and decay by not repairing the same, and it had become necessary for the protection of the property and the estate of the plaintiff therein as reversioner that the dwelling-house and other premises should be repaired; that notice had been served on the plaintiff calling on her to execute the repairs, but that she had refused, whereby the estate of the plaintiff had become diminished in value. The first four paragraphs of the statement of defence, and which the plaintiff admitted in his reply, were as follows:

"1. At a court baron held on April 7, 1875, for the Manor of the Vicarage of Chew Magna and Dundry, in the county of Somerset (of which manor the hereditaments mentioned in the statement of claim were and are parcel) the hereditaments in the statement of claim mentioned were with other hereditaments in accordance with the custom of the said manor, surrendered into the hands of the lord of the said manor, and at the same court the same premises were granted unto the defendant and Arthur Peters to hold to them for the term of their lives and of either of them longest living successively, and also to Joseph Brock, Thomas Milton, and George Vowles for the term of their lives, and of every and either of them longest living successively, according to the custom of the manor aforesaid, subject to a proviso that the said Arthur Peters, Joseph Brock, Thomas Milton, and George Vowles should take no profit out of the said premises during the life of the defendant, without her consent and good liking, and the defendant was at the same court admitted tenant to the premises, subject to the said estates for lives. The freehold and inheritance in the premises was and remained in the lord of the said manor.

2. The said premises were so surrendered as aforesaid to the use of the said Arthur Peters, Joseph Brock, Thomas Milton, and George Vowles, in trust for the Rev. E. A. Ommanney, his heirs and assigns.

3. In October, 1877, the plaintiff purchased of the said E. A. Ommanney his equitable estate aforesaid in the premises mentioned in the statement of claim for the lives of the said Arthur Peters, Joseph Brock, Thomas Milton, and George Vowles in remainder expectant on the death of the defendant, and such interest was conveyed to the plaintiff on June 24, 1878.

4. Save as aforesaid it is not the fact that in January, 1878, or at any other time, the plaintiff purchased of the Rev. E. A. Ommanney, or any other person, the reversion of or any other estate or interest in the copyhold hereditaments in the statement of claim referred to, or that subject to the defendant's tenancy for life the reversion became or now is by the said purchase or otherwise vested in the plaintiff."

Under R.S.C., Ord. 34, r. 2, the master ordered :

"The question of law whether, under the circumstances stated in paras. 1, 2, 3 and 4 of the statement of defence, and admitted by the reply, the plaintiff is, or was not seised, or possessed of, or entitled to, an estate or interest entitling him to maintain an action for waste, either voluntary or permissive against the defendant be tried before the court before any evidence is taken or any question of fact is tried and until the determination of such question all other proceedings in the action be stayed."

Wills, Q.C., and *Castle* for the plaintiff.

Holl, Q.C., and *J. G. Wood* for the defendant.

Cur. adv. vult.

July 5, 1881. **LOPES, J.**, read the following judgment of the court. The question which we have to consider in this case is, whether, in the circumstances stated and admitted in the pleadings, the plaintiff is entitled to maintain an action for permissive waste. The plaintiff, in his reply, admits that his title is correctly stated in the statement of defence. It is difficult to determine the character of the plaintiff's estate. It was contended for the plaintiff that he was an equitable joint tenant with the defendant, and, as such, entitled to sue the defendant for permissive waste. The defendant, on the other hand, contended that the plaintiff was a remainderman for life, who could have no beneficial interest until after the death of the defendant, and, as such, was not entitled to maintain an action for permissive waste. We do not think that it is necessary to determine which contention is correct, though, having regard to the terms of the surrender read in extenso, we incline to the opinion that the plaintiff is a remainderman for life. It is quite clear that, whatever the plaintiff's estate may be, that it is an equitable estate.

Many points were raised by the defendant, among them, that no action would lie for permissive waste against a tenant for life. We think this point a good one, and do not, therefore, propose to deal with the other points raised by the defendant. The legal liability of a tenant for life for waste may be doubtful, but authority is strong to show that there is no liability for permissive waste in equity. In *Powys v. Blgrave* (1), where a testator by his will directed his trustees, after payment of the expenses of keeping his estate in repair, and all such costs as "my said trustees shall expend or be put unto by means of the trusts hereby reposed in them," to pay out of the overplus rents and profits certain sums, and, after payment thereof, to pay the rents to two persons successively for life, with remainder to trustees to preserve, with remainder to first and other sons of the second tenant for life successively in remainder, and the several heirs male of the body of such sons. A bill was filed by the trustees at the instance of one of the remaindermen in tail against the second tenant for life for the purpose of making him liable for permissive waste; it was held by LORD CRANWORTH, L.C., affirming the decision of WOOD, V.-C., that the court could not interfere in cases of permissive waste. His Lordship said (4 De G.M. & G. at p. 458) :

"... it was argued, independently of the trust, that it is the duty of the tenant for life to repair.—'Equitas sequitur legem.' But even legal liability now is very doubtful: *Gibson v. Wells* (2); *Herne v. Bembow* (3). Whatever be the legal liability, this court has always declined to interfere against mere permissive waste, *Lord Castlemaine v. Lord Craven* (4): there the Master of the Rolls said, 'The court never interposes in case of permissive waste either to prohibit or to give satisfaction as it does in case of wilful waste.' "

On this ground relief was refused in *Wood v. Gaynon* (5). In that case, a tenant for life had been guilty of permissive waste, and the plaintiff and one of the defendants, Benjamin Lyme, were the reversioners; Lyme refused to join with the plaintiff in an action at law. The Master of the Rolls refused to assist the plaintiff, saying (Amb. at p. 396) that, as there was no precedent, he would not

A make one; adopting the argument that it would tend to harass tenants for life and jointresses, and that suits of this kind would be attended with great expense in depositions about the repairs. With respect to *Caldwall v. Baylis* (6), it does not sustain the doctrine for which it was cited. *Re Skingley* (7) was founded on the express obligation of the lunatic to keep in repair; see also *White v. Cann* (8). The weight of authority in equity is, therefore, clearly against an action for permissive waste; and, if there is any variance between the rules of equity and the rules of common law with reference to permissive waste, we are bound to give effect to the former. We think that this action is not maintainable for permissive waste.

Solicitors: *William Ansell Boyle*, for *Henry Brock Harris*, Merthyr Tydfil; *Sutton & Ommanney*.

[Reported by H. D. BONSEY, Esq., Barrister-at-Law.]

Re TRENCH. Ex Parte BRANDON

[COURT OF APPEAL (The Earl of Selborne, L.C., Cotton and Fry, L.JJ.), January 17, 1884]

[Reported 25 Ch.D. 500; 53 L.J.Ch. 576; 50 L.T. 41; 32 W.R. 601]

Bankruptcy—Act of bankruptcy—Domiciled Englishman residing abroad—Going and remaining abroad with intent to defeat or delay creditors.

The debtor, a domiciled Englishman, had a house in France, where he resided with his family. He was continually in London for about fourteen months in 1877 and 1878 in order to attend to the management of a newspaper of which he was proprietor, and during that period he occupied furnished lodgings there. The newspaper having proved a failure, the debtor returned to his house in France, and generally resided there. While in England he had contracted debts which he left unpaid. In June, 1882, one of the creditors met the debtor in England, when he promised to call shortly on the creditor with reference to his debt, and said he felt that, if he kept abroad, he should be able to settle his debts more easily. He did not pay the debt, and the creditor presented a bankruptcy petition against him.

Held: the debtor's permanent residence being abroad, the court could not assume that he had departed out of or was remaining out of England with intent to defeat or delay his creditors, and, therefore, he had not committed an act of bankruptcy.

H Notes. Considered: *Re Cohen, Ex parte Bankrupt v. I.R.Comrs.*, [1950] 2 All E.R. 36. Referred to: *Re Debtor (No. 360 of 1951), Ex parte Debtor v. National Provincial Bank, Ltd.*, [1952] 1 All E.R. 519, n.

As to departure or absence of debtor from country, see 2 HALSBURY'S LAWS (3rd Edn.) 268-271; and for cases see 4 DIGEST (Repl.) 75 et seq.

Cases referred to in argument:

Re Bunny, Ex parte Bunny (1857), 1 De G. & J. 309; 26 L.J.Bey. 83; 29 L.T.O.S. 318; 3 Jur.N.S. 1141; 5 W.R. 838; 44 E.R. 743, L.JJ.; 4 Digest (Repl.) 77, 659.

Re Crispin, Ex parte Crispin (1873), 8 Ch. App. 374; 42 L.J.Bey. 65; 28 L.T. 483; 37 J.P. 391; 21 W.R. 491, L.C. & L.J.; 4 Digest (Repl.) 76, 653.

Appeal from the dismissal of a petition for bankruptcy presented by G. S. and H. Brandon, the creditors, asking that the debtor, Major-General H. Le Poer Trench, be adjudicated bankrupt on the ground that, with intent to defeat or delay his

creditors, he in the year 1882 departed out of England, and being out of England had, with intent to defeat and delay his creditors, remained out of England. A

In 1876 the debtor, a domiciled Englishman, took a house at Boulogne, and went to reside there with his family. At that time he was not being pressed by any creditors. In May, 1877, he purchased a paper called "The Operatic and Dramatic Album," which he managed and published in London. The paper was not a success, and he ceased to publish it, and in March, 1878, he commenced an action with reference to it, which was afterwards settled. For about fourteen months in 1877 and 1878 he lived principally in London, and occupied furnished lodgings, occasionally visiting his family, who remained at his house in Boulogne. On ceasing to publish the paper he returned to Boulogne. In 1879 his wife died, and he then came to England and resided with his family for nine months in a house which he took furnished at Southall, his house at Boulogne being let furnished. In June, 1880, he returned with his family to his house in Boulogne, and afterwards occasionally visited England. While in England in 1877 and 1878, the debtor contracted debts to the extent of about £1,000, principally in connection with the paper, which he left unpaid. A part of this sum was due to Messrs. G. S. and H. Brandon, the creditors, who acted as his solicitors in the purchase of the paper, and in the subsequent action in reference to it, for their costs. In June, 1882, Mr. Brandon casually met the debtor on Putney Bridge, and asked him when he was going to pay his bill of costs, and he alleged that on that occasion the debtor said B C D

"the speculation of the Album left me with a lot of claims upon me, and I feel if I keep abroad I shall be able to settle them more easily,"

and he promised to call before he went back and make Mr. Brandon a proposition with reference to his debt, but he did not do so. E

On Nov. 15, 1883, the creditors presented a petition asking that the debtor might be adjudicated a bankrupt. The matter came before Mr. Registrar PEYS on Dec. 18, 1883, and the petition was dismissed. From this decision the creditors appealed.

Finlay Knight for the creditors. F

Woolf for the debtor was not called on to argue.

THE EARL OF SELBORNE, L.C.—The act of bankruptcy which is alleged, consists in the debtor remaining out of England with intent to defeat and delay his creditors. The question whether such an act of bankruptcy has been committed must be considered with regard to the circumstances of the foreign residence of the debtor. Here the debtor from a period anterior to the contraction of the petitioning creditor's debt had a bona fide residence in France, which, so far as appears, is the only residence properly so called which he has had from that time until the present. Assuming that he retained his English domicile, still the constitution of his foreign residence cannot, so far as the evidence goes, be said to have been with the intent of defeating or delaying his creditors. What are the other facts? The debtor appears to have been carrying on in London during a part of the years 1877 and 1878 the business of publishing a musical newspaper for the purpose of which he was a good deal in England. He did not, during that period, give up his foreign residence, but he had furnished lodgings in London. He gave these up when the object which brought him to London ceased. In the course of this residence in England he contracted the debt on which this petition is founded. In 1880 he was again in England for some months, occupying with his family a furnished house at Southall. G H I

The circumstance which presses most strongly against him is a conversation, which took place between him and Mr. Brandon, on Putney Bridge in June, 1882. But if that conversation is an honest one, and there is nothing to lead to a contrary conclusion, I think the proper inference to be drawn from it is that he thought that when he was at home at his residence in France with his wife and family, at the place where the people were living who were in the habit of giving him credit, it would be

- A more easy for him to settle with his English creditors than if he lived in England. I cannot leave out of the case the fact that France is a civilised country, and that creditors can sue their debtors there. It does not appear that these particular creditors have been in any way baffled by the debtor in pursuit of their remedies against him there. Those are all the facts, and they amount to this, that the debtor stays at home, his house being in a foreign country. Can we, upon the principle that a man must be taken
- B to intend the natural consequence of his acts, say that he remained out of England with intent to defeat and delay his creditors? If a debtor had left this country in order to get out of reach of its laws the presumption that he intended to defeat or delay his creditors might exist, but the present case is entirely different, and I think that such an intention ought not to be presumed. I do not think that the cases which have been cited are at all in favour of the argument on behalf of the
- C creditors, and I think the registrar's order ought to be affirmed.

- COTTON, L.J.**—I am of the same opinion. Undoubtedly the debtor being out of England, remained out, but did he do so with intent to defeat and delay his creditors? No doubt a man must be presumed to intend the natural consequences of his acts, but are there no other reasons and causes here why he should remain
- D out of England? He has no residence or business here, though no doubt at one time he had a temporary residence and business here. Since that business came to an end he has been residing at his house in France. That is a reasonable cause for his remaining out of England. The only thing to be set against that is the conversation which he had with Mr. Brandon on Putney Bridge. But I agree with the Lord Chancellor that that conversation is not sufficient to induce us to come
- E to the conclusion that he remained abroad in his home to defeat and delay his creditors.

- FRY, L.J.**—I am of the same opinion. The only thing which raised any doubt in my mind was that conversation with Mr. Brandon. But when it is carefully considered I do not think it shows that the debtor had any intention of defeating or delaying his creditors. I think he rather meant to say that he thought his
- F continuing in France instead of delaying his creditors would expedite the payment of their debts. I do not think he remained abroad with intent to defeat and delay them.

Solicitors : *G. S. & H. Brandon; Lumley & Lumley.*

[*Reported by W. C. Biss, Esq., Barrister-at-Law.*]

ERRINGTON *v.* METROPOLITAN DISTRICT RAIL. CO.

[COURT OF APPEAL (Sir George Jessel, M.R., Brett and Holker, L.J.J.), February 14, 17, 1882]

[Reported 19 Ch.D. 559; 51 L.J.Ch. 305; 46 L.T. 443;
30 W.R. 663]

Compulsory Purchase—Railway—Minerals—Right to acquire—Acquirement by notice served after compulsory purchase of surface of land.

On the true construction of the Lands Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, 1845, a railway company, having the usual powers compulsorily to take land in its special Act, can take minerals apart from the land, and that is so if they have previously purchased the surface of the land without the minerals and subsequently give a further notice relating to the minerals. What is necessary for the purposes of the undertaking is a matter for the decision of the company which, if bona fide, cannot be questioned by the court.

Notes. By the Transport Act, 1947, the principal railway undertakings were transferred to the British Transport Commission. A new s. 78 of the Railways Clauses Consolidation Act, 1845, was substituted by s. 15 of the Mines (Working Facilities and Support) Act, 1923: 19 HALSBURY'S STATUTES (2nd Edn.) 972.

Considered: *Midland Rail. Co. v. Robinson*, [1886-90] All E.R.Rep. 742; *Ruabon Brick and Terra Cotta v. Great Western Rail. Co.*, [1893] 1 Ch. 427. Referred to: *Wilkinson v. Hull, Barnsley and West Riding Junction Railway and Dock Co.* (1882), 46 L.T. 455; *Midland Rail. Co. v. Haunchwood Brick and Tile Co.* (1882), 20 Ch.D. 552; *Pountney v. Clayton* (1883), ante p. 281; *Lewis v. Weston-super-Mare Local Board of Health* (1888), 59 L.T. 769; *Great Northern Rail. Co. v. I.R. Comrs.*, [1901] 1 K.B. 416; *Great Western Rail. Co. v. Blades*, [1901] 2 Ch. 624.

As to the acquisition of land for railway purposes, see 31 HALSBURY'S LAWS (3rd Edn.) 575, 802-804, and cases there cited. For the Lands Clauses Consolidation Act, 1845, see 3 HALSBURY'S STATUTES (2nd Edn.) 890, and for Railways Clauses Consolidation Act, 1845, see *ibid.*, vol. 19, p. 590.

Cases referred to:

- (1) *Stockton and Darlington Rail. Co. v. Brown* (1860), 9 H.L.Cas. 246; 3 L.T. 131; 24 J.P. 803; 6 Jur.N.S. 1168; 8 W.R. 708; 11 E.R. 724, H.L.; 11 Digest (Repl.) 115, 93.
- (2) *Kemp v. South Eastern Rail. Co.* (1872), 7 Ch. App. 364; 41 L.J.Ch. 404; 26 L.T. 110; 20 W.R. 306, L.C.; 11 Digest (Repl.) 116, 95.

Also referred to in argument:

Re Metropolitan and District Rail. Co. and Cotton's Trustees (1881), 45 L.T. 103, C.A.; 11 Digest (Repl.) 164, 372.

Great Western Rail. Co. v. Smith (1876), 2 Ch.D. 235; 45 L.J.Ch. 235; 34 L.T. 267; 24 W.R. 443; affirmed sub nom. *Smith v. Great Western Rail. Co.* (1877), 3 App. Cas. 165; 47 L.J.Ch. 97; 37 L.T. 645; 42 J.P. 404; sub nom. *Great Western Rail. Co. v. Smith*, 26 W.R. 130, H.L.; 11 Digest (Repl.) 168, 397.

Flower v. London, Brighton and South Coast Rail. Co. (1865), 2 Drew. & Sm. 330; 5 New Rep. 424; 34 L.J.Ch. 540; 12 L.T. 10; 11 Jur.N.S. 406; 13 W.R. 518; 62 E.R. 647; 11 Digest (Repl.) 116, 94.

Evversfield v. Mid-Sussex Rail. Co. (1858), 3 De G. & J. 286; 28 L.J.Ch. 107; 32 L.T.O.S. 202; 5 Jur.N.S. 776; 7 W.R. 102; 44 E.R. 1278, L.J.J.; 11 Digest (Repl.) 116, 100.

London and North Western Rail. Co. v. Ackroyd (1862), 31 L.J.Ch. 588; 6 L.T. 124; 8 Jur.N.S. 911; 10 W.R. 367; 11 Digest (Repl.) 164, 374.

A **Appeal** from an order made by **HALL, V.-C.**, in an action for an injunction.

By the Metropolitan District Railway Act, 1878 (a private Act), with which the Lands Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, 1845, were incorporated, the defendant company were authorised to extend their railway from West Brompton to Fulham, and to take land compulsorily.

B The plaintiffs, as trustees of the family estates of Henry P. Cotton, were owners of land at Walham Green, and were served by the company with three notices to treat, dated in August, 1878, and February and March, 1879. The plaintiffs made a claim as for building land, and the land was valued by the arbitrator at the sum of £11,660. A dispute arose whether the company were entitled to have the "mines and minerals" expressly included in the conveyance to them, and **HALL, V.-C.**, and the Court of Appeal held that the words must be omitted from the conveyance (45 L.T. 103). On June 17, 1881 (prior to the decision of the Court of Appeal) the company gave notice to the plaintiffs

C "that, in the event of its being determined that the said company, in the purchase already made by them from you of the lands and hereditaments described in the schedule hereto, have not acquired the mines and minerals in and under the same, they require to purchase and take all such mines and minerals."

D On July 8, 1881, the plaintiffs commenced the present action, claiming

E "an injunction restraining the defendant company, their servants, agents, and workmen, from further proceeding under or in pursuance of their notice to treat dated the 17th day of June, 1881, and from taking any steps to procure the assessment of the purchase money of the mines, minerals, and property comprised in the said notice."

On Dec. 3 the plaintiffs moved for judgment before **HALL, V.-C.** The company, among other evidence, filed an affidavit by their engineer, which, so far as is material, was as follows:

F "1. I am the engineer to the defendant company, and supervised the construction of the Fulham extension line of railway of the defendant company.
2. I say that the lands of the plaintiffs referred to in their said affidavits are lands necessary for the railway company for the formation of their line and stations, with goods depot, and sidings, and buildings necessary thereto.
G 3. I know well the said lands, and I do not believe there are any minerals in the same, excepting gravel or clay, which, if got, would have to be got by removing the surface of the land. 4. That it would be wholly incompatible with the purpose for which the railway company desire the said lands that power should remain in the plaintiffs to interfere with the surface of the land, and thus with the buildings, sidings, and works of the defendants' railway."

H **HALL, V.-C.**, held that on the construction of the Railways Clauses Consolidation Act, 1845, it was not competent for the railway company to give the notice in question, and, therefore, the plaintiffs had a right to an injunction. The company appealed.

Davey, Q.C., and *Kekewich, Q.C.* (*Samuel Roberts* with them), for the company.
Hastings, Q.C., and *Archibald* for the plaintiffs.

I **SIR GEORGE JESSEL, M.R.**—This is an appeal from a decision of **HALL, V.-C.**, raising important questions of the construction of the Railways Clauses Act, 1845. The points which have been raised in argument are three: The first proposition is that under the powers of the Lands Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, 1845, a company, having the usual powers to take land in its special Act, cannot take minerals by compulsion apart from the land. The second point raised is that, assuming the company can in general do so, they cannot do so if they have originally purchased the surface of the land without the minerals, and that they are not entitled then to give a second notice for the

minerals. The third point raised is that, whatever the powers of the company A may be, the railway company are not entitled to purchase any land or minerals unless they are necessary for the purposes of their undertaking.

As regards the first point, it is plain that the word "lands" in the Lands Clauses Consolidation Act includes any "hereditaments" [see s. 3 of Act], which term, of course, includes mines. Upon that point there can be no question. Therefore, standing alone, those words would include the power to purchase mines. Is there B any reason for cutting the words down? I am not aware of any. It must be remembered that the Lands Clauses Consolidation Act is to be used, not only as regards railway companies, but all companies. Take a canal, or dock, or harbour company, and suppose the mines are owned by one man and the surface by another (a very common case in the north of England). If the harbour is to be made the company will have perhaps to dig down and take some of the minerals away. If C they could not give notice to the mineowner, they could not make the harbour, canal, or dock; therefore, in that case, it is absolutely necessary that they should be able to take the mines under the powers of the Lands Clauses Consolidation Act. I think that requires no further demonstration.

The Railways Clauses Consolidation Act only applies to railways. If the Lands Clauses Consolidation Act enables a railway company to take mines where they D are in a different owner from the surface, is there anything in the Railways Clauses Consolidation Act which prevents their taking them? I think not. On the contrary, s. 77 of the Railways Clauses Consolidation Act provides:

"The company shall not be entitled to any mines . . . under any land purchased by them except only such parts thereof as shall be necessary to be dug or carried away or used in the construction of the works, unless the same E shall have been expressly purchased; and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands, unless they shall have been expressly named therein and conveyed thereby."

That shows that a company may purchase mines and may have them conveyed. But it was suggested that the words "expressly purchased" were to be confined F to purchase by agreement. I do not know why. The notice to treat is as express as any agreement. Those words of s. 77 cannot be used to cut down the power given by the Lands Clauses Consolidation Act to take mines when they are in separate ownerships. It does not appear to me that the words of the Railways Clauses Consolidation Act were intended to cut down the words of the Lands Clauses Consolidation Act, but that, on the contrary, they recognise that the railway G company may purchase if the railway company think fit.

Section 78 of the Railway Clauses Consolidation Act provides for cases where the company do not purchase the mines. Then the mineowner may work them on giving thirty days' notice unless the railway company consider that the working of the mines is likely to damage their works and are willing to compensate the owner for not working them. That is not a purchase, and it does not only apply H to mines which the company may purchase; it also applies to all mines within a certain distance of the railway, whether they are within the limits of deviation or not. It has a much wider application than to the purchase of mines. That being so, why should the railway company be limited to that mode of—I can hardly say acquiring—preventing the working of the mines? I can see no reason at all. It may be said to be sometimes much more convenient to the railway company. I when it is raising its capital, to buy the mines at once. At other times it may be more convenient to wait until it sees whether the mines will be worked or not. But it seems to me that s. 78, standing alone, is put in for the protection of companies, not as limiting their power at all, and, therefore, that it does not affect the question as to their power to purchase.

The next point was this. Having given a notice to take the surface, and having thus severed the ownership, can the company now buy the mines? It follows from what I have said that, by the ownership being severed, they have a power to take

A the mines, unless there is something which prevents their taking them. That something can only be the expiration of the time for purchasing. There is no law which says that a railway company, within the period fixed, may not first take three acres, and then take three acres more, from the same landowner; and if mines are included under the word "lands," why should there be a different law as to taking horizontal strata from that as to taking vertical strata? I see no reason, and, with great deference to the Vice-Chancellor, I think there is no distinction between the severance of ownership of surface land and mines and severance of ownership laterally by taking three acres out of six acres belonging to the same landowner. I think, therefore, that that objection cannot be supported.

The last objection is that the company do not require the mines. As to that, I think the observations of LORD CRANWORTH, in *Stockton and Darlington Rail. Co. v. Brown* (1) are of great value, and fairly state the meaning of these Acts of Parliament. It is the company who are to be the judges of what they require, unless they are not acting bona fide [see s. 16 of Railways Clauses Consolidation Act, 1845], and the evidence—and the only evidence—required is the opinion of the surveyor or engineer or other officer of the company, unless the other side can show that they are not acting bona fide. You may show want of bona fides in two ways. You may show it by proving that the lands are wanted for some collateral purpose or by proving that the alleged purpose is so absurd under the circumstances that it cannot possibly be bona fide. As regards the first ground, an attempt was made here, but it was unsupported by evidence. The second ground is that, it is said, the company cannot want the minerals at all because they can be sufficiently protected by s. 78. The answer to that is very simple. The company are the judges whether they would rather have the mines now or wait until some one begins to work them. In this case we have the evidence of the engineer, which is very important. There are no mines, in the ordinary sense, under these lands. What are called mines, and what are the minerals, probably within the meaning of the Act of Parliament, are some beds of gravel or clay, lying near the surface, and it is said that they can only be worked from the surface. As far as I know, gravel pits are always open to the surface. I never heard of a gravel pit which was worked as a mine. It is the same with clay. There are cases, no doubt, in which fire clay is worked by sinking pits like mines, but ordinary clay is worked from the surface. Therefore, when the engineer says that these strata of gravel and clay will be worked from the surface, that entirely accords with one's ordinary experience. It appears to me to be perfectly reasonable, although we are told we must consider it quite absurd. If that is so, if the company do not buy these minerals, the owner, after thirty days' notice, may break the surface and dig up the gravel or clay. Anything more serious to the owners of the railway can hardly be imagined, and I think it is quite reasonable for the company to say: "We want to prevent the risk of such an evil by buying them now. They are necessary for the support of our property, and to prevent that property from being destroyed; therefore they are required for the purpose of our own undertaking." So far from being absurd, so far from being so irrational as to bring to my mind the notion of mala fides, that appears to me to be quite rational, quite reasonable, and quite proper. Therefore, I think that, upon this ground also, the objection taken on the part of the plaintiffs ought not to be entertained. It appears to me that this appeal ought to be allowed.

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BRETT, L.J.—In this case the railway company were in possession of the surface of land for the purposes of their railway, and it does not seem to be questioned, however that land was obtained, that they held it properly for the purpose of their works. Afterwards they gave notice that they required to purchase certain minerals under that land, of the surface of which, and of considerably more than the surface, they were the owners. It is objected that they could not give notice to take such minerals for the purpose of compulsorily purchasing them, because there is no power by which they could give a compulsory notice to purchase minerals at all.

Secondly, it is said that, if they have already given a notice to take the surface of the land without mentioning the minerals, they have exhausted their power of giving compulsory notice, and, therefore, cannot afterwards give a notice to take the minerals. A

Whether the company can give a notice to take the minerals in the first instance seems to depend upon whether, under the Lands Clauses Consolidation Act, or their private Act read in conjunction with the Lands Clauses Consolidation Act, they can purchase minerals by compulsion. It is said that there are no words in the Lands Clauses Consolidation Act, which give them that power. If that is true with regard to railways, considering the matter under the Lands Clauses Consolidation Act, then it is true of all other companies with whose Act the Lands Clauses Consolidation Act is combined. I do not think that anybody has disputed that the word "lands" in the Lands Clauses Consolidation Act, where it is not a matter of a railway, includes the minerals under the land, so that under the Lands Clauses Consolidation Act it is obvious that the undertakers can compulsorily purchase the minerals at the same time that they purchase the land. In other words, if a company, not being a railway company, give a compulsory notice to purchase the land, that makes a contract immediately for the purchase of the land including the minerals, and then the minerals, as well as the land, are valued, and the company became the purchasers, not only of the land, but of the minerals as part of the land. B C D

But in the case of a railway company there is s. 77 of the Railways Clauses Consolidation Act, and the question is raised whether that section does not take away from the railway company the right of purchasing minerals by compulsion at all. It seems to me that s. 77 of the Railways Clauses Consolidation Act is not an enabling section at all; it is a limiting section. The section says, in effect, that where a railway company give notice to take the land by compulsion, and afterwards, when that land is valued, become the purchasers of the land (that is on a compulsory purchase) "unless the same shall have been expressly purchased," minerals do not pass by a notice to take the land, and by a conveyance of the land after it is valued. But the section seems to me by implication to admit and acknowledge that if, at the time when the company give notice to take the land, they expressly give notice to take the minerals also, then the minerals must be valued with the land, just as in all other cases, and they take both the land and the minerals. Then it is said that, although they may do that by agreement, yet they cannot do it compulsorily, that is to say, the words "expressly purchased" exclude the idea of a compulsory purchase. In saying that they are "expressly purchased," there is nothing to say that they may not be compulsorily purchased equally expressly. In other words, when you give notice to take the land, if in that notice you expressly mention that you mean to take the minerals also, then there is nothing to say that that is not a purchase; it is a compulsory purchase, and, besides, it is an express purchase. Even that will not do, because the company must take care, as it seems to me, to see not only that they have given the notice expressly, but that, when they take the conveyance, the conveyance expressly mentions the minerals also. If they do, it is no objection with regard to s. 77 that all that has been done compulsorily. It follows that if they give express notice that they mean to take the minerals at the time they give notice to take the surface, or (for it is really not the surface) they give notice to take all the lands down to the centre of the earth, except the minerals, and at the same time they give express notice of their intention to take the minerals also, they may do that by compulsion just as well as by agreement. E F G H I

Then comes the point (upon which the Vice-Chancellor seems to have decided the case) that, if they have given their original notice to take by compulsion all the land except the minerals contained in it, and have taken that land without saying anything about the minerals, then they have exhausted their powers with regard to that land and with regard to the minerals, and cannot give notice to take the minerals. The result of such a decision seems to me almost to show that it

A could not have been intended; because, if that is so, you must go this length, that, if the railway company has once taken all the land except the minerals contained in it, however necessary it may be for the safety of their works that they should be able to touch these minerals and to deal with them, they never can do it except by agreement with the land owner. Why should that be? Why should they not have the same power with regard to that part of the land which is excepted from their first notice, as they have with regard to a part of the property which they did not deal with at the time they gave the compulsory notice as to another part. In other words, why should they not have the same power of going down vertically as of spreading out laterally? I can see nothing to prevent it. That portion of the land which is called minerals is separated from that portion of the land which is not called minerals, and it is true that the minerals are below one part and above another part. Those minerals are still land within the Lands Clauses Consolidation Act, and if the company give the notice to take that portion of the land which is called minerals within the time limited for exercising their compulsory power, I can see no reason why they are not to do that, assuming it to be requisite for the purpose of the works, because they have already taken by compulsion the other parts of the land which are above and below those minerals.

D Section 78 of the Railways Clauses Consolidation Act was also relied upon, and it was said that, having once taken all the land except the minerals, the company could not give any notice with regard to the minerals, and could not deal with them otherwise than according to that section. But s. 78 applies not only during the time limited for the railway to exercise its compulsory powers, but afterwards; the section applies at all times. It not only applies to the working of minerals under the land, where the railway company is already owner of the surface of that land, but to the working of minerals in a man's own land near the railway. Under the section, after the compensation has been paid by the railway company the minerals do not belong to the railway company. They continue to be the property of the landowner. If all they have done is to pay the compensation under s. 78, they cannot touch the minerals. It is true the landowner, to whom the minerals belong, cannot touch them, and it is because he cannot touch them that compensation is given to him; but the property in them remains in him.

F Section 78, therefore, would not meet the case which is now under consideration, where the railway company, having already bought the surface, require the minerals for the purpose of their railway. It was suggested that that never could be so; that they never could want those minerals; and that, as long as the minerals remained in the land, it was impossible that the railway company could want them. G But I think it has been shown that they might want to use them; that they might want to take them out for the purpose of giving increased support, either to their building, or to the actual railway itself as an embankment. They may want to use the space occupied by those minerals for the purpose of culverts or otherwise. I agree entirely with the suggestion made by HOLKER, L.J., that they might fairly be under the impression that they ought to have them left alone for the purpose of the safety of their works which might be in existence, or works which they intended to construct. Therefore, it is impossible to say they may not bona fide want to use the space occupied by the minerals. If they do, they must purchase them, and it would not be sufficient for their safety, or be a reasonable mode for dealing with their power, to say that all they can possibly want with regard to the space occupied by minerals is that the minerals should remain as they are. H

I The only remaining question is the one which junior counsel for the plaintiffs, I think almost by the course of his argument, practically, substantially, and argumentatively admitted was the only point that could really be made in this case. That point was that, assuming (if the company did bona fide want the space occupied by the minerals for use) they could purchase them, after having already purchased the surface without them, they are bound not only to show they want the place occupied by the minerals, but they must show that it is absolutely necessary for them. Counsel said that the affidavits filed by the company do not

show this. I cannot think that "required" means "absolutely necessary." "Required" means that the company bona fide think that the minerals are desirable, and are bona fide of opinion that they are desirable. I think the real meaning of *Stockton and Darlington Rail. Co. v. Brown* (1), and *Kemp v. South Eastern Rail. Co.* (2) (in which latter case it was intended to lay down precisely the same doctrine as in the former, as LORD HATHERLEY, L.C., in *Kemp v. South Eastern Rail. Co.* (2) says that it would be wrong to derogate in any way from the principle laid down in the *Stockton and Darlington Rail. Co. Case* (1) is, that the opinion of the railway authorities is to be the governing matter whether the things taken are for the advantage of the railway, if that opinion is expressed bona fide and bona fide laid before the court. It is what the engineer says which is the important part, and where the engineer says that he wants the property for the purpose of the railway, unless you can show that that is an assertion made mala fide, it is binding upon the court.

How could you show that it was made mala fide? If you could show that it was palpably on the face of it absurd. As in the case put by LORD HATHERLEY, L.C., if the railway engineer were to say: "We want to build a station which shall be according to a plan, of which we now give you notice, which would occupy half an acre, nevertheless I require you to sell me 200 acres," then, as to all but the half acre, it would clearly be shown to be so unreasonable that it could not be bona fide asked for for the purposes of the railway. There are a thousand other cases in which it might appear from the affidavit of the engineer, or from the requisition, that what he was asking for was so wholly absurd that his requirement must be unreasonable; and in such a case you would naturally say: "It is not merely because you ask for a thing that you are to have it, because it is not apparent that your request is bona fide." But here there is nothing to show that. It seems to me that the affidavit of the engineer is quite consistent with reason, and with a reasonable probability that these minerals are wanted to be purchased for the safety of the works; and if it is obvious that if these minerals are left in the hands of the owner, with a right to work them, the only way in which he could work them would be by endangering the surface, or using the surface, then it is palpable that it is for the safety of the works that the company should purchase these minerals. Therefore, I think that we must disagree with the judgment of the Vice-Chancellor, and with the reasons he has given us in support of his judgment.

HOLKER, L.J.—The most important question which has been raised in this case is whether the railway company, during the time limited by the Act of Parliament, can take by compulsion the land described within the limits of deviation, and not only the surface of the land, but the minerals underneath. Upon that point I had, I confess, at first some doubt, but that doubt has been entirely removed during the course of the arguments which have been presented to the court. It seems to be clear that, if the railway company were acting merely under the powers of the Lands Clauses Consolidation Act for the taking of the lands, they would be entitled to take both surface and minerals compulsorily; because, under that Act, or by that Act, the word "land" is to include minerals, and by the Act they are expressly authorised to take the lands. If it stood there, and there was nothing more, I think it would be beyond all controversy that the railway company might take both the lands and the minerals. One may imagine a very good reason why a railway company should not be excluded from the power of taking the minerals. It may be that near a railway station there is a thick bed of clay or a stratum of mineral which would very materially interfere with their operations unless they could take it at once, and it may be that there are some minerals under the land which the company will traverse by their railway, which would be of advantage to them, and which, if they could take it at the outset, they could get at a very small or comparatively small price, but for which, if they had to wait for a considerable time until the mining operations had been carried on, they would have to pay a very heavy price. Therefore one can imagine reasons why

A it may be of great advantage to the company to be able to take the minerals along with the surface.

It being conceded, or it being clear almost to demonstration, that, if the Lands Clauses Consolidation Act had been the only prevailing Act, and the company had acted upon its provisions alone, they could have taken the minerals along with the surface, there comes the question whether they have been restricted or prevented from so doing by other legislation? Section 77 of the Railways Clauses Consolidation Act, 1845, provides :

C "The company shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them, except only such parts thereof as may be necessary [for their works] unless the same shall have been expressly purchased; and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands, unless they shall have been expressly named therein and conveyed thereby."

D Therefore, according to this section, the minerals will not pass unless they have been expressly purchased. I cannot see, upon consideration, any reason to confine "expressly purchased" to purchase by agreement. The words are just as apt to describe a purchase under compulsory powers as they are to describe a purchase by agreement. If you come to look at the good sense of the thing, it is pretty obvious to my mind—indeed, it is quite clear—that this section was introduced into the Act of Parliament for the benefit, not of the landowner, but of the railway company, because it might be a most disastrous and disadvantageous thing for the railway company to be obliged at once to purchase mines which it never would require for any purpose of the railway.

E For this reason, and having that result in view, I think the legislature introduced this section for the very purpose of protecting and benefiting the railway company. As to the other points which have been dealt with by my Lord, I have nothing to add.

Appeal allowed.

F Solicitors : *Baxters & Co.*; *A. F. & R. W. Tweedie.*

[*Reported by FRANK EVANS, ESQ., Barrister-at-Law.*]

METROPOLITAN ASYLUM DISTRICT MANAGERS *v.* HILL AND OTHERS

[HOUSE OF LORDS (Lord Selborne, L.C., Lord Blackburn and Lord Watson),
January 14, 17, 18, March 7, 1881]

[Reported 6 App. Cas. 193; 50 L.J.Q.B. 353; 44 L.T. 653;
45 J.P. 664; 29 W.R. 617]

*Nuisance—Exercise of statutory powers—Powers permissive, not imperative—
No provision for compensation for injurious affection—Need to exercise
powers without causing nuisance.*

By the [repealed] Metropolitan Poor Act, 1867, powers were given to the Poor Law Board to provide asylums for the reception and relief of the sick, insane, or infirm, the cost to be paid for out of public money. The powers however, were permissive, not imperative; no interference with any private rights was authorised, either expressly or impliedly; and there was no provision for compensation to those who might be injuriously affected by the exercise of the powers.

Held: the fair inference from the terms of the statute was that the legislature intended that the discretion conferred on the Board should be exercised in strict conformity with private rights and did not intend to confer any licence to commit nuisance in any place which might be selected for the exercise of the statutory powers.

Negligence—Sick person—Duty of care.

*Public Health—Infectious disease—Duty to avoid spreading infection—Defence
of sufficient cause.*

Per LORD BLACKBURN: Those who have the charge of a sick person, if he is helpless (whether the disease be infectious or not), are at common law under a legal obligation to do, to the best of their ability, what is necessary for the preservation of the sick person, and the sick person, if not helpless, is bound to do so for his own sake. When the disease is infectious, there is a legal obligation on the sick person, and on those who have the custody of him, not to do anything, which can be avoided, which shall tend to spread the infection, and, if either do so, as by bringing the infected person into a public thoroughfare, it is an indictable offence, though it will be a defence to an indictment if it can be shown that there was a sufficient cause to excuse what is *prima facie* wrong.

Notes. Distinguished: *Dixon v. Metropolitan Board of Works* (1881), 7 Q.B.D. 418. Applied: *Lea Conservancy Board v. Hertford Corpn.* (1884), 48 J.P. 628; *Gas Light and Coke Co. v. St. Mary Abbott's, Kensington, Vestry* (1885), 15 Q.B.D. 1. Distinguished: *London, Brighton and South Coast Rail. Co. v. Truman*, ante p. 134. Considered: *Goolden v. Thames Conservators* (1887), 4 T.L.R. 187; *Rapier v. London Tramways Co.*, [1893] 2 Ch. 588; *Jordeson v. Sutton, Southcoates and Drypool Gas Co.*, [1898] 2 Ch. 614. Approved: *Canadian Pacific Railway v. Parke*, [1899] A.C. 535. Distinguished: *Goldberg v. Liverpool Corpn.* (1900), 82 L.T. 362. Considered: *East Fremantle Corpn. v. Annois*, [1900-3] All E.R.Rep. 73. Applied: *East London Railway v. Thames Conservators* (1904), 68 J.P. 302; *A.-G. v. Dorchester Corpn.*, [1904-7] All E.R.Rep. 762. Considered: *Demarara Electric Co. v. White*, [1907] A.C. 330; *Metropolitan Water Board v. Solomon*, [1908] 2 Ch. 214. Applied: *Prices' Patent Candle Co. v. L.C.C.*, [1908] 2 Ch. 526; *Hanley v. Edinburgh Corpn.* (1913), 77 J.P. 293. Considered: *Manchester Corpn. v. Farnworth*, [1929] All E.R.Rep. 90; *Marriage v. East Norfolk Rivers Catchment Board*, [1949] 2 All E.R. 1021. Referred to: *Ennew v. Great Eastern Railway* (1885), 1 T.L.R. 519; *M'Murray v. Cadwell* (1889), 6 T.L.R. 76; *National Telephone Co. v. Baker*, [1893] 2 Ch. 186; *Re an Arbitration between New River Co. and Metropolitan Water Board* (1904), 68 J.P. 329; *Edgington, Bishop and Withy v. Swindon*

A *Borough Council*, [1938] 4 All E.R. 57; *Dormer v. Newcastle-upon-Tyne Corpn.*, [1940] 1 All E.R. 219; *Fox v. Newcastle-upon-Tyne City Council*, [1941] 2 All E.R. 563; *Oakes v. Minister of War Transport* (1944), 60 T.L.R. 319; *Sellwood v. London, Midland and Scottish Rail. Co.* (1946), 175 L.T. 366; *Pride of Derby and Derbyshire Angling Association, Ltd. v. British Celanese, Ltd.*, [1953] 1 All E.R. 179; *Smeaton v. Ilford Corpn.*, [1954] 1 All E.R. 923.

B As to the exercise of statutory powers by public authorities, see 30 HALSBURY'S LAWS (3rd Edn.) 685 et seq.; and for cases see 38 DIGEST (Repl.) 34-44.

Cases referred to:

- (1) *R. v. Pease* (1832), 4 B. & Ad. 30; 1 Nev. & M.K.B. 690; 1 Nev. & M.M.C. 535; 2 L.J.M.C. 26; 110 E.R. 366; 38 Digest (Repl.) 39, 205.
- C (2) *Hammersmith Rail. Co. v. Brand* (1869), L.R. 4 H.L. 171; 38 L.J.Q.B. 265; 21 L.T. 238; 34 J.P. 36; 18 W.R. 12, H.L.; 38 Digest (Repl.) 15, 59.
- (3) *R. v. Burnett* (1815), 4 M. & S. 272; 105 E.R. 835; 38 Digest (Repl.) 200, 242.
- (4) *Baines v. Baker* (1752), Amb. 158; 27 E.R. 105; sub nom. *Anon.*, 3 Atk. 750, L.C.; 36 Digest (Repl.) 310, 577.
- D (5) *R. v. Sutton* (1767), 4 Burr. 2116; 98 E.R. 104; 14 Digest (Repl.) 283, 2578.
- (6) *R. v. Vantandillo* (1815), 4 M. & S. 73; 105 E.R. 762; 38 Digest (Repl.) 200, 241.
- (7) *Clowes v. Staffordshire Potteries Waterworks Co.* (1872), 8 Ch. App. 125; 42 L.J.Ch. 107; 27 L.T. 521; 36 J.P. 760; 21 W.R. 32, L.J.J.; 38 Digest (Repl.) 21, 91.

E Also referred to in argument:

- British Cast Plate Manufacturers (Governor & Co.) v. Meredith* (1792), 4 Term Rep. 794; 100 E.R. 1306; 38 Digest (Repl.) 19, 73.
- Sutton v. Clarke* (1815), 6 Taunt. 29; 1 Marsh 429; 128 E.R. 943; 38 Digest (Repl.) 13, 49.
- Boulton v. Crowther* (1824), 2 B. & C. 703; 2 L.J.O.S.K.B. 139; 107 E.R. 544; sub nom. *Bolton v. Crowther*, 4 Dow. & Ry.K.B. 195; 38 Digest (Repl.) 19, 83.
- Caledonian Rail. Co. v. Ogilvy* (1856), 2 Macq. 229; 25 L.T.O.S. 106, H.L.; 38 Digest (Repl.) 350, 356.
- Vaughan v. Taff Vale Rail. Co.* (1860), 5 H. & N. 679; 29 L.J.Ex. 247; 2 L.T. 394; 24 J.P. 453; 6 Jur.N.S. 899; 8 W.R. 549; 157 E.R. 1351, Ex. Ch.; 38 Digest (Repl.) 13, 54.
- G *Sutton v. Clarke* (1815), 6 Taunt. 29; 1 Marsh. 429; 128 E.R. 943; 38 Digest (Repl.) 62, 353.
- Fremantle v. London and North Western Rail. Co.*, *Bliss v. London and North-Western Rail. Co.* (1861), 10 C.B.N.S. 89; 31 L.J.C.P. 12; 5 L.T. 556; 9 W.R. 611; 142 E.R. 383; 38 Digest (Repl.) 400, 607.
- H *Whitehouse v. Fellowes* (1861), 10 C.B.N.S. 765; 30 L.J.C.P. 305; 4 L.T. 177; 26 J.P. 40; 9 W.R. 557; 142 E.R. 654; 38 Digest (Repl.) 33, 169.
- A.-G. v. Bradford Canal Proprietors* (1866), L.R. 2 Eq. 71; 35 L.J.Ch. 619; 14 L.T. 248; 15 L.T. 9; 14 W.R. 579; 36 Digest (Repl.) 314, 609.
- A.-G. v. Colney Hatch Lunatic Asylum* (1868), 4 Ch. App. 146; 38 L.J.Ch. 265; 19 L.T. 708; 33 J.P. 196; 17 W.R. 240, L.C. & L.J.; 38 Digest (Repl.) 22, 97.
- I *A.-G. v. Leeds Corpn.* (1870), 5 Ch. App. 583; 39 L.J.Ch. 711; 34 J.P. 708; 19 W.R. 19, L.C. & L.J.; 38 Digest (Repl.) 40, 206.
- Geddis v. Bann Reservoir Proprietors* (1878), 3 App. Cas. 430, H.L.; 30 Digest (Repl.) 16, 64.
- Jones v. Festiniog Rail. Co.* (1868), L.R. 3 Q.B. 733; 9 B. & S. 835; 37 L.J.Q.B. 214; 18 L.T. 902; 32 J.P. 693; 17 W.R. 28; 38 Digest (Repl.) 400, 613.
- Levingston v. Lurgan Union Guardians* (1868), 18 L.T. 338; 41 Digest 33, o.

R. v. Bradford Navigation Co. (1865), 6 B. & S. 631; 34 L.J.Q.B. 191; 29 J.P. 613; 11 Jur.N.S. 766; 13 W.R. 892; 122 E.R. 1328; 38 Digest (Repl.) 34, 176. A

Appeal from a decision of the Court of Appeal (BRAMWELL, BRETT and COTTON, L.JJ.), affirming a judgment of POLLOCK, B., reported 4 Q.B.D. 433, in an action brought by the respondents against the appellants in respect of a nuisance alleged to be caused to the respondents by a hospital for smallpox and other infectious and contagious diseases established by the appellants at Hampstead, London, N. B

The respondents, the plaintiffs, claimed in their writ damages for a nuisance arising from the use by the defendants of their hospital, at Hampstead, for smallpox and other infectious and contagious diseases, and for causing the assemblage in the neighbourhood of the plaintiffs' property of large numbers of persons suffering from smallpox or other infectious and contagious diseases, or having been recently in contact with persons so suffering, and from offensive smells and noises arising from the hospital, and they asked for an injunction to restrain the defendants from using the hospital as a hospital for patients suffering from smallpox or other infectious and contagious diseases. When the case came on for trial before POLLOCK, B., he asked the jury five questions, which with their answers were as follows: First, Was the hospital a nuisance occasioning damage to the plaintiffs or either, and which of them per se? Secondly, Or by reason of the patients coming to or going from the hospital? Answers first and second: It was a nuisance to each of the plaintiffs per se, and by reason of the patients coming to or going from the hospital. Thirdly, Assuming that the defendants were by law entitled to erect and carry on a hospital, did they do so with all proper and reasonable care and skill with reference to the plaintiffs' rights? A.: No. C
Fourthly, Assuming that the defendants were by law entitled to erect and carry on this hospital, did they do so with proper and reasonable care and skill with reference to the plaintiffs' rights? A.: No. D
Fifthly, Did the defendants use proper care and skill with reference to ambulances? A.: No; we consider the ambulances ought to have been disinfected before leaving the hospital. On these findings POLLOCK, B., gave judgment for the plaintiffs, and afterwards granted an injunction, not in the terms prayed for, but only against using the hospital in such a manner as to create a nuisance to the plaintiffs or either of them. The defendants appealed to the Court of Appeal, who affirmed the judgment of POLLOCK, B., and they now appealed to the House of Lords. E

Sir John Holker, Q.C., Willis, Q.C., Anderson and Proudfoot for the appellants. F

Sir Farrer Herschell, Q.C., Bompas, Q.C., and Finlay for the respondents. G

Their Lordships took time for consideration.

Mar. 7, 1881. The following opinions were read.

LORD SELBORNE, L.C.—It must be assumed for the present purpose that the smallpox hospital which the appellants have established at Hampstead is in its actual position and independently of the particular way in which it is conducted necessarily a nuisance to the neighbours, and the injunction which has been granted by the order appealed against is against "using the plot of land mentioned in the statement of claim and buildings thereon as a hospital for smallpox or any other infectious or contagious disorders in such manner as to create a nuisance to the plaintiffs or either of them." H

The appellants are, therefore, obliged, in order to succeed in this appeal, to prove that they have statutory authority to create a nuisance for the purpose of and as incidental to the maintenance of a smallpox hospital in this place. The appellants say that such authority has been given to them by ss. 5, 7, and 15 of the Metropolitan Poor Act, 1867 [repealed by the Poor Law Act, 1927, and the Local Government Act, 1929], and by orders of the Poor Law Board made pursuant thereto. As far as the orders of the Poor Law Board are concerned, they did undoubtedly direct the appellants to purchase the land in question at a specified price, and to build upon it an asylum for the reception of poor persons infected I

A with or suffering from fever or smallpox, and I assume that the building as erected and fitted up on that land is in strict accordance with plans which the Poor Law Board has prescribed or approved. The statute, when examined, is found to confer in general terms powers extending over a rather wide range of subjects. So far as relates to a hospital or asylum of this particular kind, there is nothing in it mandatory or imperative. Everything which it necessarily requires B may be done, though no such hospital should ever or anywhere be established. Section 5 says:

C "Asylums to be supported and managed according to the provisions of this Act may be provided under this Act for reception and relief of the sick, insane or infirm, or other class or classes of the poor chargeable in unions or parishes in the metropolis . . ."

C Section 6 authorises the formation of districts, and s. 7 requires that in each district so formed, "there shall be an asylum or asylums, as the Poor Law Board from time to time by order direct," leaving the class of poor persons for whom any such asylum may be provided entirely open. Section 15 enables the Poor Law Board from time to time by order to direct the managers

D "to purchase or hire, or to build, and (in either case) to fit up a building or buildings for the asylum, of such nature and size, and according to such plan, and in such manner, as the Poor Law Board think fit, and the managers shall carry such directions into execution."

E Subsequent clauses put the arrangements and conduct of any such asylum under the superintendence of the Poor Law Board. No compulsory power is given to acquire land or any interest in land for any asylum purposes. The Lands Clauses Acts are indeed incorporated by s. 52, but s. 53 expressly provides that so much of those Acts as relates to the purchase of land otherwise than by agreement shall not be put in force except for certain purposes concerned with existing institutions. It appears incidentally from s. 69 (which provides for the repayment of certain F expenses therein specified out of the common poor fund) that asylums might be "specially provided under this Act for patients suffering from fever or smallpox," but except in that way and from the fact that the general category of "sick" necessarily includes patients suffering from any kind of disease, there is no provision in the Act as to contagious or infectious disorders.

G If express words or necessary implication and intendment must be shown in order to authorise the Poor Law Board or any managers of an asylum to create a nuisance in the exercise of the discretionary powers given to them, I can find none in the statute. The result is (i) that this Act does not necessarily require anything to be done under it which might not be done without causing a nuisance; (ii) that as to those things which may or may not be done under it, there is no evidence on the face of the Act that the legislature supposed it to be impossible for any of H them to be done (if they were done at all) somewhere and under some circumstances without creating a nuisance; and (iii) that the legislature has manifested no intention that any of these optional powers as to asylums should be exercised at the expense of, or so as to interfere with, any man's private rights.

I The only sense in which the legislature can be properly said to have authorised these things to be done is, that it has enabled the Poor Law Board to order, and the managers to do them if and when and where they can obtain by free bargain and contract the means of doing so. If the legislature had authorised some compulsory interference with private rights of property within local limits which it might have thought fit to define for the purpose of establishing this asylum, to be used for the reception of patients suffering from smallpox or other infectious disorders, and had provided for compensation to those who might be thereby injuriously affected (in such cases and under such conditions as it might have prescribed), the present case might have been like *R. v. Pease* (1) and *Hammersmith Rail. Co. v. Brand* (2). No person outside the statutory line of compensation, even if the use

of the asylum in the manner authorised by the statute had been productive of serious damage to him, could then have obtained any relief or remedy upon the footing that what the statute authorised was a legal nuisance to himself or an actionable wrong. But the case is different when (as here) no interference at all with any private rights is authorised, and no place or limit of space is defined within which the establishment of such an asylum is made lawful. Neither the Poor Law Board nor the managers could for this purpose have taken a single foot of ground, or have interfered with the most insignificant easement against the will of the plaintiffs or of any other person to whom such land or easement might belong. No line is here drawn by the legislature between interests which are and interests which are not proper subjects for compensation. A B

Under these circumstances, I am clearly of opinion that the Poor Law Board and the managers had no statutory authority to do anything which might be a nuisance to the plaintiffs without their consent. I, therefore, move your Lordships to affirm the judgment of the court below and dismiss this appeal. C

LORD BLACKBURN.—The point on which the defendants principally relied was that, as they contended, the legislature had, by the Metropolitan Poor Law Act, 1867 [repealed by Poor Law Act, 1927, and Local Government Act, 1929], authorised the erection and maintenance of asylums for the reception of the sick poor chargeable in the metropolis, and, with that object, given power to the Poor Law Board to make the metropolis into a district, and to create a corporation, to be called the managers of the Metropolitan Asylum District, who were bound to obey the directions of the Poor Law Board; that the defendants were duly created by orders of the Poor Law Board; that all they had done in making and maintaining the hospital was bona fide done in obedience to the directions of the Poor Law Board and the Local Government Board, which had since been substituted for the Poor Law Board; and their contention was, that, even if the maintenance of the hospital was a nuisance to the plaintiffs as owners and occupiers of adjoining property, such that if it had been maintained by private persons the plaintiffs would have been entitled to relief, the legislature has thought fit for the public good to deprive them of that relief. D E F

This is a question of great public importance. It has been judged better to determine this question first. In order to raise this question it must be assumed that the maintenance of this hospital on this plot of ground for the reception of so large a body of smallpox patients is necessarily a nuisance to the adjoining occupiers. But this must be without prejudice to the contention of the defendants that the first two findings of the jury were not satisfactory. And it must also be without prejudice to the contention of the plaintiffs that, even if the construction of the Act be what the defendants contend and the plaintiffs deny, still that the answers of the jury to the 3rd, 4th, and 5th questions of the judge, if satisfactorily obtained, would entitle the plaintiffs to some relief. G

I proceed to the discussion of the question thus raised. I think that *Hammer-smith Rail. Co. v. Brand* (2), in your Lordships' House, settles beyond controversy that where the legislature directs that a thing shall at all events be done, the doing of which, if not authorised by the legislature, would entitle any one to an action, the right of action is taken away. It is enough to say that such was the unanimous decision of this House, but the reason briefly given by LORD CAIRNS seems indisputable. It is a *reductio ad absurdum* to suppose it left in the power of the person who had the cause of action to obtain an injunction and so prevent the doing of that which the legislature intended to be done at all events. The legislature has very often interfered with the rights of private persons, but in modern times it has generally given compensation to those injured; and, if no compensation is given, it affords a reason, though not a conclusive one, for thinking that the intention of the legislature was, not that the thing should be done at all events, but only that it should be done if it could be done without injury to others. H I

A What was the intention of the legislature in any particular Act is a question of the construction of the Act. Before considering the terms of the Metropolitan Poor Act, 1867, it may be as well to consider what was the state of the law before it was passed. The successive Poor Law Acts had given powers for the relief of the poor chargeable, and power to raise money for those purposes, and a series of enactments had given powers to purchase sites for workhouses, and to lodge and
B maintain the chargeable poor in those workhouses, and to raise money for that purpose. Those who had the management of such workhouses had thus the charge of a number of persons assembled together under circumstances that made it very likely that there should be sickness, and often contagious sickness, among them. I can, however, find no words in any of the Acts prior to 1844 alluding to that likelihood. There are a few words in the Poor Law Amendment Act, 1844,
C in the preamble to s. 4 [repealed], that show that the attention of those who framed that Act had been called to the likelihood of infectious disorders being communicated to the inmates in a workhouse; but there was no provision before the passing of the Metropolitan Poor Act, 1867, casting on the managers of a workhouse any special duties as to the management of the sick poor, nor any power to raise funds for any expenditure incurred for such an object further than
D it was involved in the maintenance of the persons chargeable. It seems that the legislature left the managers of a workhouse subject to the duties which the common law cast upon those having the charge of others, and did not see the necessity for providing them with extraordinary powers, or with the means of raising funds for extraordinary expenses.

E Those who have the charge of a sick person, if he is helpless (whether the disease be infectious or not), are at common law under a legal obligation to do, to the best of their ability, what is necessary for the preservation of the sick person, and the sick person, if not helpless, is bound to do so for his own sake. When the disease is infectious, there is a legal obligation on the sick person, and on those who have the custody of him, not to do anything, which can be avoided, which shall tend to spread the infection, and, if either do so, as by bringing the infected person
F into a public thoroughfare, it is an indictable offence, though it will be a defence to an indictment if it can be shown that there was a sufficient cause to excuse what is *prima facie* wrong: *R. v. Burnett* (3). To take an extreme case, if a house in which a person ill of an infectious disorder lay bedridden took fire, and it was necessary to choose whether the sick person was to be left to perish in the flames, or to be carried out through the crowd at the risk or even the certainty of infecting
G some of them, no one could suppose that those who carried out the sick person could be punishable, and probably a much less degree of necessity might form an excuse, but still some excuse is required. It is not necessary here to determine what constitutes a sufficient excuse.

H Where those who have the custody of the person sick of an infectious disorder have not the means of isolating him from the other inmates, which is very commonly the case with the poor, and, consequently, those other inmates and the neighbours are exposed to the risk of infection, I think the inability to isolate him would form a sufficient excuse to be a defence to any indictment; and, I think also, though I am not aware of any authority on the subject, that the neighbours could not maintain any action for the damage which they would in such a case sustain from the proximity of the infected person, it being a necessary incident to
I the use of property for habitations in town that contagious sickness may befall their neighbours. If those who have the charge of the infected person have the means of isolating him on the spot, they certainly do well to use them; and if it cannot be done on the spot, and they can either by their own means, or by the aid of charitable persons who have erected a hospital, find a place where he can be isolated so as to avoid the risk of infection, they will do well to use the means. I do not mean to express any opinion whether at common law they would or would not be responsible for not doing so; but there is no authority, and I think no principle, for saying that they are justified in removing him to a place where the

neighbours would be exposed to contagion, though it may be that those neighbours would be fewer in number than the neighbours of the spot where the infection broke out, nor for saying that, if that was done, and the contagion was such as to amount to a real nuisance, those neighbours might not maintain an action, and obtain an injunction to protect themselves against the importation of foreign infection. For though, as I have already said, I think it an incident to the use of a habitation in a town that the occupier must bear the necessary risks of the inmates of neighbouring habitations falling ill of a contagious disease, I do not think it an accident that he is to submit to his neighbours wilfully, though for very laudable motives, and not maliciously, bringing in contagion where it did not previously exist, if the effect is not merely to alarm him but to injure him.

This, I think, is borne out by the decisions on the subject of inoculation. Inoculation was, it is well known, introduced into this country in the early part of the eighteenth century. It consisted in artificially communicating the smallpox in such a manner that the patient took it in a very mild form, but was as much a source of infection to others as if the disease had been taken in the natural manner. The introduction of the practice was vehemently opposed. In 1752 a case came before LORD HARDWICKE which is reported in two reports: *Baines v. Baker* (4). I collect from the two reports that it was proposed by private persons to erect a building in Coldbath Fields to be used as a hospital for the reception of persons ill of the smallpox, and also for the reception of persons who were there to be inoculated. The plaintiff was, it appears, owner of building land in the neighbourhood, and gave evidence (of what seems very probable) that the fears of infection from the proposed hospital greatly deteriorated the letting value of his property. LORD HARDWICKE refused to grant an injunction, saying, what is undoubtedly law, that loss arising from the fears of mankind though reasonable, would not create a nuisance at law, and that before he could grant an injunction, he must be satisfied that what was proposed to be done would be a legal nuisance affecting the plaintiff's private rights. He is reported in AMBLER to have said that he thought such a charity was likely to prove of great advantage to mankind, such a hospital must not be far from a town, because those who are attacked with that disorder in "a natural way may not be in a condition to be carried far." This I think very true, and it is to be borne in mind when construing the Act now in question. LORD HARDWICKE seems to have decided that the plaintiff made out no nuisance to his private rights, and that even if the maintenance of a place for the artificial propagation of smallpox was indictable, which seems not to have been LORD HARDWICKE's opinion, that was a public and not a private nuisance.

In *R. v. Sutton* (5), in 1767, it was held that an indictment for maintaining a house for inoculating for the smallpox was not so plainly bad as to be quashed on motion. This is all that appears from the report, but from what LORD ELLENBOROUGH says in *R. v. Vantandillo* (6) it would appear that there had been much more discussion at the time. In *R. v. Burnett* (3), in 1815, it was decided that, though inoculation for the smallpox may be practised lawfully and innocently, yet it must be under such guards as not to endanger the public health by communicating this infectious disease. And I think, by necessary inference, it follows that to gather together in one spot patients suffering from infectious diseases is lawful, but it must be under such guards as not to endanger the public health by communicating this infectious disease, and, as it seems to me, as not to produce injury to the rights of the owners of adjoining property by producing a nuisance to it. If this be a correct view of the law, it is obvious that, however desirable it might be to erect and maintain asylums for the reception of the sick poor, it could not be done by any parochial authorities unless the authority of Parliament was obtained for raising funds for the purpose of authorising a public body to obtain a site for the asylum; and the Metropolitan Poor Act, 1867, certainly created such a body, and gave it powers to raise money, and without further powers this body could erect an asylum provided it was done in such a manner as neither to endanger the public health nor to form a nuisance to private property.

A It is, for the reason given by LORD HARDWICKE, necessary that the site of such an asylum should be not far from the places where the patients fall sick, and consequently in the case of the metropolis in an inhabited district. If it be the fact that such an asylum must be a nuisance unless on a site so extensive as to keep all habitations at a considerable distance, it may be that such a site cannot be obtained at all in the neighbourhood of the metropolis, or only at a cost so enormous as to make it practically impossible. If this is the case it might be for the consideration of the legislature whether the certain danger of infection from leaving the infectious sick paupers where they fell ill exceeded that which would arise from a well-regulated hospital in another place to such an extent that it was for the public benefit that this latter risk should be run, and, whether the rights of owners of property there should stand in the way of such a public benefit or should be made to give way with or without compensation.

C In the Metropolitan Poor Act, 1867, there are provisions (ss. 15, 16, 17, 18, 21, and 28) putting everything under the control of the Poor Law Board, and thus affording a considerable, and probably a sufficient, security that any asylum made under that Act should be a well-regulated asylum, and should not be made in any place unless the Poor Law Board thought it a fit place. But the question, as I think, is whether there is an intention shown on the part of the legislature to authorise the erection of an asylum where it is a nuisance to owners of the adjoining property if the Poor Law Board thought it a fit place, either mistakenly thinking the asylum would be no nuisance there, or, perhaps, rightly thinking that there was no other place in which it could be erected without being a greater nuisance than if erected there. It is clear that the burden lies on those who seek to establish that the legislature intended to take away the private rights of individuals to show that by express words or by necessary implication such an intention appears. There are no express words in this Act, and I think the weight of argument is rather against than in favour of such an implication. There is no power given to take land for a site otherwise than by agreement. For though the Lands Clauses Acts are incorporated by s. 52, yet by s. 53 so much of the Lands Clauses Acts as relates to the purchase of lands otherwise than by agreement shall not be put in force except for the purpose of enlarging an existing workhouse. The asylum, under this Act, must, therefore, be either made by, under s. 18, converting a workhouse into an asylum, which is not the present case, or by erecting one on land purchased or hired by agreement.

G In *Clowes v. Staffordshire Potteries Waterworks Co.* (7) MELLISH, L.J., says (8 Ch. App. at p. 139):

"If no compulsory powers were given for the purpose of purchasing lands upon which the works were to be built, it certainly seems extraordinary that compulsory powers should be given to take away the rights of other persons who have rights in the nature of easements over the lands so purchased."

H He was discussing the question whether the party grieved retained his right to an injunction or was compelled to seek for compensation. In the Metropolitan Poor Act, 1867, there is no compensation given, and the question is whether the purchase by agreement of the site for the asylum gave the defendants power without compensation to do what would have been a wrong to the plaintiffs if done by the former owners, which adds additional force to the argument of I MELLISH, L.J., when applied to the construction of this Act. It is true that in s. 7 it is said that "for each district there shall be an asylum or asylums as the Poor Law Board from time to time direct." But the construction of that is, I think, only that the managers shall make such asylums in obedience to the order of the Poor Law Board, if they can do so by exercise of the powers given them, and not to say that they must make them at all events, so as to give them additional powers to make the asylums by taking lands or injuriously affecting lands otherwise than by agreement.

I am sensible of the great difficulty that there may be in finding sites for A
asylums under this Act, or hospitals under the Public Health Act, 1875, s. 131,
unless further powers be given, but that must be for the consideration of the
legislature. I do not understand that any other point is raised on the Appeal,
and if your Lordships take this view of the construction of the Metropolitan Poor
Act, 1867, I think it will follow that the Appeal should be dismissed with costs.

LORD WATSON.—The only question falling to be determined in this appeal is B
whether, on the assumption that the first and second findings of the jury are
well founded, the respondents are entitled to have an injunction restraining the
appellants from using a building erected by them at Hampstead as a hospital for
the reception and treatment of persons suffering from smallpox or other infectious
disease, to the nuisance of the appellants, and also to recover damages from the
appellants in respect of the injury which they have thereby sustained. C

The first, and, according to the view which I take of the case, the more important
of these two findings is to the effect that the “hospital was a nuisance per se
occasioning damage to the [respondents] and each of them.” By these words I
understand the jury to affirm that the hospital which the appellants have built
upon the site acquired by them with a view to its erection, cannot be used for the
reception and treatment of persons suffering from smallpox without creating a
substantial nuisance to the respondents as owners of certain neighbouring properties.
I think it may be matter of reasonable inference, from the terms of the finding,
that nuisance would necessarily be occasioned to the respondents by the use of
any hospital for the special accommodation of smallpox patients on the same site,
and similar in size and character to that which the appellants have built. But I
do not understand the jury thereby to affirm the impossibility of erecting and
using a hospital for the treatment of smallpox on a lesser scale, and according to
a different plan, upon the site in question, or the impossibility of procuring else-
where a suitable site upon which a hospital of the same plan and dimensions with
that complained of might be erected and so used, without creating a nuisance in
either case. D E

The second finding of the jury affirms, that “nuisance was occasioned to the
respondents by reason of the patients going to or coming from the hospital.” F
The precise meaning the jury intended to convey by that finding may be doubtful.
It may signify that, in the opinion of the jury, the conveyance of smallpox patients
to and from the hospital would of itself, and in all circumstances, occasion nuisance,
although they might be treated within its walls without creating any nuisance. G
Or it may simply mean that the provision made by the appellants for the entrance
and exit of patients was defective, and that the nuisance thereby occasioned might
be obviated by the adoption of a better arrangement. Owing to the shape in
which this appeal comes before the House, I have no means of ascertaining for
myself the true import of the finding, and the parties, as I understood, were not
at one upon the point. But in the view which I have taken of the legal conse-
quences of the first finding, the second appears to me to be immaterial, whatever
its true meaning may be. H

I consider myself bound to assume that the verdict of the jury was given accord-
ing to the facts and in terms of the law, as correctly stated by the presiding judge.
I understood that so much was conceded by the counsel for the appellants, and
that their argument was addressed to the House on the footing that the building
which the appellants have erected at Hampstead cannot be used for the treatment
of persons suffering from smallpox without occasioning that which is both in
fact and law a nuisance to the respondents. In that case it seems to be clear
that if the appellants acted in a private capacity, and without legislative sanction,
they could not successfully impeach the judgment of POLLOCK, B., confirmed by
the Court of Appeal. That proposition I did not understand the appellants to
contest, but they allege that in providing a smallpox hospital at Hampstead they
did no more than carry out the orders of the Local Government Board, and they I

A maintain that the Board had full power under the Metropolitan Poor Act, 1867, to order the erection and use of the building for the treatment of smallpox irrespective of any nuisance thereby occasioned. In these circumstances it was rightly represented on both sides of the Bar that the legal issue before the House depends upon the construction to be put upon the enactments of the statute of 1867. But I think it expedient, before dealing with the enactments of the

B statute in question, to consider shortly what kind or degree of statutory sanction is sufficient to justify the creation of a legal nuisance.

The judgment of this House in *Hammersmith Rail. Co. v. Brand* (2) determines that where Parliament has given express powers to construct certain buildings or works according to plans and specifications upon a particular site and for a specific purpose, the use of these works or buildings in the manner contemplated and

C sanctioned by the Act, cannot, except in so far as negligent, be restrained by injunction, although such use constitutes a nuisance at common law, and that no compensation is due in respect of injury to private rights unless the Act provides for such compensation being made. Accordingly, the respondents did not dispute that if the appellants, or the Local Government Board, had been, by the Metropolitan Poor Act, 1867, expressly empowered to build the identical hospital which

D they have erected at Hampstead upon the very site which it now occupies, and that with a view to its being used for the treatment of patients suffering from smallpox, the respondents would not be entitled to the judgment which they have obtained. The appellants do not assert that express power or authority to that effect has been given by the Act either to themselves or to the Board, but they contend that, having regard to the nature of the public duties laid upon them

E and the necessities of the case, it must on a fair construction of the Act be held that the legislature did intend them to exercise and authorise them to exercise such power and authority under the direction and control of the Poor Law Board.

I see no reason to doubt that wherever it can be shown to be a matter of plain and necessary implication from the language of a statute that the legislature did intend to confer the specific powers which I have above referred to, the result in

F law will be precisely the same as if these powers had been given in express terms; and I am disposed to hold that, if the legislature, without specifying either plan or site, were to prescribe by statute that a public body shall within certain defined limits provide hospital accommodation for a class or classes of persons labouring under infectious disease, no injunction could issue against the use of a hospital established in pursuance of the Act, provided it were either apparent or proved to

G the satisfaction of the court that the directions of the Act could not be complied with at all without a nuisance. In that case the necessary result of that which they have directed to be done must presumably have been in the view of the legislature at the time when the Act was passed. On the other hand, I do not think that the legislature can be held to have sanctioned that which is a nuisance at common law, except in the case where they have authorised a certain use of a

H specific building in a specified position, which cannot be so used without occasioning nuisance, or in the case where the particular plan or locality not being prescribed, they have imperatively directed that a building shall be provided within a certain area and so used, it being an obvious or established fact that nuisance must be the result.

In the latter case the onus in proving that the creation of a nuisance will be

I the inevitable result of carrying out the directions of the legislature depends upon their making good these two propositions, in the first place that they are bound to obey the imperative order of the legislature, and in the second place that they cannot possibly do so without infringing private rights. If the order of the legislature can be implemented without nuisance, they cannot, in my opinion, plead the protection of the statute, and, on the other hand, it is insufficient for their protection that what is contemplated by the statute cannot be done without nuisance, unless they are also able to show that the legislature has directed it to be done. Where the terms of the statute are, not imperative but permissive, when

it is left to the discretion of the persons empowered to determine whether the general powers committed to them shall be put into execution or not, I think the fair inference is that the legislature intended that discretion to be exercised in strict conformity with private rights, and did not intend to confer licence to commit nuisance in any place which might be selected for the purpose.

To return to the statute upon the terms of which the appellants seek to justify the nuisance which they must for the purposes of the present case be held to have established at Hampstead. The objects of the Act of 1867 are various, but they all relate to the relief of the legal poor within the metropolis, and include the establishment of "district asylums for the reception and relief of the sick, insane, infirm, or other class or classes of the poor chargeable in unions or parishes." So far as regards this last object, the Act seems to me to have been designed to supplement, if not to supersede, certain provisions of the Poor Law Amendment Act, 1844 [repealed], which made it lawful for the poor law commissioners, in the cases of London and each of five other large cities in England, to combine parishes and unions into districts for the purpose of providing and managing asylums for the temporary relief of the destitute homeless poor. The machinery enacted by the statute for carrying out that object is very similar to that which is provided in regard to asylums by the Act of 1867.

The sections of the Act of 1867, so far as these relate to asylums, are not complicated or ambiguous. Section 5 declares in general terms that asylums to be supported and managed according to the provisions of the Act "may be provided" for the occupation and relief of the poor or classes of poor already mentioned, and in furtherance of that purpose it is declared by s. 6 that the Poor Law Board "may from time to time" combine into districts, unions or parishes, or unions and parishes, in the metropolis. By s. 7 it is imperatively enacted that: "For each district there shall be an asylum or asylums, as the Poor Law Board may from time to time by order direct." These enactments are followed by sections which provide for the constitution of a board of managers for each district formed under the Act. Then comes s. 15 which enacts that

"The Poor Law Board may from time to time by order direct the managers to purchase or hire, or to build, and (in either case) to fit up a building or buildings for the asylum, of such nature and size, and according to such plan, and in such manner, as the Poor Law Board shall think fit . . ."

I assume that the words of the preceding clause are sufficient to confer by implication the same powers in regard to the purchase of a site, which are expressly given in relation to the purchase of a building. The other sections requiring notice are s. 17, which empowers the managers to meet the expenses incurred in the execution of s. 15 by borrowing, on the security of the poor rates of the unions and parishes comprehended in their district, a capital sum to be repaid out of these rates by equal annual instalments not exceeding twenty, and also ss. 16, 51, 52, and 53. I shall not examine these four sections in detail, it being sufficient for the purposes of this case to state that their effect is to give the managers powers, first, to acquire lands and buildings for the purposes of s. 15 by voluntary purchase, no compulsory powers being given except "for the purchase of lands for the purpose of enlarging a workhouse, hospital, or school existing at the passing of this Act"; secondly, to acquire such lands and buildings by voluntary purchase from persons under legal incapacity; and, thirdly, to use certain short statutory forms of conveyance.

Such being the subject of the enactments of the statute of 1867 which have a material bearing upon the present question, I am unable to find in them anything to support the plea that the legislature thereby intended to authorise in any case the creation of a nuisance. I assume that the Hampstead Asylum has been erected in pursuance of the Act in this sense, that the procedure prescribed by the statute has been strictly followed both by the Local Government Board, who now stand in the place of the Poor Law Board, and by the managers. There is

A no question as to the bona fides both of the Board and the managers. It is clear that they acted in the honest belief that all they did was for the benefit of the community, and within their statutory powers. But that will not avail if the Act does not empower either of them or both in conjunction to erect an asylum to the nuisance of neighbouring proprietors. These powers appear to me to be from first to last permissive, and not imperative. Whether they shall be exercised

B at all, and, if so, to what extent and effect their exercise shall be carried, is left to the discretion of the Poor Law Government Board. No doubt the language of s. 7 is imperative, and that is a circumstance upon which the appellants were fairly entitled to argue in support of their contention. But it is, in my opinion, a conclusive answer to their argument that, in the first place, the Board is not bound to form a district; and, in the second place, if they do not see fit to form a

C district in terms of s. 6, they are under no statutory compulsion to establish an asylum for smallpox patients by reason of the provisions of s. 7, but have ample means of satisfying these provisions by the erection and use of an asylum or of asylums which do not constitute a nuisance to anybody.

So far as regards a smallpox hospital the discretion committed to the Board is not limited to determining on what site, of what size, and according to what plan,

D it shall be built, but involves the duty of considering and determining whether it shall be built at all. The appellants in support of their construction of the Act founded strongly upon s. 69 (2) which provides that expenses incurred for "the maintenance of patients in any asylum specially provided under this Act for patients suffering from fever or smallpox," shall be repaid out of the Common Poor Fund. But that provision is not meant to add and cannot be held to add to

E the powers previously conferred. It is not disputed that an asylum shall be provided and used for the treatment of smallpox patients, if no nuisance is thereby occasioned, and all that the legislature have enacted by s. 69 is that if and when such a hospital has been lawfully established the expense of maintaining patients in it shall be defrayed out of a common fund raised by contributions from all the parishes and unions comprised in the district and not by the parishes or unions

F to which they are severally chargeable. The sections in question belong to a class of enactments of which abundant examples are to be found in the statute book, the main object of which is to legalise the application of public rates to purposes which would otherwise be ultra vires the bodies by whom these rates are administered. Such purposes are in themselves lawful, but it is not lawful to expend the money of the ratepayers upon them without the express sanction of

G Parliament. It appears to me that, in making provision with regard to asylums in the metropolis, the legislature has done nothing more than is requisite to place the authorities to whom it has committed the execution of that part of the Act upon the same level as individuals in so far as the rights of third parties are concerned, but with the right, which individuals have not, to defray the cost by rates levied from the public. I am, accordingly, of opinion that the judgments under

H appeal ought to be affirmed.

Solicitors: *Few & Co.; Bischoff, Bompas & Bischoff.*

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

Re LEVY. Ex Parte WALTON

[COURT OF APPEAL (Sir George Jessel, M.R., James and Lush, L.JJ.), May 26, 1881]

[Reported 17 Ch.D. 746; 50 L.J.Ch. 657; 45 L.T. 1;
30 W.R. 395]

Bankruptcy—Disclaimer—Power of trustee—Exercise—Rights of third parties. Statute—Construction—Avoidance of absurdity, repugnance, or inconsistency with rest of statute or intention of legislature.

In construing statutes and written instruments the grammatical and ordinary sense of the words is to be adhered to unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity or inconsistency, but no further. A literal construction of a statute ought not to prevail if it is opposed to the intentions of the legislature, as apparent by the statute, and if the words are sufficiently flexible to admit of some construction by which that intention will be better effectuated.

Held, accordingly, that s. 23 of the Bankruptcy Act, 1869, which empowered a trustee to disclaim onerous property of the bankrupt [see now s. 54 of the Bankruptcy Act, 1914: 2 HALSBURY'S STATUTES (2nd Edn.) 321] must be read as not affecting the rights of third parties except so far as necessary to free the bankrupt, his trustee, and the estate from liability in respect of the disclaimed property.

Notes. Considered: *Re Clarke, Ex parte East and West India Dock Co.* (1881), 17 Ch.D. 759; *Harding v. Preece* (1882), 9 Q.B.D. 281; *Hill v. East and West India Dock Co.* (1884), 9 App. Cas. 448. Applied: *Wood v. Hayes* (1885), 1 T.L.R. 207. Considered: *De Vesci v. O'Connell*, [1908] A.C. 298. Applied: *Wise v. Lansdell*, [1920] All E.R.Rep. 648. Considered: *Re Sassoon, I.R.Comrs. v. Raphael, Re Sassoon, I.R.Comrs. v. Ezra*, [1933] Ch. 858. Referred to: *Re Latham, Ex parte Glegg* (1881), 19 Ch.D. 7; *Re Marrish, Ex parte Hart Dyke* (1882), 22 Ch.D. 410; *Re Cock, Ex parte Shilson* (1887), 20 Q.B.D. 343; *Heritable Reversionary Co. v. Millar*, [1892] A.C. 598; *O'Grady v. Wilmot*, [1916] 2 A.C. 231; *R. v. Halliday*, [1917] A.C. 260; *Tozer v. Viola*, [1918] 1 Ch. 75; *Victoria City Corpn. v. Bishop of Vancouver Island*, [1921] 2 A.C. 384; *Re Lister, Ex parte Bradford Corpn. v. Durrance*, [1925] All E.R.Rep. 467; *Leitch v. Emmott*, [1929] 2 K.B. 236.

As to disclaimer by a trustee in bankruptcy and construction of statutes to avoid absurdity, etc., see 2 HALSBURY'S LAWS (3rd Edn.) 457 et seq., and *ibid.*, vol. 36, pp. 391, 392. For cases see 5 DIGEST (Repl.) 997 et seq., and 42 DIGEST 616.

Cases referred to:

- (1) *Caledonian Rail. Co. v. North British Rail. Co.* (1881), 6 App. Cas. 114; 29 W.R. 685, H.L.; 42 Digest 638, 410.
- (2) *Grey v. Pearson* (1857), 6 H.L.Cas. 61; 26 L.J.Ch. 473; 29 L.T.O.S. 67; 3 Jur.N.S. 823; 5 W.R. 454; 10 E.R. 1216, H.L.; 42 Digest 626, 277.
- (3) *Smalley v. Hardinge* (1881), post; 7 Q.B.D. 524; 50 L.J.Q.B. 367; 44 L.T. 503; 29 W.R. 554, C.A.; 5 Digest (Repl.) 1019, 8242.

Also referred to in argument:

- Re Muller, Ex parte Buxton* (1880), 15 Ch.D. 289; 43 L.T. 183; 29 W.R. 28, C.A.; 5 Digest (Repl.) 1010, 8154.
O'Farrell v. Stephenson (1879), 13 I.L.T. 161; 5 Digest (Repl.) 1020, *4543.
London and Westminster Loan and Discount Co., Ltd. v. Drake (1859), 6 C.B.N.S. 798; 28 L.J.C.P. 297; 5 Jur.N.S. 1407; 7 W.R. 611; 141 E.R. 664; 31 Digest (Repl.) 222, 3595.

A Appeal from an order made by a registrar in bankruptcy.

By an indenture of lease, dated Aug. 11, 1879, and made between the lessors, Walton William Walton and Henry Walton, of the one part, and Hyam Levy and Moss Hyam Levy, cabinet makers and co-partners, of the other part, the lessors demised a messuage on the west side of and being No. 96, Leman Street, Goodman's Fields, Whitechapel, to Hyam Levy and Moss Hyam Levy, their executors,

B administrators, and assigns, for a term of ten years, from Dec. 25, 1878, at a yearly rent of £70, payable on the four usual quarter days. The lease contained joint and several covenants by the lessees that they, their executors, administrators, and assigns would pay the rent, taxes, and a proportion of the expense of repairing party walls, gutters, and drains; repair and paint; peaceably deliver up the premises at the end or othersoever determination of the term; and repay insurance premiums on the sum of £1,250, the ascertained value of the premises demised.

C The lease contained a proviso for re-entry in case of non-payment of rent for twenty-one days, or non-performance of covenants by the lessee, their executors, administrators, or assigns. The lessors covenanted for quiet enjoyment and to insure.

By an indenture of lease, dated Aug. 29, 1879, and made between Hyam Levy and Moss Hyam Levy, of the one part, and Herman Michaelson, of the other part, it was witnessed that, in consideration of £100 paid to them by Michaelson and of the rent, and covenants reserved, H. Levy and M. H. Levy demised the premises No. 96, Leman Street aforesaid, to Michaelson from June 24, 1879, for nine and a half years less seven days, at the rent of £56 11s. 3d. (being the sum of £55 in respect of the premises, and the sum of £1 11s. 3d. which H. Levy and M. H. Levy

E "pay to the superior landlords for the insurance"). The covenants were similar to those in the original lease. On Jan. 17, 1881, H. Levy and M. H. Levy, trading as Barnett, Moss & Co., filed a petition for liquidation, and resolutions for liquidation and the appointment of trustees were afterwards passed and registered. On Mar. 31 the trustees gave notice of motion to Messrs. Walton and to Michaelson for an order that the trustees might be at liberty to disclaim the lease of Aug. 11, 1879. The affidavit of the trustees in support referred to the fact that the premises were underlet at a rent less than that reserved by the original lease.

F

The motion was heard on April 8 before Mr. Registrar HAZLITT, who ordered that the trustees should be at liberty to disclaim all their interest in the property. The lessors appealed.

J. Henderson for the lessors.

G *Winslow, Q.C.*, and *Finlay Knight* for the trustees.

Methold for the under-lessee.

SIR GEORGE JESSEL, M.R.—This case raises a very important question as to the proper construction to be put upon s. 23 of the Bankruptcy Act, 1869. Before considering the exact words of the section I should like to say a word or two as to the rule which is binding on all courts when they are concerned to construe statutes or other instruments.

H Whatever may have been the rule in times past as to the interpretation of statutes, the rules which are to be applied are now well recognised. In order to show what those rules are, I am about to cite some passages from the last case on the subject, that of *Caledonian Rail. Co. v. North British Rail. Co.* (1), decided by the House of Lords on Feb. 17, 1881. That is not only the last decision as to the construction of statutes, but it is a very recent decision. It was an appeal from the Court of Session, but it is an authority binding on this court, inasmuch as the law on the subject is the same both in England and Scotland. The appellants there said that the literal effect should be given to the words of the statute, although by such a construction effect would not be given to the preamble of the statute. But in his judgment LORD SELBORNE said (6 App. Cas. at p. 122):

I

"The more literal construction ought not to prevail if (as the court below has thought) it is opposed to the intentions of the legislature, as apparent by the

statute, and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated."

LORD BLACKBURN cited with approval the opinion of LORD WENSLEYDALE, which he called the golden rule for construing all written engagements, and which in *Grey v. Pearson* (2) (6 H.L.Cas. at p. 106) he stated thus:

"... in construing wills, and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity or inconsistency, but no further."

Having these rules before me, I proceed to consider the object of the Bankruptcy Act, 1869, especially with regard to s. 23, and then to see whether a literal construction of that section would be absurd or inconsistent with the object of the statute. The object of the legislature is apparent. When a man becomes bankrupt it is not intended that he shall remain liable to engagements in respect of the property which is taken away from him. The legislature intended to set him free from all such liabilities. That is one object. Another object is that all the bankrupt's property shall be vested in his trustee in bankruptcy. No man would accept the office of trustee if he were made subject to all the personal liabilities attaching in respect of the property of the bankrupt which has vested in the trustee. Those who framed the Act must have been well acquainted with the term "covenant running with the land," or known that certain liabilities arose from the mere holding of property in certain cases, as in that of the property being held under a lease for years; and it was never intended that the trustee should be compelled to hold the property subject to the liabilities. Accordingly, a provision was made that when the trustee found that the property would produce no surplus beyond the liabilities affecting it, he might disclaim, and so get rid of the property and the liabilities together. It was certainly not intended that the trustee should be freed from the liabilities and still keep the property. I have stated what, as far as I can see, was the object of the legislature. It never is the object of the legislature to confiscate property without urgent reason. Any ruling as to the meaning of the statute which involved such a proposition would be considered, to use the word of LORD WENSLEYDALE, as an "absurdity."

Section 23 of the Bankruptcy Act provides, first of all, for "land of any tenure burdened with onerous covenants." Those words relate, not only to leaseholds or contracts, but to freeholds held subject to perpetual rent charges which are common in some parts of the country. The next subject is "unmarketable shares in companies." That means shares for which the trustee can get nothing. The holders of the shares are frequently liable to calls to a limited or unlimited extent, according to the nature of the company in which they are held. The provision is continued as to "unprofitable contracts." These words are of general application. They apply to any contract which is unprofitable to the estate, or which, if adopted, would render the trustee liable. With respect to those things which I have named, and also to

"any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money,"

it is provided that the trustee, notwithstanding he has tried to sell, or has taken possession of, such property, or exercised any act of ownership in relation thereto, may, by writing under his hand, disclaim such property, and upon the execution of such disclaimer the property disclaimed shall, if the same is a contract, be deemed to be determined from the date of the order of adjudication.

We may take the case of a contract by a builder to build houses on another man's land. The owner of the land merely contracts to grant leases of the houses

A when built. The contract is then pledged for a debt owing by the builder to a bank or some person. In such a case is it to be supposed that the legislature ever contemplated that the equitable assignee of the contract was to lose his property or security by the act of the trustee in disclaiming the contract, or the builder becoming bankrupt? That would be the effect of construing the section literally. I have known cases where thousands of pounds have been lent to a builder on the security of such a contract, and the builder has speculated and become bankrupt. The money is not to be lost because the builder is bankrupt. To hold that such a result would follow would be manifestly absurd. The same rule applies in the case of a contract to build a ship where a third party would get all the benefit of the contract in the case of bankruptcy and disclaimer. Can the trustee be allowed, by disclaiming the contract, to destroy the property of persons, or confiscate it, without any reason except that a third party would be benefited, who would, by the accident of the bankruptcy having occurred, thus obtain the property. The section goes on to say that "if the [property] is a lease it shall be deemed to have been surrendered on" the date of adjudication.

That is the case before us. Here there is an under-lease. In some cases there is an assignment of the lease by way of mortgage, a deposit by way of equitable security, or an underlease by way of mortgage. The equitable mortgagee would not lose his security by reason of the bankruptcy; and in the case of a mortgage by way of legal underlease, it would be monstrous injustice to hold that the lessor's rights under the lease granted by him were gone, for in that case the mortgagee would get the property intended as a security for his debt, and would get such property discharged from the rent and covenants to which it was originally subject. The section provides also that the property shall, "if the same be shares in any company, be deemed to be forfeited." Shares may be very valuable, but may be worth nothing to the trustees, because they have been pledged for more than they are worth. Is it possible that in such a case the trustee in bankruptcy of the original shareholder can be allowed to disclaim them for the benefit of the company? Such a ruling would be clearly absurd. The first clause of the section ends as follows:

"If any other species of property, it shall revert to the person entitled on the determination of the estate or interest of the bankrupt; but if there shall be no person in existence so entitled, then in no case shall any estate or interest therein remain in the bankrupt."

G Those words apply to the case of a freehold vested in the bankrupt subject to the payment of a fee farm rent. Probably, in such a case as that, as there is no reversioner, the property would, on disclaimer, go to the Crown.

I have gone through these words of the section to show the absurdity of the result if the section were to be literally construed. But there are words in the section which show that the legislature intended to deal with property over which the

H Court of Bankruptcy had power, property which could be disposed of by that court. The words are:

"Any person interested in any disclaimed property may apply to the court, and the court may, upon such application, order possession of the disclaimed property to be delivered up to him, or make such other order as to the possession thereof as may be just."

I These are not very apt words, especially as regards disclaimed property consisting of contracts. It is obvious that the operation of this clause could not be restricted to cases where possession could be absolutely given, and in cases where the lease had been assigned, I do not think that those words limit the previous general words which relate as between the bankrupt and his trustees. That section, in my opinion, means that the property is to be disclaimed inter se, so as not to interfere with the rights of third parties, and so as only to benefit the bankrupt and his estate, and to put an end to the obligations of the bankrupt so far as they created

rights and liabilities as between the trustee and the persons entitled to the benefit of them. It is only to free such bankrupt and his trustee and estate from liability, on the one hand, and, on the other, to protect persons whose direct rights against the bankrupt may be interfered with by the disclaimer. The last clause provides that

"Any person injured by the operation of this section shall be deemed a creditor of the bankrupt to the extent of such injury, and may accordingly prove the same as a debt under the bankruptcy."

It is not for me to state the principles on which we should work out the whole thing; but it is clear that this lessor's right of distress cannot be affected by allowing the trustee to disclaim. Such right will remain in respect of the original rent, and the original lessor may still re-enter for the breach of any of the lessee's covenants contained in the original lease.

JAMES, L.J.—By the law of England a lessor has a double right—a right in personam on the contract—a right in rem by distress on the property demised, and by the power of re-entry for non-payment of rent or breach of covenant. Where the lessee makes a sub-demise the sub-tenant is not liable on the contract, but he takes the property subject to all the lessor's rights in rem. It would be very unjust and unreasonable if a lessee, who takes the property subject to liabilities, could, by any arrangement whatever with the third party, derogate from the lessor's right. Of course, the lessee may enter into any contract he pleases with his sub-lessee, by which he, the lessee, expressly or impliedly undertakes to discharge the obligations of his own lease. But it would be a violation of every principle of law and justice, and against all common sense, to permit two men, by bargaining with one another, to affect any right of property whatever in another man, particularly any right of the owner from whom both derive title—the first immediately, the second mediately. Although, for want of privity, no action of covenant lies against the sub-lessee, yet equity always prevents the sub-lessee from any active violation of the stipulations in the original lease. It would seem to be equally against principle, and against common honesty, that a lessee, by becoming bankrupt, should deprive the lessor of his remedies in rem, or release a sub-lessee from the legal liabilities and obligations which the property was, in his hands, liable to before the bankruptcy. If the lessee were insolvent, but not made bankrupt, or if the lessee had died insolvent, the lessor's remedies as against the estate itself, and the sub-lessee's liability to distress and forfeiture would remain.

Is it possible to conceive that the insolvency resulting in bankruptcy should confiscate the lessor's right and give the lessee an absolute immunity from such distress and forfeiture. The object of the bankruptcy laws was meant to regulate the distribution of the bankrupt's assets between his creditors, and to relieve the bankrupt and his estate from future liability to his creditors. But it was never intended to affect rights and liabilities as between the creditor and a third party. A surety, for instance, is not discharged by the bankruptcy of his principal. But to revert to the position of lessor and lessee. Take the case of a lease with a surety for the payment of rent. Could it ever have been intended that the bankruptcy of the lessee was to release the surety? Take the case of a lease to two as joint tenant with the usual joint and several covenant. The survivor becomes bankrupt. Can the disclaimer of his trustee release the other joint tenant from his liability? It has been held that the disclaimer does not destroy the interest of his sub-lessee. But supposing that, instead of there being a sub-lease there had been a charge created by way of equitable mortgage, a rent-charge, or otherwise, is it possible that the trustee can surrender so as to destroy that charge? Possibly these considerations, and a good many more that could be suggested, might lead to the conclusion that where the statute says that the disclaimer shall operate as a surrender, there must be an implied condition that the trustee had

- A in himself full right to surrender, not the lease, but the property, and discharged from all estates and interest; that the rule which requires the assent of the court to any disclaimer is obligatory on the trustee, and that the court ought not to give such assent unless satisfied that it can so do without injustice to the lessor or to anyone else, and without prejudice to any rights or remedies of or against any third person.
- B But, seeing that that would not give the trustee the immunity it is intended he shall have, the more complete and satisfactory solution of the riddle may be found in the following principle. When a statute enacts that something should be deemed to have been done, which in fact and truth was not done, the court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to. The bankruptcy law is a special law, having for its object the distribution of an insolvent's assets equitably among his creditors and persons to whom he is under liability, and, upon this *cessio bonorum* to release him, under certain conditions, from future liability in respect of his debts and obligations. That being the sole object of the statute, it appears to me legitimate to say that when the statute says that a lease which was never surrendered in fact (a true surrender requiring the consent of both parties, one giving up and the other taking) is to be deemed to have been surrendered, it must be understood as saying so, with the following qualification, which is absolutely necessary to prevent the most grievous injustice and the most revolting absurdities: "Shall, as between the lessor, on the one hand, and the bankrupt, his trustee or estates, on the other hand, be deemed to have been surrendered."

E LUSH, L.J.—I have felt great difficulty in putting a proper construction on the words of s. 23 of the Bankruptcy Act. I agree that we must insert qualifying words into it in order to carry out its object, as it is quite impossible to construe it literally without involving an absurdity. The obvious intent of the Bankruptcy Act is to free the bankrupt from future liability. The obvious intent of s. 23 was to free the bankrupt's estate from onerous contracts, which, if the trustee could not get rid of them, would be standing burdens on the estate. In order to prevent absurdity, we must read the word "surrendered" in a qualified sense. On reading the words of the section, we find that the trustee may disclaim a lease if it contains onerous covenants, and that when disclaimed the lease shall be deemed to have been surrendered on the date of the order of adjudication. The court may make an order as to possession, and any person injured may prove on the estate.

- G To give literal effect to the words of the section, if the lease had been actually surrendered, the lessor must be deprived of all his rights under it. I think that the object of the section was to put the trustee in the same position as if the lease had never vested in him. Any qualifying words should have some effect, as it seems to me, so as to put the trustee, after disclaimer, in the same position as if the lease had never been granted at all. The object was to relieve the bankrupt's estate and trustee from liability, and not to interfere with the rights of third parties, except so far as might be actually necessary. I at first thought that the section could not be applied to a case where an underlease had been granted. On consideration I think qualifying words must be inserted as to delivering up possession. Where the possession of the property is in the trustee himself, he must give it up to the lessor, and that construction carries out the Act by enabling I him to give up and get rid of the burdensome property.

This is the first time that the precise point has been before the court. The framers of the rules under the Act made it necessary, under the Bankruptcy Rules, 1871, r. 28, for the trustee to get the sanction of the court to the execution of the disclaimer of a lease, and the court may call all interested persons before it. The object of that part of the rule seems to have been to prevent the trustee from wasting valuable property. In *Smalley v. Hardinge* (3) the question was entirely different. There the trustee in bankruptcy had disclaimed the lease, and the landlord thought that he had a right to bring ejectment against the under-lessee;

and the only question present to the mind of the court, of which I was one member, was whether the disclaimer, operating as a surrender, had the effect of putting an end to the under-lease. The disclaimer can have no effect so as to prejudice the interest of the original lessor in the land which he has demised. Lest any expression of opinion now given should lead people to suppose that our present decision is at variance with what was laid down by the Court of Appeal in *Smalley v. Hardinge* (3) I think it necessary to add that, if the same case again arose, it would be decided in exactly the same way as that case was decided.

Method.—I presume that the under-lessee may be admitted to prove against the estate of the bankrupt for the difference between the rent of £70, which he will now have to pay, and the rent of £56 11s. 3d., reserved by the under-lease.

SIR GEORGE JESSEL, M.R.—Yes; the under-lessee is entitled to prove for that.

Solicitors: *Henderson & Buckle; H. Montagu; Baddeley & Sons.*

[Reported by FRANK EVANS, ESQ., Barrister-at-Law.]

PEARSON v. HEYS

[QUEEN'S BENCH DIVISION (Pollock, B., and Manisty, J.), June 28, 1881]

[Reported 7 Q.B.D. 260; 50 L.J.M.C. 124; 45 L.T. 680;
45 J.P. 730; 30 W.R. 156]

Bastardy—Affiliation order—Term not stated by justices in court included by mistake in order as drawn up—Validity of added term—Weekly payments—Termination—Marriage of mother of child.

By s. 4 of the Bastardy Laws Amendment Act, 1872, justices might adjudge a man to be the putative father of a bastard child, and, if they thought fit, "having regard to all the circumstances of the case," might make an order on the putative father for the payment to the mother of the child of a weekly sum for the maintenance and education of the child. By s. 5 such an order ceased to be of any force or validity after the child had attained the age of 13 or died, provided that the justices might direct the payment to be made until the child was 16.

By a mistake made by an assistant to the justices' clerk the putative father of a bastard child was ordered to pay to the mother a weekly sum until the child should attain the age of sixteen years, or should die, "or the said mother shall marry," these last words not being included in the oral statement made in court when the justices pronounced their decision. Upon the subsequent marriage of the mother, the putative father discontinued the weekly payments. On a complaint by the mother of the child,

Held: (i) the court could only look at the order as formally drawn up and could not consider the terms of the justices' oral pronouncement; (ii) the justices had a discretionary power to make an order terminating before the 13 or 16 years specified in s. 5, and, therefore, the provision that the payments should continue until the mother should marry was valid and effectual and on her marriage the order ceased to be of any force.

Notes. The Bastardy Laws Amendment Act, 1872, was repealed by the Affiliation Proceedings Act, 1957, of which, for the provisions dealt with in the present case, see s. 4 and s. 6: 37 HALSBURY'S STATUTES (2nd Edn.) pp. 40, 43.

Considered: *Williams v. Davies* (1889), 11 Q.B.D. 74.

- A** As to affiliation orders, see 3 HALSBURY'S LAWS (3rd Edn.) 122 et seq.; and for cases see 3 DIGEST (Repl.) 461 et seq.

Cases referred to in argument:

- Ex parte Johnson* (1863), 3 B. & S. 947; 2 New Rep. 111; 32 L.J.M.C. 193; 27 J.P. 661; 9 Jur.N.S. 1128; 11 W.R. 620; 122 E.R. 354; sub nom. *R. v. Essex Justices*, 8 L.T. 275; 3 Digest (Repl.) 461, 446.
- B** *R. v. Lanyon* (1872), 27 L.T. 355; 3 Digest (Repl.) 463, 470.
- Sotheron v. Scott* (1881), 6 Q.B.D. 518; 44 L.T. 522; 45 J.P. 423; 29 W.R. 666; sub nom. *Southeran v. Scott*, 50 L.J.M.C. 56; 3 Digest (Repl.) 466, 488.
- Hardy v. Atherton* (1881), 7 Q.B.D. 264; 50 L.J.M.C. 105; 44 L.T. 776; 45 J.P. 683; 29 W.R. 788; 3 Digest (Repl.) 466, 486.
- C** *Ex parte Coley* (1851), 4 New Sess. Cas. 507; 16 L.T.O.S. 419; 2 L.M. & P. 130; 15 J.P. 420; 15 Jur. 128; sub nom. *R. v. Green*, 20 L.J.M.C. 168; 3 Digest (Repl.) 461, 450.
- Stacey v. Lintell* (1879), 4 Q.B.D. 291; 48 L.J.M.C. 108; 40 L.T. 553; 43 J.P. 510; 27 W.R. 551, D.C.; 3 Digest (Repl.) 442, 342.

- D** **Case Stated** by justices for the county of Lancaster.

At a petty sessions holden at Haslingden, in and for the division of Rossendale, on May 6, 1881, a complaint, preferred by the respondent, Dinah Heys, against the appellant, James Pearson, under s. 4 of the Bastardy Laws Amendment Act, 1879, charging that the appellant had neglected to pay to the respondent the sum of £5 4s. for arrears under a bastardy order, was heard and determined by the justices who directed the said sum with costs to be recovered by distress and sale of the goods of the appellant, and in default of distress the appellant to be imprisoned for one calendar month.

- On the hearing of the complaint no evidence was given on oath, as all the facts material to the issue, and which were as follows, were admitted by all parties. On June 16, 1873, an order in bastardy was made against the appellant upon the application of the respondent, then Dinah Yates, a single woman, in respect of a child born on May 21, 1873. Under that order the appellant was ordered to pay to the respondent "the sum of 4s. weekly until the child attains sixteen years of age." The assistant to the clerk to the justices, in making out the order and copy for service, used two of the printed forms applicable to the law relating to children born prior to Aug. 10, 1872, which contained a direction that the payment by the putative father should cease on the marriage of the mother.
- E** On Mar. 23, 1879, the respondent married, and the appellant refused to continue the payments. Until that time the respondent was not aware of the mistake in the order. The sum of £5 4s. was alleged by the respondent to be due from the appellant in respect of the child, and the complaint was made which forms the subject of this case.

- F** On the part of the appellant it was contended that the order was good in every respect, and must be taken to be the order the justices intended to make, inasmuch as no other order had been served on the appellant, and no amended order could now be obtained by reason of the death of one of the justices. The appellant's solicitor further contended that the justices had discretionary power, after the passing of the Bastardy Laws Amendment Act, 1872, to insert the provision that the payments should cease on the marriage of the mother, and that, as such provision was found in the only order ever signed by the justices and served upon the appellant, it was a binding limitation on the period of the payments, and the contingency of the mother's marriage having happened, the appellant's liability to make any further payments ceased. The respondent's solicitor replied that the order as announced in court was in accordance with law, and she was entitled to have the same embodied in the printed order served on the appellant; that the same was embodied in the form annexed, but that something else had been added

which the magistrates never authorised. The respondent's solicitor further contended that, if the order could not be amended by the issue of another in proper form, then the order, so far as the words "or the said Dinah Yates shall marry" were concerned, must be treated as bad, the magistrates having no authority to insert such a condition, their discretionary power as to the period of payments being limited to the age of the child. A

The justices found as a fact that the magistrates in 1873 did not intend to insert any condition in the order as to the payments ceasing on the marriage of the mother, and found that, with the exception of the words in question, the order was good, and, such words having been inserted by mistake, they would be justified in treating them as surplusage. They were further of opinion that when the order was made the magistrates had no power to insert such a condition, and, whether the same had been inserted with their knowledge and consent, or by mistake or otherwise, the order to that extent would be bad. Accordingly, they decided that the order was intelligible and complete and valid without the words quoted, and that by their insertion in the manner described the appellant was not relieved from his liability on the marriage of the respondent, and gave our determination against the appellant. B C

By the Bastardy Laws Amendment Act, 1872 : D

Section 4. "After the birth of such bastard child, on the appearance of the person so summoned . . . the justices in such petty session shall hear the evidence of such woman, and such other evidence as she may produce and shall also hear any evidence tendered by or on behalf of the person alleged to be the father, and if the evidence of the woman be corroborated in some material particular by other evidence to the satisfaction of the said justices, they may adjudge the man to be the putative father of such bastard child, and they may also, if they see fit, having regard to all the circumstances of the case, proceed to make an order on the putative father for the payment to the mother of the bastard child . . . of a sum of money weekly . . . for the maintenance and education of the child" E

Section 5. "No order for the maintenance and education . . . of any such child made in pursuance of this Act shall, except for the purpose of recovering money previously due under such order, be of any force or validity after the child in respect of whom it was made has attained the age of thirteen years, or after the death of such child; provided, that the justices may in the order direct that the payments to be made under it in respect of the child shall continue until the child attains the age of sixteen years, in which case such order shall be in force until that period." F G

French for the appellant.

J. Fraser Macleod for the respondent.

POLLOCK, B.—I cannot say that I feel very much difficulty in this case. I am always glad, whenever a matter of form may be more or less in conflict with the real and actual substance of a case, to be able to give effect to the substance rather than to the form. H

Upon looking at the order of justices, as it was formally drawn up by their clerk in the present instance, we find that it is an order made by them upon the appellant, directing him to pay to the respondent the weekly sum of 4s.

"until the bastard child, of which the justices had adjudged him to be the putative father, should attain the age of sixteen years, or should die, or the mother [the respondent] should marry." I

It has been argued before us by the learned counsel for the respondent that that order is not the real order of the justices, but that the order which they orally pronounced in court on the hearing of the complaint, the minutes of which were entered in the justices' minute-book, is, and must be looked upon as being, the real order in the matter. That, I think, is not so; for, whether or not there was

A any power of amending the order that was drawn up, no such power was exercised, and that order so drawn up, therefore, stands, and must alone be looked at as the order in the case. It is perfectly clear in terms.

The question then arises: Is that order a good or a bad one, and had the justices power to limit the order as they have done with reference to the mother's marrying, or had they not? The answer to that question depends upon ss. 4 and 5 of the

B Bastardy Laws Amendment Act, 1872. By s. 4 of that Act, the justices in petty sessions, after hearing evidence on the part of the mother, and, if there be any such produced before them, on the part of the alleged father also, may, if satisfied by the evidence, adjudge the man to be the putative father of the child; and they may also, if they see fit, having regard to all the circumstances of the case, proceed to make an order on the putative father for the payment to the
C mother of the child of a sum of money weekly, not exceeding 5s. a week. It is true that by s. 5 it is enacted that no order for maintenance, etc., of a bastard child shall be of any force or effect, except for the purpose of recovering arrears of payments previously due, after the child has attained the age of thirteen years or after its death, but it is also thereby provided that

D "the justices may in the order direct that the payments to be made under it in respect of the child shall continue until the child attains the age of sixteen years, in which case such order shall be in force until that period."

The limit of the order, therefore, under ordinary circumstances, is thirteen years, but the justices may direct that it shall be extended to and continue for sixteen years, which is the extreme limit allowed by the Act. There is no language in

E the Act to show that the justices may not adapt the order to "all the circumstances of the case," and that they may not, having regard to such circumstances, limit the duration of the weekly payments to such period shorter and less in duration than the statutory period of either sixteen or thirteen years, as they may think fit. There are, indeed, many cases which occur to one's mind in which it would be
F neither just nor expedient to make an order on the putative father, a poor labourer probably, for the full period allowed by the statute, as for instance, where it might be well known to the justices that the mother would at some subsequent date, anterior to the expiration of the statutory period, come into possession of property amply sufficient to enable her to maintain the child out of her own means.

The justices, therefore, may well and reasonably, I think, possess the discretionary power to limit the duration of these payments, and I can see nothing
G in the statute that is inconsistent with their having it. That being so, the affiliation order as drawn up was well made, and the limitation with respect to the mother's marrying cannot be looked upon or considered as surplusage. That order, therefore, was a good and valid order, but ceased to be enforceable (except, of course, with respect to arrears due at the time) upon the marriage of the respondent
H in 1879. The decision of the justices now appealed from must be reversed, and judgment be given for the appellant.

MANISTY, J.—I am of the same opinion. I find no words in the statute which exclude the right and power of the justices, in their discretion, to make an order limiting the duration of the payments to the mother to some period less than either
I the sixteen or thirteen years from the birth of the child, which are specified in the statute. There are words in the Act of Parliament which fix a maximum period for the duration of the order, but there are none which circumscribe or fetter the discretion of the justices in assigning a shorter period for it if they deem it expedient so to do.

Under the Poor Law Amendment Act, 1844 [repealed], and prior to the Act of 1872, an order for the maintenance of a bastard child ceased to have any force or effect after the marriage of the mother, except in so far as to enable arrears of payments previously due to be recovered; but in 1872 the legislature altered

that condition of things, and under the Act of 1872, which repealed that provision, an affiliation order may be enforced after the mother's marriage so long as the child remains under the age of thirteen years or sixteen years as the case may be. The justices, under s. 4 of the Act of 1872, are to "have regard to all the circumstances of the case" before them, and, in my opinion, they have under these words, which are very wide, a discretionary power, in a case in which it appears to them right and just that they should do so, to order that the payments shall continue for a less period than thirteen years, and to direct whether or not they shall cease on the mother's marriage. At first I was rather inclined to think that this view of the power of the justices under the statute might operate sometimes unjustly, as, for instance, in a case where the mother, at the expiration of the fixed period, might still be unable to maintain the child; but on looking at s. 3 of the statute my doubt on that point was removed. By that section the mother may, either before the birth, or within twelve months from the birth of the child, or at any time thereafter if the father of the child has within twelve months after its birth paid money for its maintenance, apply for a summons against the putative father.

In the present case the order was made, and money paid under it in 1873 within twelve months from the birth of the child, so that the mother may, it would seem, at the expiration of the period mentioned in the order, apply again to the justices for another order. The only other question is whether we are to look at the order as formally drawn up and acted upon, or are to go behind it and put the decision of the justices orally pronounced in its place. I think we can only look at the order which was formally drawn up, and which has been acted on. On all points, therefore, my judgment is for the appellant, viz., that the affiliation order of 1873 was good, but ceased to have effect (except as provided in the statute with reference to arrears previously due) upon the marriage of the mother, and that the decision of the justices at the hearing in May last was wrong and should be reversed.

Appeal allowed.

Solicitors: *Shaw & Tremellen*, for *Forshall & Parker*, Preston; *Clarke, Woodcock & Ryland*, for *J. O. Thomson*, Haslingden.

[Reported by HENRY LEIGH, Esq., Barrister-at-Law.]

BEATTY AND OTHERS v. GILLBANKS

[QUEEN'S BENCH DIVISION (Field and Cave, JJ.), June 13, 1882]

[Reported 9 Q.B.D. 308; 51 L.J.M.C. 117; 47 L.T. 194;
46 J.P. 789; 15 Cox, C.C. 138]

Criminal Law—*Unlawful assembly*—"Tumultuously assembling to the disturbance of the public peace"—*Innocent purpose*—*Probability of breach of peace by opponents*.

Knowledge by persons peaceably assembling for a lawful purpose that their assembly will probably be opposed by other persons who will indulge in violence and so disturb the peace does not render the assembly unlawful.

The appellants, with a considerable number of other persons, forming a body called the "Salvation Army," assembled together in the streets of a town for a lawful object, and with no intention of carrying out their object unlawfully, or by the use of physical force, but knowing that their assembly would be opposed and resisted by other persons in such a way as would in all probability tend to the committing of a breach of the peace on the part of such opposing persons. A disturbance of the peace having been created by the forcible opposition of a number of persons to the assembly and subsequent procession through the streets of the appellants and their supporters, who themselves used no force or violence,

Held: the appellants had not been guilty of unlawfully and tumultuously assembling to the disturbance of the peace, and, therefore, could not be convicted of unlawful assembly.

Notes. Considered: *Wise v. Dunning*, [1900-3] All E.R.Rep. 727; *Duncan v. Jones*, [1935] All E.R.Rep. 710. Referred to: *O'Kelly v. Harvey* (1882), 15 Cox, C.C. 435; *R. v. Graham and Burns* (1888), 4 T.L.R. 212; *R. v. Clarkson* (1892), 8 T.L.R. 248.

As to unlawful assemblies, see 10 HALSBURY'S LAWS (3rd Edn.) 585-587; and for cases see 15 DIGEST (Repl.) 787-791.

Cases referred to in argument:

R. v. Vincent (1839), 9 C. & P. 91; 3 State Tr.N.S. 1037; 15 Digest (Repl.) 788, 7387.

R. v. Neale (1839), 9 C. & P. 431; 3 State Tr.N.S. App. 1312; 15 Digest (Repl.) 788, 7383.

Redford v. Birley (1822), 3 Stark. 76; 1 State Tr.N.S. 1071; 15 Digest (Repl.) 783, 7357.

Case Stated by justices for the petty sessional division of Axbridge, Somerset, sitting at Weston-super-Mare.

On Mar. 29, 1882, before the justices the three appellants Beatty, Mullins, and Bowden were charged on the complaint of the respondent Gillbanks, superintendent of constabulary, for that they had unlawfully and tumultuously assembled, with divers other persons, to the number of 100 or more, in public thoroughfares, called Walliscote Road, Regent Street, and other places within the parish of Weston-super-Mare, on Mar. 26, 1882, to the disturbance of the public peace and against the peace of our Lady the Queen. On the hearing of the complaint it was proved or admitted that the Salvation Army was an organised body of persons who were and had for some time been in the habit of forming themselves into processions of more than 100 persons, and in such processions parading the principal streets and public places of the town. Those processions were formed at the hall of the Salvation Army, and, after their formation, proceeded, headed by a band and flags and banners, through the streets, collecting as they went a mob of persons with whom, attended by much shouting and singing, uproar and noise, they eventually returned to the hall, where a meeting was then held. The appellant Beatty was

captain and a leader of the Salvation Army, and organised and directed the processions and meetings. The other appellants Mullins and Bowden were also leaders of the Salvation Army, and assisted in organising and directing the processions and meetings. There was another organised band of persons at Weston-super-Mare, called the Skeleton Army, which also paraded the streets, and was antagonistic to the Salvation Army and its processions. There were numbers of other persons at Weston-super-Mare who, as soon as the Salvation Army formed for the purpose of parading the streets were in the habit of assembling in a mob of great numbers about and around and in front of the procession of the Salvation Army. Some of these, together with the Skeleton Army, assembled to dispute the passage of the Salvation Army through the streets, some to encourage such passage, with shouting, singing, uproar, and noise, to the great terror, disturbance, annoyance, and inconvenience of the peaceable inhabitants of the town and to the endangering of the public peace.

On several occasions previous to Mar. 23, 1882, the procession of the Salvation Army, accompanied by such a mob as aforesaid, had come into collision with the Skeleton Army and other persons who were antagonistic to the Salvation Army, and thereupon a free fight, great uproar, blows, tumults, stone-throwing, and disorder ensued. On Mar. 23, 1882, the Salvation Army formed a procession and paraded the streets and places, accompanied by a disorderly and riotous mob of over 2,000 persons who had been collected as the Salvation Army proceeded. In the midst of the mob were fighting and great disturbance, stone-throwing, and noise. The police were for a long time overpowered and unable to cope with the disturbance, and the Salvation Army forced their way through several public streets to a public place called the Railway-parade, where a general fight occurred. The appellant Beatty led and directed the Salvation Army on this occasion, but neither he nor the other appellants were seen to commit any overt act of violence. The police were ultimately reinforced and the crowd then dispersed. In all probability bloodshed and injury were prevented by the interference of the police. These matters caused great terror and alarm in the minds of the peaceable inhabitants of the town who believed, and had good reason to believe, that the processions would lead to a repetition of the disturbances, and would endanger life, property, and the public peace, and who, in consequence, brought the matter to the notice of the sergeant of police in charge of the peace of the town and made complaints to him thereupon. In consequence, a notice was issued signed by two of the magistrates, and copies of it were placarded in conspicuous parts of the town and were served on the principal appellant Beatty, in these terms:

"Public Notice.—Whereas it hath been made to appear unto us, the undersigned, two of Her Majesty's justices of the peace for the county of Somerset, acting in and for the division of Axbridge in the same county, upon the oath of divers persons, that a riotous and tumultuous assembly did take place on the night of Mar. 23, in certain public streets at Weston-super-Mare, in the said county, and further, that there are reasonable grounds for apprehending a repetition of such riotous and tumultuous assembly in the public streets of Weston-super-Mare as aforesaid; we do therefore hereby require, order, and direct all persons to abstain from assembling to the disturbance of the public peace within the said parish.—Given under our hands and seals at Weston-super-Mare aforesaid this Mar. 24, 1882. (Signed by two Magistrates.)"

On Sunday, Mar. 26, at 10.30 a.m. while numbers of the inhabitants of the town were proceeding to places of worship, the Salvation Army, under the direction of the appellants, was formed into a procession of 100 or more persons, and, having been so formed, commenced to march away from their hall, through the streets and public places of the town. The appellants marched at the head of the procession, which was surrounded by a tumultuous and shouting mob of some hundred persons, which rapidly increased as the procession passed on. The police sergeant met the procession (after it had paraded through certain principal public streets) in a

A public street called Walliscote Street, and with others of the police force stopped the advance of the procession, and asked the appellant Beatty if he was leading the procession, and if he had received a copy of the notice. The appellant Beatty admitted that he was leading the procession and had received the notice. The sergeant of police told him that he must obey the notice, and must desist from leading the procession, and must disperse at once or he would be arrested. The appellant Beatty refused to comply and marched on at the head of the procession some twenty yards further, and told the sergeant that he would still proceed, and thereupon he was arrested. After he was arrested he shouted to the procession to proceed. The other appellants, Mullins and Bowden, then took the direction of the procession and persisted in leading it on, whereupon they also were arrested. Neither of the appellants were guilty of any overt act of violence other than the acts aforesaid, and submitted quietly to their arrest.

The appellants intended to parade their procession through the principal streets and public places of the town, and to collect on their march a large mob of persons to accompany them; and they had good reason to expect that they would come into collision with the Skeleton Army and other persons antagonistic to the procession, and that there would be the same fighting, stone-throwing, and disturbance as there had been on previous occasions, and intended on meeting such opposition to force their way through the streets and places as they had done on previous occasions.

It was contended for the appellants that there had not been any unlawful and tumultuous assembling on their part, that they had not been guilty of the charge and complaint made against them, that their arrest had been unlawful and that they should be discharged. The magistrates, however, thought that the charge had been made out, and ordered the appellants to be bound over to find sureties to keep the peace for twelve months. The appellants appealed, the questions of law stated for the opinion of the court being whether the facts found by the justices to be proved constituted the offence charged in the complaint, and whether the order made was valid.

Edward Clarke, Q.C., Sutherst, and L. C. Jackson for the appellants.
A. R. Poole and Valpy for the respondent.

FIELD, J.—I am of opinion that this order cannot be supported, and must, therefore, be discharged. The appellants together with a large number of other people, belong to a body of persons called the Salvation Army, who are associated together for a purpose which cannot be said to be otherwise than lawful and laudable, or, at all events, cannot be called unlawful, their object and intention being to induce a class of persons who have little or no knowledge of religion and no taste or disposition for religious exercises or for going to places of worship to join them in their processions, and so to get them together to attend and take part in their religious exercises, in the hope that they may be reclaimed and drawn away from vicious and irreligious habits and courses of life, and that a kind of revival in the matter of religion may be brought about among those who were previously dead to any such influences. That undoubtedly is the object of the Salvation Army, and of the appellants, and no other object or intention has been or can be imputed to them; and, as has been said by their learned counsel, and doubtless with perfect truth, so far are they from desiring to carry out that object by means of any force or violence, their principles are directly and entirely opposed to any conduct of that kind, or to the exercise or employment of anything like physical force. Indeed, it appears that on the occasion in question they used no personal force or violence, but, on the contrary, when arrested by the police, they submitted quietly without the exhibition of any resistance either on their own part or on that of any other member of their body.

Such being their lawful object and intention, and having no desire or intention of using force or violence of any kind, it appeared that on Mar. 26, 1882, they assembled, as they had previously done on other occasions, in considerable numbers at their hall, and proceeded to march thence in procession through the streets of

Weston-super-Mare. That, in itself, was certainly not an unlawful thing to do, nor can such an assembly be said to be an unlawful one. Numerous instances might be mentioned of bodies of persons assembling in much larger numbers, and marching, accompanied by banners and bands of music, through the public streets, and no one has ever doubted that such processions were perfectly lawful. The appellants complain that, for having so assembled as I have stated, they have been adjudged guilty of the offence of holding an unlawful assembly, and have in consequence been ordered to find sureties to keep the peace, in the absence of any evidence of their having broken it. A B

It was necessary that the justices should find that some unlawful act had been committed by the appellants in order to justify them in binding them over. The offence charged against them is

“unlawfully and tumultuously assembling with others to the disturbance of the public peace, and against the peace of the Queen,” C

and before they can be convicted upon the charge clear proof must be adduced that the specific offence charged has been committed. Was that charge sustained? There is no doubt that the appellants did assemble together with other persons in great numbers, but that alone is insufficient. The assembly must be a “tumultuous assembly,” and “against the peace,” in order to render it an unlawful one. But there was nothing so far as the appellants were concerned to show that their conduct was in the least degree “tumultuous” or “against the peace.” All that they did was to assemble together to walk through the town, and it is admitted by the learned counsel for the respondent, that as regards the appellants themselves, there was no disturbance of the peace, and that their conduct was quiet and peaceable. But it is argued that, as their line of conduct on the occasion in question was the same as had on previous similar occasions led to tumultuous and riotous proceedings with stone-throwing and fighting, causing a disturbance of the public peace and terror to the inhabitants of the town, and as on the present occasion like results would in all probability be produced, therefore the appellants, being well aware of the likelihood of such results again occurring, were guilty of the offence charged against them. D E F

Without doubt, as a general rule it must be taken that every person intends what are the natural and necessary consequences of his own acts, and if in the present case it had been their intention, or if it had been the natural and necessary consequence of their acts, to produce the disturbance of the peace which occurred, then the appellants would have been responsible for it, and the magistrates would have been right in binding them over to keep the peace. But the evidence as set forth in the Case shows that, so far from that being so, the acts and conduct of the appellants caused nothing of the kind, but, on the contrary, that the disturbance that did take place was caused entirely by the unlawful and unjustifiable interference of the Skeleton Army, a body of persons opposed to the religious views of the appellants and the Salvation Army, and that but for the opposition and molestation offered to the Salvationists by these other persons, no disturbance of any kind would have taken place. The appellants were guilty of no offence in their passing through the streets, and why should other persons interfere with or molest them? What right had they to do so? If they were doing anything unlawful it was for the magistrates and police, the appointed guardians of law and order, to interpose. G H I

The law relating to unlawful assemblies, as laid down in the books and the cases, affords no support to the view of the matter for which the learned counsel for the respondent was obliged to contend, viz., that persons acting lawfully are to be held responsible and punished merely because other persons are thereby induced to act unlawfully and create a disturbance. In *RUSSELL ON CRIMES* (4th Edn.), vol. 1, p. 387, III, an unlawful assembly is defined as follows:

“An unlawful assembly, according to the common opinion, is a disturbance of the peace by persons assembling together with the intention to do a thing

- A which, if it were executed, would make them rioters, but neither actually executing it nor making a motion towards the execution of it."

It is clear that, according to this definition of the offence, the appellants were not guilty, for it is not pretended that they had, but, on the contrary, it is admitted that they had not, any intention to create a riot, or to commit any riotous or other unlawful act. Many examples of what are unlawful assemblies are given in *HAWKINS'*

- B *PLEAS OF THE CROWN* (8th Edn.), book 1, cap. 28, ss. 9 and 10, p. 516, in all of which the necessary circumstances of terror are present in the assembly itself, either as regards the object for which it is gathered together, or in the manner of its assembling and proceeding to carry out that object. The present case, however, differs from the cases there stated; for here the only terror that existed was caused by the unlawful resistance wilfully and designedly offered to the proceedings of the
- C *Salvation Army* by an unlawful organisation outside and distinct from them, called the *Skeleton Army*.

It was suggested by the respondent's counsel that, if these *Salvation processions* were allowed, similar opposition would be offered to them in future, and that similar disturbances would ensue. But I cannot believe that that will be so. I hope, and I cannot but think, that when the *Skeleton Army*, and all other persons who are

D opposed to the proceedings of the *Salvation Army*, come to learn, as they surely will learn, that they have no possible right to interfere with or in any way to obstruct the *Salvation Army* in their lawful and peaceable processions, they will abstain from opposing or disturbing them. It is usual happily in this country for people to respect and obey the law when once declared and understood, and I hope and have no doubt that it will be so in the present case. But, if it should not be so, there is

- E no doubt that the magistrates and police, both at *Weston-super-Mare* and everywhere else, will understand their duty and not fail to do it efficiently, or hesitate, should the necessity arise, to deal with the *Skeleton Army* and other disturbers of the public peace as they did in the present instance with the appellants, for no one can doubt that the authorities are only anxious to do their duty and to prevent a disturbance of the public peace. The present decision of the justices, however,
- F amounts to this, that a man may be punished for acting lawfully because he knows that his so doing may induce another man to act unlawfully—a proposition without any authority whatever to support it. Under these circumstances, the questions put to us by the justices must be negatively answered, and the order appealed against be discharged.

- G **CAYE, J.**—I am entirely of the same opinion. The question in this case is whether these persons were guilty of the offence of unlawfully and tumultuously assembling together to the disturbance of the public peace and that of the Queen, and I am of opinion that they were not.

The learning on the subject of "unlawful assemblies" is to be found in *HAWKINS' PLEAS OF THE CROWN* and *DALTON'S COUNTRY JUSTICE*. In the first-mentioned

H authority the definition of an unlawful assembly is given, which my brother *FIELD* has referred to in his judgment; but it is there further said:

"This seems to be much too narrow a definition; for any meeting whatever of great numbers of people with such circumstances of terror as cannot but endanger the public peace and raise fear and jealousies among the king's subjects seems properly to be called an unlawful assembly, as when great numbers, complaining of a common grievance, meet together, armed in a warlike manner, in order to consult together concerning the most proper means for the recovery of their interests, for no man can foresee what may be the event of such an assembly."

I Further it is said:

"Also an assembly of a man's friends for the defence of his person against those who threaten to beat him if he go to such a market, &c., is unlawful, for he who is in fear of such assaults must provide for his safety by demanding the surety

of the peace against the persons by whom he is threatened, and not make use of such violent methods, which cannot but be attended with the danger of raising tumults and disorder to the disturbance of the public peace. Yet an assembly of a man's friends in his own house for the defence of the possession thereof against those who threaten to make an unlawful entry therein, to or for the defence of his person against those who threaten to beat him therein, is indulged by law, for a man's house is looked upon as his castle":

HAWKINS' PLEAS OF THE CROWN (8th Edn.), book 1, c. 28, ss. 9, 10, p. 516. So far HAWKINS; but DALTON, in his COUNTRY JUSTICE, goes further where, in cap. 136, s. 1, it is said:

"An unlawful assembly, riot or rout, is where three or more shall gather together, come, or meet in one place, to do some unlawful act with violence, and that unlawful act must be *malum in se* and not *malum prohibitum*. As when three persons or more shall come and assemble themselves together to the intent to do any unlawful act with force or violence against the person of another, his possessions or goods; as to kill, beat, or otherways to hurt or to imprison a man; to pull down a house, wall, pale, hedge, or ditch; wrongfully to enter upon or into another man's possession, house, or land, or to cut or take away corn, grass, wood, or other goods wrongfully, or to hunt unlawfully in any park or warren, or to do any other unlawful act with force or violence, against the peace or to the manifest terror of the people; if they only meet to such a purpose or intent, although they shall after depart of their own accord without doing anything, yet this is an unlawful assembly."

Putting these several passages from these old authorities together, it seems to me to be impossible to hold that the appellants here have been brought within them as being guilty of unlawfully and tumultuously assembling. The meeting or assembly of the Salvation Army was for a purpose not unlawful. Was there an intention on their part to use violence? If, though their meeting was in itself lawful, they intended, if opposed, to meet force by force, that would render their meeting an unlawful assembly; but it does not appear that they entertained any such intention. On the contrary, when met and resisted by the Skeleton Army, they used no violence of any kind, and manifested no intention of meeting their opponents with like violence to that which the latter offered to them. I come, therefore, to the conclusion that the appellants were not guilty of unlawfully assembling, and that, for the reasons and on the grounds before mentioned, the judgment of the court should be pronounced in their favour.

Appeal allowed.

Solicitors: *Whittington, Son & Baker; Crowder, Anstie & Co.*, for *J. C. Simmons*, Axbridge.

[Reported by HENRY LEIGH, Esq., Barrister-at-Law.]

A

Re DUDLEY CORPORATION AND EARL OF DUDLEY'S TRUSTEES

[COURT OF APPEAL (Brett, Cotton and Lindley, L.JJ.), November 25, 26, 1881]

B

[Reported 8 Q.B.D. 86; 51 L.J.Q.B. 121; 45 L.T. 733; 46 J.P. 340]

Local Authority—Statutory powers—Rights implied without which powers useless—Contrary construction of statute.

Sewer—Sewer carried through land not belonging to local authority—Right to support—Duty to make and maintain sewer—Compensation for landowner—Percolation of sewer contents.

C

If the legislature gives power to a public authority to do certain acts it follows as a necessary implication that the authority must also have rights without which the power granted to them would be useless. Where the right is necessary for the exercise of the statutory power its existence must be implied unless there is something in the terms of the statute or the circumstances of the case tending to the contrary.

D

Accordingly, where the Public Health Act, 1875, required local authorities to cause to be made such sewers as might be necessary for effectually draining their district, and empowered them to carry any sewer through any lands in their district, there being also a provision in the Act that where any person sustained damage by reason of the exercise of any of the powers of the Act full compensation should be made to him by the authority exercising such power,

E

Held: by requiring a local authority to make a sewer, imposing on them the duty of maintaining it, and giving them power to carry the sewer through land which did not belong to them, for which the landowner was to receive compensation, the legislature impliedly gave them a right as against the landowner to subjacent support for the sewer.

F

Observations as to an implied right to lateral support also.

Held, further: the landowner would not be entitled to compensation for percolation of the contents of the sewer through the soil into works (e.g., mines) of the landowner, for, as the local authority had a right to proper support, any percolation which took place would necessarily be caused by a wrongful act of the landowner.

G

Notes. The statutory provisions relating to the provision of sewers by local authorities are now to be found in the Public Health Act, 1936, Part II (ss. 14-42).

Considered: *South Staffordshire Waterworks Co. v. Mason* (1886), 56 L.J.Q.B. 255; *London and North Western Rail. Co. v. Evans*, [1893] 1 Ch. 16. Applied: *Jary v. Barnsley Corpn.*, [1907] 2 Ch. 600. Referred to: *Normanton Gas Co. v. Pope and Pearson* (1883), ante p. 503; *Glamorganshire Canal Navigation Co. v. Nixon's Navigation Co.* (1901), 85 L.T. 53; *Manchester Corpn. v. New Moss Colliery*, [1906] 1 Ch. 278; *West Midlands Joint Electricity Authority v. Pitt*, [1932] All E.R.Rep. 861; *Newcastle-under-Lyme Corpn. v. Wolstanton, Ltd.*, [1947] 1 All E.R. 218.

H

As to the provision of sewers, see 31 HALSBURY'S LAWS (3rd Edn.) 200 et seq.; and for cases see 41 DIGEST 19 et seq. For the Public Health Act, 1936, see 19 HALSBURY'S STATUTES (2nd Edn.) 302.

I

Cases referred to:

- (1) *Metropolitan Board of Works v. Metropolitan Rail. Co.* (1869), L.R. 4 C.P. 192; 38 L.J.C.P. 172; 19 L.T. 744; 17 W.R. 417, Ex. Ch.; 41 Digest 36, 263.
- (2) *North London Rail. Co. v. Metropolitan Board of Works* (1859), John. 405; 28 L.J.Ch. 909; 33 L.T.O.S. 383; 23 J.P. 515; 5 Jur.N.S. 1121; 7 W.R. 640; 70 E.R. 479; 11 Digest (Repl.) 310, 2171.

Also referred to in argument:

Dunn v. Birmingham Canal Co. (1872), L.R. 8 Q.B. 42; 42 L.J.Q.B. 34; 27 L.T. 683; 21 W.R. 266, Ex. Ch.; 11 Digest (Repl.) 175, 440.

Whitehouse v. Wolverhampton and Walsall Rail. Co. (1869), L.R. 5 Exch. 6; 39 L.J.Ex. 1; 21 L.T. 558; 18 W.R. 147, Ex. Ch.; 11 Digest (Repl.) 170, 402.

Roderick v. Aston Local Board (1877), 5 Ch.D. 828; 46 L.J.Ch. 802; 36 L.T. B 328; 25 W.R. 403, C.A.; 41 Digest 22, 174.

Caledonian Rail. Co. v. Sprot (1856), 27 L.T.O.S. 264; 2 Jur.N.S. 623; 4 W.R. 659; 2 Macq. 449, H.L.; 11 Digest (Repl.) 175, 434.

Appeal by the plaintiffs from an order of a Divisional Court (DENMAN and WATKIN WILLIAMS, JJ.), on an award of an arbitrator.

The corporation of Dudley, who were the sanitary authority of the borough of Dudley, carried sewers through land which was vested in the respondents as trustees of the will of the Earl of Dudley. The land in question contained mines and minerals, and in consequence of the construction and maintenance of the sewers, and the works incidental thereto, these mines and minerals could not be worked and gotten, in accordance with the usual and customary method of working, without causing the subsidence of the surface, risk of injury to the sewers, and risk of percolation of sewage into the mines. The question of the amount of compensation payable by the corporation to the respondents was referred to an umpire who found that there was reasonable ground for apprehending that the mines might be permanently or temporarily damaged, and that in consequence of the premises the value of the mines and minerals was diminished. In a Special Case the umpire left the following questions to the court.

"Whether the corporation were entitled to have the sewers supported by the lands under the same, or adjacent thereto, or the trustees were entitled to work the mines and minerals as freely as if the sewers had not been made."

"Whether, in case the sewer should leak in consequence of the working of the mines, and sewage and water should percolate into the mines, and damage the same, the trustees would have any cause of action against the corporation for such injury and damage."

The award then stated the amount of compensation—£1,500—to be paid in each event if the questions were decided in favour of the trustees. The Divisional Court (DENMAN and WATKIN WILLIAMS, JJ.), held that £3,000 was payable, and gave judgment accordingly. The corporation appealed.

Jelf, Q.C., and *A. T. Lawrence* for the corporation.

Sir Farrer Herschell, Q.C., and *Anstie* for the respondents.

BRETT, L.J.—The parties have left it to us to say, without regard to the form of the questions left to us in the Special Case, what are the rights and liabilities of the parties to this litigation. The local authority had, under the powers contained in the Public Health Act, 1875, placed a sewer on land belonging to the trustees of the late Lord Dudley, and for this the trustees claimed compensation. The matters in respect of which the trustees claimed to be compensated were two. In the first place, they claim in respect of the burden which was put on them by the mere fact of the sewer being made in the position in which it is, for they contend that the statute imposes on them an obligation so to deal with their own land as not to take away support from the sewer. Secondly, they claim in respect of the risk of percolation of water from the sewer into the mines underneath. The argument against them is that there is no burden cast on them so to use their land as not to withdraw support from the sewer, and that nothing in the Act gives the corporation a right to any support for any sewer which they may make. As to percolation they say that there can be no right of action or right to compensation if the landowners are bound to support the sewer, because, if they are so bound, any percolation that may take place must necessarily be caused by their own

A wrongful act in so using their land as to withdraw the support which they are bound to give to the sewer.

The first question which we have to consider is this: Does the Public Health Act, 1875, give the local authority who have made the sewer any right, as against the owners of land or mines, to support for the sewer, and, if any, what right does it give? It is admitted that there is no express clause in the statute giving
B any such right, and the question is whether such an implication is to be gathered from the provisions of the statute that the court must say that such a right exists, and if such an implication is to be made, what is the right? The general rule is that if the legislature gives power to a public authority to exercise powers under an Act of Parliament, it follows as a necessary implication that there must be such rights as those without which the powers given would be useless. We cannot
C imply any right which would only be necessary under accidental circumstances; but where the right would, in ordinary cases, be necessary for the exercise of the statutory powers, we must make the implication that it exists unless there is something in the circumstances of the case tending to the contrary.

Here a power was given to the local authority to put sewers in the land; the power was given, and more than that, a duty was imposed upon them to execute
D the work. The Local Government Board can insist on the local authority making drains, and can take measures under s. 299 of the Act to compel them to make the drains required, and s. 16 gives power to the local authority without consent of the owner of the land, and without coming to any arrangement with him, on giving him reasonable notice, to make sewers through his land. By s. 15 there is no option on the part of the local authority; they are obliged to make such
E sewers as may be necessary, and to keep all sewers belonging to them in repair. Therefore, the local authority have power to make sewers on anybody's land, and are obliged to keep such sewers in repair. It is said that there is a necessary implication that the persons on whose land a sewer is made, or whose land is next to that on which a sewer is made, are obliged so to use their land as not to take away support from the sewer, since, if they might take away subjacent support,
F it could be impossible for the sewer to be maintained and kept in repair as the local authority are bound to maintain it and keep it in repair. I do not mean to say that every part of the land vertically under a sewer is land which gives subjacent support. That is not necessary.

The question is: Can the landowners take away the land which is necessary for the subjacent support of the sewer? If they can take away the land which is
G necessary for this purpose, they can at any time destroy the sewer. Is it possible that the legislature meant that the landowner could render the powers given by the Act of Parliament abortive, which he can do if he can take away the land necessary for the support of the sewer? It seems to me that, unless there is something in the Act to the contrary, we are bound to imply this right to support—that, as against the owner of the land in which the sewer is actually made, and
H also as against everyone whose land affords any subjacent support to the sewer, this right would be acquired. If the sewer were on the boundary of two properties there would be a right as against both owners to subjacent support.

It has been suggested that the support must be vertical; this is, that the land which must be left in order to give such support can only be the land which is directly under the sewer. I do not deal with the question mathematically, but I
I think that substantially the support required may be what people accustomed to buildings and work of this kind would think necessary. The base of the portion of land which it would be necessary to leave untouched may be wider than the upper part, and if so it would be wider than the sewer. I should say that the support required would be what anyone conversant with the subject would understand by subjacent support. If the sewer is on the very edge of one man's land, it may be that the subsoil of his neighbour may be required for the purpose of subjacent support, and in such a case the neighbour would be entitled to compensation. This is only an argumentative, not a practical, difficulty. I think, therefore,

that there is to be implied a right to subjacent support, but that it is not necessary to determine as to lateral support. Lateral, as distinguished from subjacent, support is well known in the case of land and buildings, but as regards sewers it is generally impossible to say that a sewer would require more lateral support than the land without the sewer. If lateral support would only be required in accidental positions, then, as the right could only come into existence accidentally and under certain circumstances, I am not prepared to say that we should imply such a right. It is not necessary to determine this question, but the inclination of my opinion is that we ought not to imply a right to lateral support of a sewer, whereas I am of opinion that the right to subjacent support ought to be implied unless there is something in the Act of Parliament to the contrary. A B

It is said that s. 175 gives a right to the local authority to purchase any lands, and that by the interpretation clause in s. 4 the word "lands" includes easements, and, looking at these provisions together, it is said that the legislature has foreseen that support would be wanted for sewers, and has given the local authority the right either to purchase the land itself through which the sewer is made, or to purchase such an easement as will insure the necessary support. It is true that the right is given, but does this exclude the possibility of the local authority not exercising such right? There is no obligation on the local authority to purchase nor on the landowner to sell, and, therefore, this power to purchase does not do away with the difficulties which I have already pointed out. Against this argument also are the provisions of s. 308, by which any person sustaining damage by reason of the exercise of the powers of the Act, if not himself in default, is to receive compensation. This shows that, if we make the implication I have alluded to, the legislature has not done such an unjust thing as to say that a burden shall be cast on the owners of land without compensation. The legislature has said that there shall be compensation for damage by reason of the exercise of the powers of the Act. It is true that there is no express provision authorising the imposition of this burden on a landowner, but I think the section means that, if the local authority place a burden on him by reason of this implication, he shall be compensated. C D E

It was argued that this compensation was not to arise until a particular time. I think that counsel for the corporation practically yielded to the observations I made as to this. Compensation is given, but no time is fixed, and if it is claimed when the works are executed it must be prospective, for it is in respect of future loss. Therefore, among those things which impose a burden on the landowner is the burden of being obliged so to use his own land as not to take away subjacent support from the sewer. In the case of ordinary land the burden is extremely slight, for it is not probable that the owner will lose anything by being unable to excavate below the sewer; but if it is building land, and a burden of this kind is imposed upon it, this hampers the owner's power of building, and as such a burden would cause pecuniary loss to him he would be entitled to pecuniary compensation. Again, the land may contain mines, as in this case, and if the burden imposed on the land hampers the mode of working the mines, that is a tangible injury, and the owner is entitled to compensation. F G H

Therefore, it follows that, in the present case, so far as they are not able to work the mines in consequence of the sewer having been made where it is, Lord Dudley's trustees are entitled to compensation. That is the main point on which the local authority desired our decision, and our decision is that the local authority are entitled to support for their sewer from the land lying underneath it, the effect of which is to hamper the trustees by preventing them from working a certain portion of their mines, and in consequence of the right to impose this burden the local authority are bound to compensate the trustees under the arbitration. I

There is a subsidiary claim in respect of the risk of injury to the mines by percolation from the sewer. We gather that, if there is a right to support and a burden thereby cast upon the trustees, as we think there is, and the trustees are compensated, there could be no percolation in respect of which the trustees could

A claim, either by action at law, or by way of compensation, for, the other point being decided in their favour, it follows that any percolation which might take place would necessarily be caused by a wrongful act of their own. I am, therefore, of opinion that the trustees are entitled to no compensation in respect of percolation. On their first claim there will be judgment for them for £1,500.

B I think that our decision in this case is not inconsistent with the case in the Exchequer Chamber as to the Metropolitan Railway and the Fleet sewer: *Metropolitan Board of Works v. Metropolitan Rail. Co.* (1). That case is distinguishable from the present, because there the court refused to draw the inference which we draw here, because there was no compensation clause in the Act (11 & 12 Vict., c. 112) under which the sewer was constructed, and if they had drawn the inference it would have followed that the legislature would have been doing an injustice. C That was the ground of that decision, and it does not apply to this statute.

COTTON, L.J.—The question which we have to decide is, how certain questions ought to be answered: First, whether the local authority are entitled to support for their sewer from the ground lying underneath it, and, therefore, whether the landowners are prevented from working the mines lying under or near the sewer, and are entitled to compensation in respect of the loss occasioned by them in being so prevented; and, secondly, whether the landowners are entitled to compensation in respect of damage to their mines in consequence of percolation of water from the sewer. D

E It is not disputed that the trustees are entitled to compensation for making the sewer through their land, but the question is whether they are also entitled to compensation in consequence of being bound to leave support for the sewer. I am of opinion that they are. The Public Health Act, 1875, requires the local authority to make all necessary sewers and to maintain them, and, assuming that more is wanted for the subjacent support of the sewer than would be wanted for the support of the land left in its natural state, it seems to me impossible to suppose F that the Act gave the local authority power to make the sewer and imposed on them the liability to maintain it without also giving them the right to say that the owner of the land shall not do that which would destroy the sewer. I am of opinion that the legislature, by giving the local authority power to make the sewer, and imposing on them the duty of maintaining it, at the same time gave them the right to subjacent support of the sewer. If there were no additional provisions in G the statute I think we ought to imply that such right of support was intended to be given.

H It is said that here there was that which contradicted the implication, because the Act, by s. 175, construed in the light of the inclusion, by s. 4 of the Act, of easements in the term "lands," gave a right to the local authority to acquire the easement of a right to support or to buy the land in which the sewer is constructed. I think the power to purchase is given merely because in some cases the local authority may find it more convenient to buy the land out and out than to render themselves subject to claims for compensation. That, therefore, in my opinion, cannot prevent the implication arising. Then s. 26 provides that, where any person without having obtained consent causes buildings to be erected over any sewer, he shall be liable to a penalty, and the buildings may be pulled down. I I is said that this section, as it contains a special provision dealing with injury by surface weight, affords an argument against the right to support below; it does not give the local authority a right to the surface, but only a summary remedy as against persons dealing with the surface in a way that would be likely to interfere with their sewers. It is said that s. 334 prevents the right to support from existing, for by that section:

"Nothing in this Act shall be construed to extend to mines of different descriptions so as to interfere with or to obstruct the efficient working of the same. . ."

In consequence of this clause, it is said that making the sewer does not prevent the landowner from working the mines in any way; but we must not read that part of the section as if it stood alone. The section goes on:

“nor to the smelting of ores and minerals, nor to the calcining, puddling and rolling of iron and other metals, nor to the conversion of pig iron into wrought iron, so as to obstruct or interfere with any of such processes respectively.”

The latter part of the section is a guide as to the meaning of the first part. There is a distinct portion of the Act [ss. 91-111] which refers to nuisances; and, in my opinion, looking to that fact, and to the latter part of the section, we must construe that section as merely joining on with that nuisance part of the Act which refers to smoke arising from furnaces and such work, and it is not to be considered as applying to such nuisances as arise from the working of mines, or to the other matters referred to in the latter part of that section. Therefore, in my opinion, there is nothing in the Act to prevent the implication that the local authority are entitled to support.

We were pressed with the argument that, if there is a right to subjacent support, there must also be a right to lateral support; but here, in dealing with the matter as regards Lord Dudley's trustees, it is not necessary to answer that suggestion. But it is not properly lateral support—it is support from lateral owners; that is to say, support from the land of owners through whose land the sewer is not actually made. I can in no way see that the right to support which is to be given by Lord Dudley's trustees is to be confined to the support by the land vertically under the line of the sewer. It may be necessary that there should be support from land at any given angle, but one must consider this. The support of the lateral owners must stand in a very different position, and it may well be—I do not decide it, for I think it is not necessary to do so—that there is a right from the mere authority to construct and maintain the sewer as against the owners through whose land the sewer is constructed.

Consider what the difference between the two is. The owner through whose land the sewer is made was the absolute owner of the land, so as to be able to deal with it as he pleased, but when the sewer was put in he could not work the land as he had been entitled to work it before, and, therefore, he is entitled to compensation, not only for the loss of a portion of his land, but for his altered position in not being able to deal with the lower strata as he had been entitled to deal with them before. As to a lateral owner, unless the sewer throws upon him a burden by wanting more lateral support than his neighbour's land wanted before the sewer was made, he suffers no harm, and if so he does not come within the compensation clause. His neighbour, in whose land the sewer is made, was entitled to the support which his land, in the natural state, without any additional weight upon it by houses, required; and unless the sewer does throw an additional weight upon the land, and requires an additional lateral support to that which was afforded previously, and which ought to have been afforded previously by the neighbour of the owner of the land where the sewer is, he suffers no damage whatever by the exercise of the power given by the Act. If so, he certainly does not come within the compensation clause, and there is no additional burden of support required from him. If a sewer is constructed in such a way, as it may be by being above the surface on an embankment, as to throw an additional burden on him, it may be that for such exceptional circumstances the Act of Parliament did not provide when it simply gave power to make a sewer. I do not decide that, for it is not necessary. Possibly that is to be provided for by the power given to the local board to buy an easement—that is, the right of such support as is required from the lateral owner through whose land the sewer does not go, or it may be met by buying the land in order to obtain lateral support. It may well be that, as against the owner through whose land the sewer is made, the Public Health Act, 1875, does, by necessary implication, give a right to support, and, therefore, gives him a right to compensation in respect of support both subjacent and lateral:

A but that, in the exceptional cases where support may be required from an adjoining or lateral owner, it does not by necessary implication give, by the mere fact of giving power to make and maintain a sewer, a right to compensation. In the present case it is not necessary to decide that. The only question on this part of the case being whether Lord Dudley's trustees, who are entitled to some compensation, can say that they were damaged by the power which they formerly

B had of dealing with their land as they thought fit, that is, of getting the minerals, being taken away from them by the construction of the sewer, I think they are entitled to compensation in respect of it.

There are two authorities which have been referred to, and with which we ought to deal. I assent to what BRETT, L.J., said as to *Metropolitan Board of Works v. Metropolitan Rail. Co.* (1). As to the other case, before Wood, V.-C., *North London*

C *Rail. Co. v. Metropolitan Board of Works* (2), it only comes to this, that the sewer authorities are not bound, as railway companies acting under the Lands Clauses Consolidation Act, 1845, are, to buy the land, or to make the deposit required by s. 85 of that Act, but have power to make sewers through other persons' land, paying compensation for the damage caused by their so doing, and, therefore, that decision has no bearing on this question. I am, therefore, of opinion that the

D trustees are entitled to compensation in respect of the loss caused by their being bound to give support to the sewer. The other question, whether they are entitled to compensation in respect of percolation, I answer in the negative, because, if the trustees are bound to give the necessary support, there can be no percolation except by the trustees' wrongful act, and therefore, they cannot be entitled to compensation in respect of this. Therefore, the only sum which the local

E authority is liable to pay is £1,500 in respect of the damage caused to Lord Dudley's trustees in not being able to work the mines.

LINDLEY, L.J.—I am of the same opinion. The first question is whether, when the local authority make a sewer, they have a right to have it supported by the land lying underneath it. Prima facie I should say they had; but it is said

F ingeniously that they could buy the right of support, and, therefore, not having bought in, they are not entitled to it. The effect of acceding to that argument would be that anyone might let the sewer down at any point where it passed through his land. It is said that the local authority must take the chance of this. I think the true construction of the statute negatives that view. When power is given to the local authority to make the sewer, and the obligation is imposed upon

G them of keeping it in repair, it would be inconsistent to say that they had no right to support. Therefore, on the ground put by BRETT, L.J., I am of opinion that the local authority must have support for the sewer, and the trustees are entitled to compensation in respect of the burden so imposed upon them.

It seems to me that there is no authority to the contrary. The case as to the Fleet sewer, *Metropolitan Board of Works v. Metropolitan Rail. Co.* (1), is no

H authority to the contrary, and the reason of that decision does not apply to the present case. That case turned on this, that the court would not say that there was an implied right to lateral support because no compensation was given by the Act there in question to the adjoining owner. That does not apply here. There is a puzzling question as to the effect of s. 334. Counsel for the corporation put it that you must not prevent a mineowner from working his mines; that is to say,

I you cannot expect him to refrain from working his mines in order to leave your sewer alone. The language of the first part of the section, I think, goes that length; but logically it goes this length too, that mines are out of the Act altogether, and counsel saw that, and, therefore, would not push it so far. He said: "Notwithstanding the general language of that Act we certainly have a right to make sewers through mines, and if necessary to buy the mines." He was compelled to put an illogical and inconsistent construction upon those general words; but when you look at the last part of the section, you see at once that the construction sought to be put upon it cannot possibly be the right one. I have no hesitation

whatever in putting on this section a construction, which makes it sense, by saying that it applies to those groups of sections which apply to nuisances. The question on the award is whether the compensation is to be £3,000 or £1,500. We are of opinion that it should be for £1,500 only.

BRETT, L.J.—I agree with what has been said as to s. 334.

Order accordingly.

Solicitors : G. S. Warmington, for E. M. Warmington, Dudley; Benbow, Saltwell & Tryon.

[Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.]

DAHL v. NELSON, DONKIN & CO.

[HOUSE OF LORDS (Lord Selborne, L.C., Lord Blackburn and Lord Watson), November 16, 17, 23, 24, 1880, January 13, 1881]

[Reported 6 App. Cas. 38; 50 L.J.Ch. 411; 44 L.T. 381;
29 W.R. 543; 4 Asp.M.L.C. 392]

Shipping—Carriage of goods by sea—Cargo—Unloading—Place of unloading—Named dock or “so near to as she may safely get”—Primary obligation—Entry into dock—Impediment causing impossibility—Need to be physical and permanent—“Permanency”.

When, by the terms of a charterparty, a loaded ship is to proceed to a named dock “or so near thereto as she may safely get and lie always afloat” the first of these alternatives constitutes a primary obligation, and, to complete her voyage, the vessel must go to and into the dock named unless it has become in some sense impossible to do so. It is only in the case of her entry into that dock being barred by such impossibility that the owners under the second alternative can require the charterers to take delivery of her cargo at a place outside the dock. The impediment leading to impossibility need not be physical, e.g., the exclusion of the ship from the dock by an order of the statutory dock authority can constitute an impossibility to enter. Nor need the impediment be permanent in the sense that it will remain for ever. What length of delay constitutes “permanency” so as to create impossibility depends on the circumstances of each case and the terms of the charterparty. In ascertaining the implied meaning of the charter the court must assume that the parties intended to stipulate for that which is fair and reasonable having regard to their common interests and the main objects of the charter.

Notes. Considered: *Horsley v. Price* (1883), 11 Q.B.D. 244. Applied: *The Carisbrooke* (1890), 15 P.D. 98; *The Fox* (1914), 83 L.J.P. 89. Considered: *Re An Arbitration Between Comptoir Commercial Anversoise and Power, Son & Co.*, [1918-19] All E.R.Rep. 661. Referred to: *Allen v. Coltart* (1883), 11 Q.B.D. 782; *Murphy v. Coffin* (1883), 12 Q.B.D. 87; *Castel and Latta v. Trechman* (1884), Cab. & El. 276; *Pyman v. Dreyfus* (1889), 24 Q.B.D. 152; *Tharsis Sulphur and Copper Co. v. Morel*, [1891] 2 Q.B. 647; *Bulman and Dickson v. Fenwick*, [1894] 1 Q.B. 179; *Monsen v. Macfarlane*, [1895] 2 Q.B. 562; *Bensaude v. Thames and Mersey Marine Insurance Co.* (1896), 75 L.T. 155; *Sailing Ship Milverton Co. v. Cape Town and District Gas Light and Coke Co.* (1897), 13 T.L.R. 548; *Carlton Steamship Co. v. Castle Mail Packets Co.*, [1897] 2 Q.B. 485; *Watson v. Berner* (1899), 4 Com. Cas. 335; *The Derwent* (1901), 84 L.T. 360; *Ardan Steamship Co. v.*

- A** *Weir & Co.* (1905), 93 L.T. 559; *Larsen v. Sylvester & Co.*, [1908-10] All E.R.Rep. 247; *Leonis Steamship Co. v. Rank*, [1908] 1 K.B. 499; *Tillmanns v. Steamship Knutsford, Ltd.* [1908] 2 K.B. 385; *Embiricos v. Sydney Reid & Co.*, [1914-15] All E.R.Rep. 185; *Horlock v. Beal*, [1916-17] All E.R.Rep. 81; *F. A. Tamplin Steamship Co., Ltd. v. Anglo-Mexican Petroleum Products Co. Ltd.*, [1916-17] All E.R.Rep. 104; *Countess Warwick Steamship Co. v. Le Nickel Société Anonyme*, [1916-17] All E.R.Rep. 104; *Countess Warwick Steamship Co. v. Le Nickel Société Anonyme*, [1916-17] All E.R.Rep. 104; *Countess Warwick Steamship Co. v. Le Nickel Société Anonyme*, [1916-17] All E.R.Rep. 104;
- B** *Anglo Northern Trading Co. v. Emlyn, Jones and Williams* (1917), 87 L.J.K.B. 309; *The Lizzie*, [1919] P. 22; *Akt. Olivebank v. Danck Soovesyre Fabrik* (1919), 120 L.T. 629; *Bank Line, Ltd. v. Arthur Capel & Co.*, [1918-19] All E.R.Rep. 504; *Hirji Mulji v. Cheong Yue Steamship Co., Ltd.*, [1926] All E.R.Rep. 51; *United States Shipping Board v. Strick*, [1926] A.C. 545; *The Varing*, [1931] P. 79; *Joseph Constantine Steamship Line, Ltd. v. Imperial Smelting Corp'n. Ltd.*, [1931] A.C. 545; *The Varing*, [1931] P. 79;
- C** *Kingswood*, [1941] 2 All E.R. 165; *Swift v. Macbean*, [1942] 1 All E.R. 126; *Cricklewood Property and Investment Trust, Ltd. v. Leighton's Investment Trust, Ltd.*, [1945] A.C. 221; *Blane Steamships, Ltd. v. Minister of Transport*, [1951] 2 K.B. 965; *Compagnie Algerienne De Meunerie v. Katana Soc. di Navigazione Marittima S.P.A.*, [1959] 1 All E.R. 272; *Société Franco Tunisienne D'Armement v. Sidermar S.P.A.*, [1960] 2 All E.R. 529; *Sociedad Financiera v. Agrimpex Co.*, [1960] 2 All E.R. 578; *Reardon Smith Line, Ltd. v. Ministry of Agriculture*, [1961] 2 All E.R. 577.

As to unloading cargo, see 35 HALSBURY'S LAWS (3rd Edn.) 437 et seq.; and for cases see 41 DIGEST 517 et seq.

Cases referred to :

- E** (1) *Brown v. Johnson* (1842), 10 M. & W. 331; 11 L.J.Ex. 373; 152 E.R. 497; 41 Digest 568, 3926.
- (2) *Ogden v. Graham* (1861), 1 B. & S. 773; 31 L.J.Q.B. 26; 5 L.T. 396; 8 Jur.N.S. 613; 10 W.R. 77; 121 E.R. 901; 41 Digest 522, 3509.
- (3) *Samuel v. Royal Exchange Assurance Co.* (1828), 8 B. & C. 119; 6 L.J.O.S.K.B. 315; 108 E.R. 987; 29 Digest (Repl.) 166, 1027.
- F** (4) *Shield v. Wilkins* (1850), 5 Exch. 304; 19 L.J.Ex. 238; 155 E.R. 130; 41 Digest 444, 2786.
- (5) *Schilizzi v. Derry* (1855), 4 E. & B. 873; 3 C.L.R. 1160; 24 L.J.Q.B. 193; 25 L.T.O.S. 66; 1 Jur.N.S. 795; 3 W.R. 374; 119 E.R. 324; 41 Digest 444, 2788.
- G** (6) *Metcalf v. Britannia Ironworks Co.* (1876), 1 Q.B.D. 613; 45 L.J.Q.B. 837; 35 L.T. 796; 3 Asp.M.L.C. 313; affirmed (1877), 2 Q.B.D. 423; 46 L.J.Q.B. 443; 36 L.T. 451; 25 W.R. 720; 3 Asp.M.L.C. 407, C.A.; 41 Digest 518, 3477.
- (7) *Parker v. Winlow* (1857), 7 E. & B. 942; 27 L.J.Q.B. 49; 4 Jur.N.S. 84; 119 E.R. 1497; 41 Digest 528, 3558.
- (8) *Bastifell v. Lloyd* (1862), 1 H. & C. 388; 31 L.J.Ex. 413; 10 W.R. 721; 41 Digest 524, 3534.
- H** (9) *Hillstrom v. Gibson and Clark* (1870), 8 Macph. (Ct. of Sess.) 463; 22 L.T. 248; 41 Digest 564, 3894i.
- (10) *Capper & Co. v. Wallace* (1880), 5 Q.B.D. 163; 49 L.J.Q.B. 350; 42 L.T. 130; 28 W.R. 424; 4 Asp.M.L.C. 223, D.C.; 41 Digest 519, 3478.
- (11) *Moss v. Smith* (1850), 9 C.B. 94; 19 L.J.C.P. 225; 14 L.T.O.S. 376; 14 Jur. 1003; 137 E.R. 827; 29 Digest (Repl.) 303, 2288.
- I** (12) *Geipel v. Smith* (1872), L.R. 7 Q.B. 404; 41 L.J.Q.B. 153; 26 L.T. 361; 20 W.R. 332; 1 Asp.M.L.C. 268; 41 Digest 411, 2558.
- (13) *Jackson v. Union Marine Insurance Co.* (1873), L.R. 8 C.P. 572; 42 L.J.C.P. 284; 22 W.R. 79; 2 Asp.M.L.C. 435, n.; affirmed (1874), L.R. 10 C.P. 125; 44 L.J.C.P. 27; 31 L.T. 789; 23 W.R. 169; 2 Asp.M.L.C. 435, Ex. Ch.; 41 Digest 330, 1859.
- (14) *Hadley v. Clarke* (1799), 8 Term Rep. 259; 101 E.R. 1377; 12 Digest (Repl.) 459, 3426.

- (15) *Burmester v. Hodgson* (1810), 2 Camp. 488; 170 E.R. 1228, N.P.; 41 Digest 548, 3754. A
- (16) *Randall v. Lynch* (1809), 2 Camp. 352; 170 E.R. 1181, N.P.; 41 Digest 578, 4021.

Also referred to in argument:

Rodgers v. Forresters (1810), 2 Camp. 488; 170 E.R. 1226, N.P.; 41 Digest 548, 3753. B

Postlethwaite v. Freeland (1880), 5 App. Cas. 599; 49 L.J.Q.B. 630; 42 L.T. 845; 28 W.R. 833; 4 Asp.M.L.C. 302, H.L.; 41 Digest 539, 3666.

Thiis v. Byers (1876), 1 Q.B.D. 244; 45 L.J.Q.B. 511; 3 Asp.M.L.C. 147; sub nom. *Thiis v. Byers*, 34 L.T. 526; sub nom. *Thiess v. Byers*, 24 W.R. 611; 41 Digest 540, 3676.

Tapscott v. Balfour (1872), L.R. 8 C.P. 46; 42 L.J.C.P. 16; 27 L.T. 710; 21 C W.R. 245; 1 Asp.M.L.C. 501; 41 Digest 559, 3851.

Ashcroft v. Crow Orchard Colliery Co. (1874), L.R. 9 Q.B. 540; 43 L.J.Q.B. 194; 31 L.T. 266; 22 W.R. 825; 2 Asp.M.L.C. 397; 41 Digest 562, 3876.

Davies v. McVeagh (1879), 4 Ex.D. 265; 48 L.J.Q.B. 686; 41 L.T. 308; 28 W.R. 143, 4 Asp.M.L.C. 149, C.A.; 41 Digest 572, 3961.

The Alhambra (1880), 5 P.D. 256; 49 L.J.P. 73; 43 L.T. 31; 4 Asp.M.L.C. 334; reversed (1881), post p. 707; 6 P.D. 68; 50 L.J.P. 36; 44 L.T. 637; 29 W.R. 655; 4 Asp.M.L.C. 410, C.A.; 41 Digest 523, 3514. D

Atkinson v. Ritchie (1809), 10 East, 530; 103 E.R. 877; 41 Digest 464, 2955.

Blight v. Page (1801), 3 Bos. & P. 295, n.; 127 E.R. 163, N.P.; 41 Digest 454, 2849.

Ford v. Cotesworth (1868), L.R. 4 Q.B. 127; 9 B. & S. 559; 38 L.J.Q.B. 52; 19 L.T. 634; 17 W.R. 282; 8 Mar.L.C. 190; affirmed (1870), L.R. 5 Q.B. 544; 10 B. & S. 991; 39 L.J.Q.B. 188; 23 L.T. 165; 18 W.R. 1169; 3 Mar.L.C. 468, Ex. Ch.; 41 Digest 532, 3602. E

Mersey Docks Trustees v. Gibbs, *Mersey Docks Trustees v. Penhallow* (1866), L.R. 1 H.L. 93; 11 H.L.Cas. 686; 35 L.J.Ex. 225; 14 L.T. 677; 30 J.P. 467; 12 Jur.N.S. 571; 14 W.R. 872; 2 Mar.L.C. 353; 11 E.R. 1500, H.L.; 41 Digest 977, 8665. F

Appeal from a decision of the Court of Appeal (JAMES, BRETT and COTTON, L.JJ.), reported 12 Ch.D. 568, reversing a decision of SIR GEORGE JESSEL, M.R., in an action brought by the respondents, owners of the steamship *Euxine*, against the appellants, timber merchants, to recover demurrage and other charges in respect of the ship. G

By a charterparty, dated June 21, 1877, in a printed form, filled up in writing, and made between the plaintiffs, owners of the steamship *Euxine*, and the defendants, it was agreed that the *Euxine* should proceed to a port named, and there load from the defendants a full cargo of deals. This was done, and there was no dispute about that part of the contract. The charterparty then provided that the *Euxine*, H

"being so loaded, shall therewith proceed to London Surrey Commercial Docks, or so near thereto as she may safely get, and lie always afloat, and deliver the same on being paid freight,"

at a specified rate, certain perils mentioned always excepted. The other provisions which were material were as follows:

"The cargo to be supplied to the steamer at port of loading as fast as she can take the same on board, Sundays and legal holidays excepted, and to be received at port of discharge as fast as steamer can deliver as above . . . and ten days on demurrage, over and above the . . . laying days, at £80 per day, payable day by day, it being agreed that, for the payment of all freight, dead freight, and demurrage, the owner shall have absolute charge and lien on the said cargo. The cargo to be brought to and taken from alongside the ship at merchants' risk and expense." I

A The *Euxine* was not delayed on her voyage by any of the excepted perils referred to in the charterparty, but, on her arrival, at the entrance of the Surrey Commercial Dock, she was refused admittance. The plaintiffs sought to prove that there was a custom in the port of London as regarded this trade which should be incorporated in the written contract, but in this they failed, and consequently, the liabilities which the parties had by the contract taken upon themselves depended upon what was the true construction of the charterparty.

The action was tried before the Master of the Rolls, who gave judgment for the defendants, but his judgment was reversed, as above mentioned.

Charles Russell, Q.C., A. L. Smith and R. T. Reid for the appellants.

Benjamin, Q.C., Cohen, Q.C., and Rigby for the respondents.

C Their Lordships took time for consideration.

Jan. 13, 1881. The following opinions were read.

LORD BLACKBURN.—The question in this case is whether the defendants have broken the contract into which they have entered with the plaintiffs, and the first matter to be considered is: What was that contract?

D [His LORDSHIP stated the facts, and continued:] The legal effect of the contract, in my opinion, so far as regards the shipowner, is that he bound himself that his ship should, unless prevented by some of the excepted perils, proceed to the discharging place agreed on in the charterparty. That was in this case the Surrey Commercial Dock, which must, I think, mean inside the dock, with an alternative, "or so near thereto as she may safely get, and lie always afloat." The first part of the alternative has not been fulfilled. The question in the cause is whether the second part of the alternative has been fulfilled or not. The legal effect, as regards the obligation on the merchant, is that he bound himself, on the ship arriving at the place where she is to deliver, to take the cargo from alongside, and for that purpose to provide the proper appliances for taking delivery there. If, as both parties wished and expected, she got to a discharging berth within the dock, the merchant was, by himself, or the dock company as his agents, to provide proper means for landing the cargo on the quay. If the ship might not get safely further than the entrance of the dock, and was entitled to require the merchant to take delivery in the river, which is what, it is said by the plaintiffs, has happened in this case, the merchant must provide lighters or other craft to take the cargo from alongside, unless it is arranged by the parties that instead she should go into some other dock. If the ship had been permitted to get into the dock and lie there, but had been unable to get to a discharging berth, the merchant might have brought lighters to her and taken delivery in the middle of the dock.

Whether he was bound to do so or not I do not say, for it is not necessary to decide what would have been the rights and liabilities of the parties if she had been admitted inside the dock gate, as this did not in fact happen. I will only observe that, though in the printed form it is said, "and ten days on demurrage over and above the said laying days," there are no laying days provided in this charterparty in the sense in which I understand these words, and the ten days on demurrage could only begin after the ship had been at the place where the merchant ought to have taken delivery long enough for the merchant to be in default for not having completed the discharge. There is no period specified in this charterparty within which the merchant has engaged that the ship should at all events be discharged, which is what I understand by laying days. I think, therefore, that the cases, such as *Brown v. Johnson* (1), deciding when laying days commenced, have no direct bearing on such a charterparty as this.

Both parties agreed in naming the Surrey Commercial Docks in the charterparty as the dock to which the steamer was to go. I can see nothing amounting to a contract, either on the one side or the other, to procure the ship admittance, nor has any authority been cited to the effect that such a contract is implied. If the charterparty had left it free to the merchant to select a dock, it might well be

that he was bound to select one into which admittance could be procured. *Ogden v. Graham* (2) is an authority in favour of that position. And in *Samuel v. Royal Exchange Assurance Co.* (3), where the merchant directed the shipowner to proceed to the King's Dock at Deptford, and the ship arrived near the dock gates while there was much ice, but the merchant was not able to procure an order to admit it for some days, LORD TENTERDEN, C.J., ruled that, if the ship remained there waiting for an order to admit, it was an unreasonable delay, which would discharge the underwriters, but otherwise if the delay was on account of the ice. That authority seems to point the same way. A B

I do not, however, pronounce any decision on this, as it is not the case now before the House. I only mention it to prevent it being said that what I now say would be applicable to such a case. But where, as in this case, the dock was named from the beginning by both parties, the refusal of the dock authorities to let the ship inside the dock gates was the fault of neither party. They ought to have foreseen that it might happen that the dock company would, owing to the exigencies of their traffic, refuse to admit a steamer for some time; in fact, it appeared from the evidence that before the charterparty was made both parties knew that the number of timber-laden steamers was so unusually great at this time that it was very likely to happen that they would refuse for a long time. D They might have made any new provision on which they could agree. If they had in terms said that, in the event of something for which neither party was responsible rendering it impossible to get into the dock at all, or without a delay so great as to render it unreasonable to wait, the shipowner would, unless excused by some of the excepted perils, bring his ship to a discharging place in London, as near as might be to the dock and deliver there, and that the merchant should take the cargo there and pay the freight, they would have come to as prudent an arrangement as could well be devised. They preferred to keep unaltered the old form, "or so near thereto as she may safely get," and be bound by whatever the legal effect of that might be. E

The facts on this part of the case were that it was the practice of the Surrey Commercial Dock Co. to give orders for the admission of steamers to their dock to discharge there, which were in practice generally on the application of the charterer or his representative made either before or after the arrival of the steamer. By giving such an order the dock company agreed to admit the steamer, and on the production of the order she was as soon as practicable admitted into the dock. The company in practice limited the number of orders to so many steamers as they at that time thought they could accommodate with discharging berths. On July 16 Messrs. Dahl, having probably heard by telegraph that the *Euxine* was about to start, applied for an order for her admission. The superintendent of the docks, Mr. Ross (who died before the trial), wrote the two following letters: F G

"July 19, 1877. Gentlemen, referring to the enclosed order for steamships *Euxine* and *Chatsworth*, I beg to inform you that on looking over the list of Gravesend orders I have accepted, I fear I have rather exceeded the number of steamers for which I can safely provide accommodation during the months of July and August. Under these circumstances you may, perhaps, think it advisable in your interest to arrange for the vessel to be discharged elsewhere." H.

The second letter was as follows: I

"July 25, 1877. Gentlemen, I much regret to be again compelled to return the enclosed order for the *Euxine* from Soderhamn, but on going round the docks today I find my position is even worse than I anticipated. The quays are so loaded with goods that it will be impossible for me to afford the vessel anything like the usual steamboat despatch."

On the arrival of the *Euxine*, the ship's agent applied to the dock company to take her in, but was refused, the company having declined to give the order for

A her admission previously. It appeared in the evidence that there was plenty of room in the dock for the ship to lie afloat inside the dock, but that the company would not admit her until they saw a prospect of being able to give her a discharging berth within a reasonable time. The legal advisers of the defendants thought (whether correctly or not, it is not necessary to decide) that, if once admitted within the dock gate, the merchants would be answerable for all subsequent delay, and they pressed Mr. Griffin, the secretary of the dock company, not to let the *Euxine* enter the docks until they could give her a discharging berth. The secretary, to relieve his mind, on Aug. 7 sent a telegram to the superintendent in these terms: "Can you give *Euxine* immediate discharging berth? If not, on no account admit steamer into dock." This was relied on by the plaintiffs as proving that the defendants hindered the steamer from entering the dock. But it is clear, from the evidence of Mr. Griffin, the dock secretary, that the dock authorities, in their discretion, refused to admit any steamers other than those they had already engaged for, though there was plenty of room for them to lie without discharging, until there was a prospect of giving them discharging berths, and that he refused to admit the *Euxine* on Aug. 7 because he could not then give her a discharging berth, and not on account of the defendants' request. On being asked the question expressly, he says that he had no prospect of being able to give a berth after a short delay, or within any reasonable time.

The dock authorities, it seems to me, acted very prudently and properly in what they did, but even if they were wrong the defendants were not responsible for this. Though the secretary must have known at the time he gave his evidence when, as it really turned out, a steamer arriving on Aug. 7 could have had a discharging berth, neither side asked that question. He does say that if it had been admitted into the dock to lie afloat it would, in the then state of the traffic, have been five weeks before the ship could have been discharged into lighters there, from which it would seem that it would have been longer before it could have got a discharging berth; and, as demurrage was at £30 a day, it is obvious that the consequences of the delay would have been serious. I may observe that the anxious desire of the defendants that the steamer should not be admitted within the dock gate, when they believed, rightly or wrongly, that the doing so would fix him with the cost of the delay, is evidence that they believed that the delay would be important. The plaintiffs' legal advisers wrote to the defendants the following letter, and received the following answer:

G "Aug. 7, 1877.—We are instructed to inform you that the ship *Euxine*, chartered by you, is ready to discharge. The Surrey Commercial Docks Co. have declined to allow the vessel to enter their dock, as they, we learn, intimated to you several days ago. The ship's lay days begin tomorrow. Should she not be discharged by you with the usual despatch, you will be held answerable for demurrage. Your lighters should be alongside, as you have been already informed, by the first thing tomorrow morning. The cargo would be discharged in two or three days. This notice is given you that you may take such steps as you think right to expedite the unloading of the ship."

H On August 8 the defendants replied:

I "Our legal advisers tell us to say in reply to your favour of yesterday that the ship is chartered for the Surrey Commercial Docks, and that when the vessel is there we will be prepared to fulfil your clients' contract with us, and take delivery of the cargo. The notice given by you is one which you have no power to give, and which we are not called upon to obey. If the captain enters into a contract to go to a particular dock, he must go there, and it is no business of the receivers that the dock, at the time of his arrival, is full and cannot take him in. He must wait till there is room."

Some attempts were made to come to an amicable settlement, which unfortunately failed, and both parties stand on their legal rights.

It is perfectly plain to my mind that the ship did not fulfil the primary engagement in the charterparty to proceed to the Surrey Commercial Dock by merely proceeding to the gate of that dock; but if, under the circumstances, she had, on Aug. 7, fulfilled the alternative of proceeding "as near thereto as she may safely get," the merchant was, by his agreement, to take the cargo from alongside at his risk and expense, and there was no reason why he should not have to bear all the damage occasioned by his refusal to comply with the request to send lighters alongside, which, on the assumption that she had got as near thereto as she could safely get, was what he had undertaken to do. A B

Two questions arose on these points. First, whether the *Euxine* could have got into the dock without such a delay as would have been unreasonable, taking into account the nature of the transaction and the interests of both parties. That was a question of fact to be determined on the evidence. Secondly, whether, supposing that fact to be found in favour of the plaintiffs, the *Euxine* had got as near thereto as she might safely get, within the meaning of the contract. That was a question of law, depending on the construction of the written contract. As far as regards the question of law, it is not material when, or by whom, the question was first raised, your Lordships having to decide it according to law. But as regards the question of fact depending on the evidence, it might be material when it was raised, for if the point had not been raised at all by the plaintiffs, it would have been possible enough that the defendants refrained from calling further evidence which would have altered the case. But in fact it appears, by the shorthand-writer's note, that this was distinctly stated in the opening as part of the plaintiffs' case, so that there was ample to call on the defendants to produce whatever evidence they could to show that the delay in the present case would not have been unreasonable. I certainly understand from his judgment that the Master of the Rolls thought it quite immaterial whether the incapacity to get into the dock was produced by a matter threatening the safety of the ship, or by some other matter. In this the judges of the Court of Appeal all agreed with him, and so do I. But he thought it immaterial whether the delay was long or short, if it would at some time come to an end. In this the judges of the Court of Appeal differ from him. I think it far the most difficult question in this cause, but I agree with the judges of appeal. C D E F

Had the words in the charterparty been "as near thereto as she may get," it would have been open to a charterer to contend that the ship must get as far as it was possible, however dangerous it might be. I do not think it would have been successfully so contended, but those who originally framed this clause prevented the possibility of such a contention by inserting the word "safely." In the absence of authority, and construing the words in their ordinary sense, I think that is the only effect of the introduction of the word "safely." I think if a ship cannot get at all it cannot get safely. There is no authority putting any other construction on these words. It is singular enough, considering how long this has been a common form, that there is not, as far as I can learn, anything said about its construction, either in the textbooks or in any decision in our reports before *Shield v. Wilkins* (4) as late as 1850. It would seem that in practice no difficulty had been found in putting a sensible meaning on this clause, so as to avoid disputes. G H

Since 1850 there have been a few cases, all of which, I believe, were cited in the argument, but the decision in *Shield v. Wilkins* (4) had no bearing on this case. In *Schilizzi v. Derry* (5) the ship under the charterparty was bound to proceed to Galatz or Ibrail, or so near thereto as she might safely get, and load a cargo of grain. The ship having arrived at the Sulina mouth of the Danube, which is ninety miles below Galatz, and still farther from Ibrail, the master found the water on the bar unusually low, so that he could not safely cross the bar until it rose, and gave notice that he required the merchant to load his cargo there, a place where it was neither customary nor reasonable to load cargo. The decision as far as regards this point was that, as LORD CAMPBELL, C.J., said (4 E. & B. at p. 886): I

A "The meaning of the charterparty must be that the ship is to get within the ambit of the port, though she may not reach the actual harbour. Now could it be said that the vessel, if she was obstructed in entering the Dardanelles, had completed her voyage to Galatz?"

B In *Metcalf v. Britannia Ironworks Co.* (6) it was actually contended that the shipowner, who had contracted that his ship would go to Taganrog, or so near thereto as she could safely get, and there deliver the cargo, was entitled to require the merchant to take delivery at Kertch, 300 miles from Taganrog, and that the ship had completed her voyage because she was obstructed in entering the Sea of Azof, but the court, both below and in the court of error, agreed with the prior decision in *Schilizzi v. Derry* (5).

C I think it plain that neither of those decisions touches the present case. Whether the language which LORD CAMPBELL used is quite the most accurate to express his idea may be doubted, but in the case at Bar it was both reasonable and customary to unload ships in that part of the river to which the *Euxine* had come, and the docks adjoining. In *Parker v. Winlow* (7) and *Bastifell v. Lloyd* (8) where the charterparty was to proceed to a wharf in a tidal harbour, which could not be reached during the neap tides, or as near as she might safely get, it was held that, D the ship arriving during the low tides, the master was bound to wait for the higher tides, on the ground that his contract was to go to the wharf, if it could be reached in the ordinary course of navigation, and that the shipowner took on himself the risk of delay from the ordinary course of navigation. The delay in the case at Bar was not in the ordinary course of navigation. *Hillstrom v. Gibson* (9) in Scotland, E and *Capper & Co. v. Wallace* (10) were cases where the ship could get to her primary destination if she discharged a part of her cargo so as to lighten her. The majority of the Court of Session thought that, as the quantity of cargo which the ship would have had to discharge to enable her to be always afloat at Glasgow was small, it was reasonable to do so, and she was bound to do so. Nothing was decided in that case as to the alternative. The Court of Queen's Bench in the F latter case held that whether the ship might insist on the whole cargo being taken at the spot where it was necessary to lighten her, as being the nearest to which she could safely get, or was bound to go further, depended on whether it was reasonable in all the circumstances to lighten her to the necessary extent, which they thought was not the case.

G These are all the cases which were cited in the argument, and, as far as I know, all the cases which exist, in which anything has been said as to the construction of this clause. I do not think any of them is an authority for putting a different meaning on the words from that which they would bear in their natural sense, which, I think, is that which I have already expressed. The question whether a prevention causing delay for any time, however long, but which would terminate, would amount to a prevention within the meaning of the clause, is a much more H difficult question. There is no authority directly bearing on the construction of this clause, except *Capper & Co. v. Wallace* (10), which was decided after the decision of the Court of Appeal in the present case, and adds no weight to it; but there are decisions so far analogous that they establish the principle on which the Court of Appeal acted, and which, I think, they applied rightly.

I It is quite true that the words of the contract are "as she may safely get," and nothing is said expressly about getting without unreasonable delay; but in *Moss v. Smith* (11), MAULE, J., speaking of what constitutes a total loss of a ship as against an underwriter, after stating that the shipowner must repair the ship if possible, says (9 C.B. at p. 103):

"It may be physically possible to repair the ship, but at an enormous cost, and there also the loss would be total; for in matters of business a thing is said to be impossible where it is not practicable, and a thing is impracticable when it can only be done at an excessive or unreasonable cost. If a ship sustains such extensive damage that it would not be reasonably practicable to repair

her, seeing that the expense of repairs would be such that no man of common sense would incur the outlay, the ship is said to be totally lost." A

Though the particular case was a policy of insurance, MAULE, J., speaks generally of mercantile contracts. And on this principle it was held in *Geipel v. Smith* (12), by the whole court, and in *Jackson v. Union Marine Insurance Co.* (13), by a majority in the Common Pleas, and in the same case in error by a majority of the Court of Exchequer Chamber that a delay in carrying out a charterparty caused by something for which neither party was responsible, if so great and long as to make it unreasonable to require the parties to go on with the adventure, entitled either of them, at least while the contract was executory, to consider it at an end. I said in *Geipel v. Smith* (12) (L.R. 7 Q.B. at p. 414): B

"Very different considerations arise where the cargo is already on board, or, as in *Hadley v. Clarke* (14), is already on the voyage; but while the contract still remains executory, I think time is so far of the essence of the contract as that matter which arises to cause unavoidable but unreasonable delay is sufficient excuse for refusing to perform it." C

I still think that there is a distinction between the cases, for when the shipowner has got the merchant's cargo on board, he cannot simply put an end to his contract; he must do something with the cargo. But in this case the parties have provided for what is to be done with it. If the ship cannot get into dock, she is to go as near as she may safely get, and there deliver. It certainly seems to me that any cause that would excuse the ship from going into the dock if the contract was wholly executory, must be sufficient to excuse her, and so bring the alternative into operation, when the cargo is on board. There was a dissenting minority in *Jackson v. Union Marine Insurance Co.* (13), and some previous authorities are perhaps not quite consistent with the decision. It is no doubt competent to your Lordships to re-consider that case, and to decide contrary to it. I think it was rightly decided, but I can only refer your Lordships to the judgment delivered by BRAMWELL, B., in that case, in the reasoning of which I then concurred and still concur, and to which I have nothing to add. D

The only remaining question is whether the evidence in this case is such as to lead your Lordships to concur in the finding of fact by all the judges in the Court of Appeal, that the delay would have been in this case so great as to make it unreasonable to call on the shipowner to wait. The shipowner would, I think, be bound to go into the dock if he could do so by waiting a reasonable time, but not if he could only do so by waiting an unreasonable time. It is quite true that a question of "reasonable or unreasonable" must always be a question of more or less, and, therefore, of uncertainty, but that, I think, cannot be helped. I do not pretend to lay down any precise rule as to what is reasonable or what is not. I think the main elements to be considered are what would be the effect on the object of the contract, and the damage to each party caused by the delay, and if the result be to lead those who have to decide the question to think (to adopt the language of the Master of the Rolls) that it is absurd to suppose that two commercial men entering into a contract to charter a steamer to go to a dock, or as near thereto as she may safely get, should mean that she was to wait outside so long, they ought to find it unreasonable. E

In the present case it was agreed in the written contract that the cargo was to be received as fast as steamer can deliver. And though I do not agree with what is suggested by CORRON, L.J. (12 Ch.D. at p. 597), that this cast the duty on the merchant of discharging the vessel as quickly as if she had obtained admission to the Surrey Commercial Docks, it certainly showed that both parties knew that a prompt despatch was of great consequence to the steamer, and £30 per day being mentioned as demurrage, it was known to each that the loss by a day's delay would be at least that sum, so as to show that a prompt despatch was to a great extent the object of the contract. It does not appear distinctly how long it would have taken to unload the steamer with lighters in the river, nor what it would F

A have cost the merchant, but it does appear that the steamer was willing to go to the Millwall Dock, where she could have been discharged at the same cost as in the Surrey Dock, in about the same time. The defendants refused to assent to this, and I do not think they were bound to assent. They refused because they thought, not that the cargo would be worse, but that the value of it would be diminished so as to make them a loser by about £120. Assuming this to be so, they required
B the steamer to wait for a period uncertain in its length, but certainly exceeding five weeks, and five weeks at £30 a day would represent a loss to the shipowner of more than £1,000. I cannot think that reasonable. The result is, that I come to the conclusion that the judgment should be affirmed, and the appeal dismissed with costs.

C **LORD WATSON.**—This is a case of importance, seeing it involves the construction of a clause which has long been of common occurrence in contracts of affreightment.

Various questions were argued in the courts below, but the only issue raised between the parties on this appeal is whether the *Euxine*, on Aug. 7, 1877, had, as was found by the Court of Appeal, completed her voyage in terms of the charterparty. It is not maintained by the respondents, the owners of the *Euxine*, that
D the vessel had proceeded to the Surrey Commercial Docks. On the contrary, their contention is that it had become impossible, in the sense of the charterparty, for her to obtain admission to the dock, and, consequently, that she must be held to have completed her voyage whenever she reached her moorings at the Deptford Buoys, seeing that she was then as near to the dock as she could safely get and
E lie afloat. The appellants, on the other hand, contend that, by the conditions of the charterparty, the *Euxine* was bound to proceed to her primary destination, unless prevented by some permanent physical obstacle. They further maintain that the circumstances which occasioned the exclusion of the *Euxine* did not constitute an obstacle either of a physical or of a permanent character, and that the vessel was, therefore, bound to wait, at owner's risk, until the obstruction was removed,
F and then to enter the dock for the purpose of discharge.

Both parties seemed to concede, and I think it may be taken as settled law that when, by the terms of a charterparty, a loaded ship is destined to a particular dock, or as near thereto as she may safely get, the first of these alternatives constitutes a primary obligation, and, in order to complete her voyage, the vessel must proceed to and into the dock named, unless it has become in some sense "impossible" to do so. It is only in the case of her entrance into such dock being barred
G by such "impossibility" that the owners can require the charterers to take delivery of her cargo at a place outside the dock. When a vessel in the course of her voyage is stopped by an impediment occurring at a distance from the primary place of discharge, it has been decided that she cannot be held to have got "as near thereunto as she could safely get," and, therefore, cannot claim to have completed
H the voyage in terms of the second alternative: see *Schilizzi v. Derry* (5); also *Metcalf v. Britannia Ironworks Co.* (6). It was observed by LORD CAMPBELL, C.J., in the former of these cases, that the meaning of these words in the charterparty, "so near the port of landing as the ship may safely get," must be that she "should get within the ambit of the port, though she may not be able to enter it." In the present case it does not admit of dispute that the *Euxine*, when lying at the
I Deptford Buoys, was as near to the Surrey Commercial Docks as she could safely get, if it be assumed that it had become, within the meaning of the charterparty, "impossible" for her to get into the dock.

The appellants maintained that there can be no impossibility within the meaning of the contract, unless the vessel is stopped by an impediment which is both physical and permanent; but I greatly doubt whether, on any fair construction of the charterparty, it is necessary that the obstruction should be of a purely physical character. I also doubt whether there be any foundation in fact for the appellants' contention. The exclusion of the *Euxine* from the Surrey Docks in August, 1877,

was owing to a rule made by the statutory authorities entrusted with the administration and control of the docks. It is not suggested that the rule was in excess of their powers, or that it was not capable of being legally enforced. I am of opinion that an order emanating from the proper authority, which, if disregarded, would lead either to the dock gates being shut against the vessel, or to her being summarily turned out of the dock, if she did get into it, does in reality constitute a physical obstacle. A

The controversy between the parties appears to me, accordingly, to be narrowed to this issue—whether the obstacle which the *Euxine* encountered was of such permanency as to render it impossible, within the meaning of the charterparty, for her to get into the Surrey Commercial Docks. In providing alternative destinations, the charterparty does not express the condition upon which the second alternative becomes substituted for the first. It does not in terms express any distinction between the alternatives; and that the first is to be regarded as the primary destination to which the chartered vessel must, if possible, proceed, is, I apprehend, an inference based upon what is known to be the ordinary course of shipping business, and on the presumption that both parties would, from considerations of common interest, have agreed to that effect if they had made it a matter of express contract. The question before the House must also, in my opinion, be determined by some such reasonable considerations. A permanent obstacle can in no reasonable sense be held to mean an obstacle which will remain for ever. There must in every case be some limit of time within which an obstacle ceasing to exist cannot be regarded as permanent, and beyond which a continuing obstacle ceases to be temporary. B C D

It may be very difficult to fix that limit, which will obviously vary with the circumstances of each case and the terms of the charterparty; but I do not think the same difficulty exists in regard to the principle upon which it ought to be determined. I have always understood that when the parties to a mercantile contract, such as that of affreightment, have not expressed their intentions in a particular event, but have left these to implication, a court of law, in order to ascertain the implied meaning of the contract, must assume that the parties intended to stipulate for that which is fair and reasonable, having regard to their common interests, and to the main objects of the contract. In some cases that assumption is the only test by which the meaning of the contract can be ascertained. There may be many possibilities within the contemplation of the contract of charterparty which were not actually present to the minds of the parties at the time of making it; and when one or other of these possibilities becomes a fact, the meaning of the contract must be taken to be, not what the parties did intend for they had neither thought nor intention regarding it, but that which the parties, as fair and reasonable men, would presumably have agreed upon if, having such possibility in view, they had made express provision as to their several rights and liabilities in the event of its occurrence. E F G

I am of opinion that the question at issue in the present appeal must be solved in that way, and that the *Euxine* cannot be held to have completed her voyage on Aug. 7 unless it be established that the delay which would have taken place before she was admitted to the Surrey Docks would have been so great that the parties, had they anticipated and provided against its occurrence on June 21, 1877, would not, as reasonable men of business, have arranged that the vessel should wait outside the dock at owner's risk until a berth was ready for her. I adopt the view of BRETT, L.J. (12 Ch.D. at p. 593), that the shipowner must bring his ship to the primary destination named in the charterparty H I

"unless he is prevented from getting his ship to that destination by some obstruction or disability of such a character that it cannot be overcome by the shipowner by any reasonable means, except within such a time as, having regard to the adventure of both the shipowner and the charterer, is, as a matter of business, wholly unreasonable."

A None of the authorities cited in the course of the argument, with the exception of two which I shall shortly notice, appears to me to have any material bearing upon the question before the House. Most of these authorities related to the question whether, had she been permitted to enter the dock, the *Euxine* would have completed her voyage, and would have been at the charterer's risk as soon as she was moored there, or not until she reached a discharging berth alongside the quay. There being no proper lay days stipulated in her charterparty, it might in that event have been plausibly contended that the *Euxine* fell within the principle of decision in *Burmester v. Hodgson* (15) and not within the rule established in *Randall v. Lynch* (16). But it does not appear to me to be necessary to decide the point, because the *Euxine* never did get into dock, and I do not think that its decision one way or another would be of any assistance in determining whether it was impossible for her to get there.

C *Parker v. Winlow* (7) and *Bastifell v. Lloyd* (8) come somewhat nearer to the present, although their bearing upon it is not very direct. It was there held that the shipowner, having contracted in the knowledge, or at least with the means of knowledge, that the primary place of discharge specified in the charterparty was a tidal port, was bound to take the risk of the tides being unfavourable when his vessel arrived, and to complete the voyage by proceeding to that place at spring tides. It appears to me to be a reasonable inference from these decisions that no impediment arising in the ordinary course of navigation to a particular port or dock, or arising in the usual and ordinary course of management of a particular port or dock, and not lasting beyond ten days or a fortnight, is to be regarded as permanent obstruction; but that the ship must wait, and proceed to its primary destination before the charterer can be required to take delivery of the cargo. But I do not think that much aid can be derived from these decisions in determining what shall be held to constitute a permanent obstacle in a case like the present.

D In *Geipel v. Smith* (12) and *Jackson v. Union Marine Insurance Co.* (13) certain points were decided in regard to the effect of unreasonable delay arising from causes not imputable to any of the parties, and so far these cases appear to me to have a very close analogy to the present. In each of these cases there had been an impediment in the way of the chartered vessel, in consequence of which she did not go to her port of loading. That impediment, which arose in the first case from a blockade, and in the second from shipwreck, was temporary in this sense, that it would have been quite possible for the one vessel to have proceeded to her place of loading after the blockade was raised, and for the other after her repairs were completed.

G In *Geipel v. Smith* (12) the charterer raised an action of damages for breach of contract against the shipowner; but the Court of Queen's Bench, being satisfied that the ship could not have reached her destination within a reasonable time without running the blockade, held in law that the contract of the charterparty was thereby discharged.

H In *Jackson v. Union Marine Insurance Co.* (13), the shipowner preferred a claim for lost freight against the underwriters, who resisted it on the ground that the charterparty remained in force notwithstanding the mishap that had befallen the ship, and that the plaintiff was entitled to demand either specific performance or damages from the charterer. At the trial of the cause the jury, in answer to questions put to them by the presiding judge, found that the time necessary for repairing the ship, so as to make her a cargo-carrying ship, was so long as to make it unreasonable for the charterers to supply the cargo agreed upon at the end of such time, and also that the time was so long as to put an end, in a commercial sense, to the commercial speculation entered upon by the charterers. A verdict was entered for the defendants, leave to move being reserved to the plaintiff; and the case was thereafter argued on a rule before the Court of Common Pleas, under an agreement that the defendants should be at liberty to argue that the findings of the jury were against the weight of evidence. The majority of the Common Pleas took substantially the same view of the facts as the jury had done, and held that

the delay occasioned by the getting off and repair of the ship was so unreasonable as to terminate the adventure, and that the plaintiff was, accordingly, entitled to recover under his policy on freight. On appeal the Court of Exchequer Chamber, with a single dissentient voice, affirmed the judgment. A

It was precisely the same question which arose for decision in these two cases; and, if I understand them aright, it was in both decided that this delay in loading a cargo would have been so unreasonable, so inconsistent with the presumable views and intentions of both the contracting parties, that the charterparty could no longer be held binding on either of them. No doubt in these cases the contract had not passed the executory stage; but, seeing that unreasonable delay in reaching the place of loading, when occasioned by no fault of either of the parties, is effectual to discharge such a contract altogether, I conceive that, *à fortiori*, a similar delay in reaching the primary place of discharge ought to have the effect of enabling the vessel to complete her voyage by proceeding to the alternative destination. B C

That leaves only the question of fact, whether the state of the Surrey Commercial Docks in August, 1877, was such as would have unreasonably delayed the discharge of the *Euxine* within that dock. I think it may be taken as proved that the block occasioned by the great demand for steamship berthage in August and September, 1877, although that was rapidly becoming the normal condition of the Surrey Docks in the preceding months of June and July, was due, not to ordinary, but to exceptional, causes. Seeing that on Aug. 4 the authorities could not undertake within a month, or any other given time, to admit the *Euxine* into the dock, and even on Aug. 23 they were not in a position to give a more definite and satisfactory undertaking, it appears to me to be safe to conclude that the length of time for which the *Euxine* must have waited in the port of London in order to discharge in the Surrey Docks would have been in excess of any delay which either the shipowner or the charterer, at the time of entering into the charterparty, could reasonably have contemplated. I am, therefore, of opinion that the judgment of the Court of Appeal ought to be affirmed. D E

LORD SELBORNE, L.C., concurred.

Appeal dismissed. F

Solicitors : Plews, Irvine & Hodges; Druce, Sons & Jackson.

[Reported by C. E. MALDEN, Esq., Barrister-at-Law.]

Re HAVEN GOLD MINING CO.

[COURT OF APPEAL (Sir George Jessel, M.R., Brett and Lindley, L.JJ.), January 13, 14, 1882]

[Reported 20 Ch.D. 151; 51 L.J.Ch. 242; 46 L.T. 322;
30 W.R. 389]

*Company—Winding-up—"Just and equitable"—Substratum of company gone—
Company not insolvent—Majority of shareholders opposed to winding-up.*

Where the substratum of the company is gone, so that it is impossible to carry on the business for which the company was formed, it is "just and equitable" that the company shall be wound-up [see now Companies Act, 1948, s. 222 (f)], and a winding-up order will be made on the petition of a shareholder, although the company is not insolvent and a large majority of the shareholders are opposed to any winding-up.

Per SIR GEORGE JESSEL, M.R.: Fraudulent representation in the prospectus is not of itself a sufficient ground for winding-up. The company may waive the fraud, complete the bargain, and go on, or they may vary the bargain on the ground of fraud and complete it with variations. As to that the majority of the company in general meeting are the best judges, but where the whole thing has gone the majority cannot bind the minority to enter into an entirely new speculation.

Notes. Applied: *Re German Date Coffee Co.* (1882), ante p. 372. Considered: *Re Bristol Joint Stock Bank* (1890), 44 Ch.D. 703. Applied: *Re Coolgardie Consolidated Gold Mines* (1897), 76 L.T. 269. Considered: *Re Eastern Telegraph Co.*, [1947] 2 All E.R. 104. Referred to: *Re Bidwell*, [1893] 1 Ch. 603; *Re General Phosphate Corpn.* (1893), 37 Sol. Jo. 683; *Re Brinsmead*, [1897] 1 Ch. 406; *Stephens v. Mysore Reefs (Kangundy) Mining Co.*, [1902] 1 Ch. 745.

As to winding-up on ground of just and equitable, see 6 HALSBURY'S LAWS (3rd Edn.) 532, 534, 535; and for cases see 10 DIGEST (Repl.) 856. For the Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 452.

Case referred to:

(1) *Re Suburban Hotel Co.* (1867), 2 Ch. App. 737; 36 L.J.Ch. 710; 17 L.T. 22; 15 W.R. 1096, L.JJ.; 10 Digest (Repl.) 856, 5639.

Also referred to in argument:

Re London and County Coal Co. (1866), L.R. 3 Eq. 355; 15 W.R. 151; 10 Digest (Repl.) 865, 5639.

Re Diamond Fuel Co. (1879), 13 Ch.D. 400; 49 L.J.Ch. 301; 41 L.T. 573; 28 W.R. 309, C.A.; 10 Digest (Repl.) 862, 5670.

Re Langham Skating Rink Co. (1877), 5 Ch.D. 669; 46 L.J.Ch. 345; 36 L.T. 605, C.A.; 10 Digest (Repl.) 884, 5861.

Appeal from a decision of BACON, V.-C., dismissing a petition for the compulsory winding-up of the Haven Gold Mining Co.

One Eicke obtained the execution by an aboriginal New Zealander of a document dated Nov. 30, 1868, whereby, in consideration of an annual payment of £20 sterling (of which an instalment of £2 was stated to have been already paid out of the first year's payment), the New Zealander purported to grant to Eicke and his assigns a licence to sink shafts and tunnel for gold for a term of fourteen years in a block of land in the gold region of New Zealand sketched out in a rough plan annexed, and said to contain about three acres and a half. By a deed dated Dec. 14, 1868, two other New Zealanders, described as aboriginal native chiefs, purported to grant to Eicke a lease for twenty years of another and smaller piece of land in the gold-fields for mining purposes, in consideration of a rent of £20 per annum. Eicke did not then register the title as required by the law of New Zealand, or work under either of them; but in October, 1871, he obtained two other

documents confirming the prior grants for the purpose of registration. These deeds were registered in 1871. The apparent reason for registration was that one Dexter Brigham was willing to give Eicke £300 for the documents. On each of the documents there was an endorsement that Eicke had sold all his interest and the lease to one Dexter Brigham for £300, which sum was acknowledged to have been received. The documents were handed to Brigham, and nothing more was done till early in 1880, when Eicke appeared in England and represented that he was entitled to a lease for twenty years in a large property in the gold regions of New Zealand called the Haven Gold Mine. By an agreement of Dec. 20, 1880, one Elliot (whose title did not appear) purported to agree to sell Eicke's property in the alleged mining property to a Mr. Hance for £16,000. By an agreement dated Dec. 24, 1880, it was arranged that Hance should sell the property to W. R. May as trustee for the Haven Gold Co. for £30,000, of which £10,000 was to be paid in fully paid-up shares of the purchasing company, and the rest in cash.

The company was registered in 1880 under the Companies Acts, 1862-1880, with limited liability. The memorandum of association stated that the objects of the company were:

"(a) To purchase, hire, lease, or otherwise acquire mines and mineral properties, lands, or hereditaments in New Zealand or elsewhere, or any estate, or interests in or rights or privileges over any such mines or mineral properties, lands or hereditaments, which may be deemed necessary or advisable for the purposes of the company, and more particularly to carry out an agreement, dated Dec. 24, 1880, and made between John Pelham Hance, of the one part, and W. R. May, as trustee for and on behalf of the company, of the other part, upon the terms and conditions therein mentioned. . . . (c) To work and maintain the mines and mineral properties and works of the company, and to carry on and conduct the business of raising, working, winning, and selling ores, metals, and other minerals, in all its branches, and to smelt and render merchantable any ores and minerals to be obtained from the mines or property of the company or any other company. . . ."

The capital of the company consisted of £100,000 divided into 100,000 shares of £1 each.

A prospectus issued on behalf of the company contained the following statement:

"This company is formed for the purpose of acquiring and developing the property called the 'Haven Claim,' situate at the Thames Gold Field, Grahams-town, near Auckland, north island of New Zealand."

The prospectus also stated that the mining rights in the land set forth in the plan had been acquired by the company; that the land was held on lease at a rent of £40 a year; and that the documents of title were duly registered in New Zealand. Extracts were then given from reports of a Mr. Rice and Professor Simons, which stated the prospects of working the mining property and its supposed value. It appeared in the Court of Appeal that Mr. Rice and the professor had never seen the property, and that their report was based on the statement of Eicke. Shortly after the company had been formed the directors found that the documents of title were in Dexter Brigham's hands, and they, accordingly, purchased the documents and his interest under them for £1,000.

Some time in May, 1881, a telegram was received by the directors from Messrs. Hesketh and Richmond, the New Zealand solicitors of the company, that the property comprised in the lease of Dec. 14, 1868, was actually in the possession of and worked by a Mr. Russell, who had a title earlier in date of grant as to one piece, and earlier in registration as to both pieces than that of the company, whose title was, therefore, bad. On Sept. 24, 1881, a petition was presented by two shareholders of the company praying that the company might be wound-up, on the ground that the substratum of the company was gone, and that it was just and equitable that the company should be wound-up. On Oct. 13 the directors issued a

A circular stating their opinion that it was hopeless to go on with the matter, and advising that the company should be wound-up voluntarily. A special meeting of the shareholders was held to consider the circular, at which resolutions were passed that there was no necessity for winding-up; that Mr. Rice should be sent out to New Zealand to make further inquiries as to the title, and, if possible, obtain an extension of the leases for a further term of twenty years; and that the meeting should be adjourned for five months while he was away. The company was not insolvent, and had a balance in hand of about £8,000. Sixty-four shareholders, holding 8,915 shares, voted for the resolutions; and four creditors, holding 250 shares, voted against them. The petition was heard by BACON, V.-C., and dismissed. The petitioners appealed.

C *N. Higgins, Q.C.*, and *A. Beddall* for the petitioners.
Eddis, Q.C., and *E. Chitty* for the company.
Horton Smith, Q.C., and *Whinney* for shareholders supporting the petition.

SIR GEORGE JESSEL, M.R.—This is a very remarkable case. It appears that a person by the name of Eicke—who is described in some of the documents as a gentleman, and in other of the documents as a commission agent, and who probably is as much entitled to one description as the other—in the year 1868 had some conversation with a New Zealand savage, whose name I am unable to pronounce. The result of that conversation was that the New Zealand savage (who could neither read nor write, is described in the documents to which I am going to refer as an illiterate person, and, apparently, was unable to understand English, so that the document was interpreted to him) was persuaded to grant to Mr. Eicke something, which I will consider in a moment. What the New Zealand savage was entitled to does not appear. Whether he was or was not entitled, by the law of that part of the country, to any lands or any mines, is not stated by any one, nor is there any recital that he was so entitled. I cannot say that any plot of land is described in the document of Nov. 30, 1868, but there is some scratching, on the back of the document, which looks something like a plan and shows the plot of land in question and another block of land as well. As I read that document, it is only what we call an exploring licence; it is only a right to sink shafts and tunnel for gold. There is no gift or grant of the gold itself to Mr. Eicke, and it does not say that he is to retain the gold. It is not an exclusive licence, and, therefore, if this New Zealand savage was the owner of the property, there was nothing to prevent his granting licences to other people. About the same time Mr. Eicke had another conversation with two other New Zealanders (who seem to have been in the same state as the first one as regards education, and are described as aboriginal native chiefs). By a deed dated Dec. 14, 1868, without any recital of title at all, in consideration of the rent reserved, these two chiefs granted to Mr. Eicke a piece of land in the goldfield for £20 sterling a year, for twenty years from the date of the deed, for mining purposes. That is a grant of the lands and the mines from that date, and a covenant for further assurance. It is said to have been interpreted to the chiefs, who signed it with their marks. If the chiefs had a title it passed by the deed.

I These two documents are said to have passed to Mr. Eicke some property, the value of which is incalculable. According to the prospectus the two grants cover something like six or seven acres of gold reef of enormous value, worth I do not know what—I must leave that to the imagination of the shareholders. Eicke does not seem to have taken the trouble to register the title, as required by the law of New Zealand. He did not himself work under either of these titles, and he allowed this immense mass of gold reef to remain unworked. In October, 1871, he obtained two other documents confirming the grants previously made, but they conferred no further title, and seem to have been made as deeds of confirmation for the purpose of registration. These were registered in 1871. It appears that there was a reason for the registration. Mr. Eicke seems to have found in the colony a gentleman of the name of Dexter Brigham, who was willing to give him £300 for the documents. The documents were handed over to Mr. Brigham, and

nothing more was done by Mr. Eicke until 1880, when, as I understand, he was in A
England.

Whether Mr. Eicke's imagination was excited by the reports of the successful
working of gold mines (either by the raising of gold or by disposing of shares
therein), whether, in fact, the whole transaction with Mr. Brigham was not
genuine, but a mere sham, or whether Mr. Eicke had forgotten it, I do not know; B
but at all events Mr. Eicke represented to certain gentlemen that he was entitled
to the lease of a large property in the gold region of New Zealand, called the
Haven Gold Mine. Not having the papers with him—and I suppose being oblivious
of the contents of them—he drew a fancy portrait of the locus in quo, which has a
somewhat distant resemblance to the scratching on the document to which I have
referred, and, representing that he had the lease for twenty years, he proposed to
sell it. There were some subsequent agreements, and eventually a gentleman of C
the name of Hance promoted the Haven Gold Mining Co., and an agreement
(dated Dec. 24, 1880) was made under which it was arranged that Hance should
sell this property to the company for £30,000 payable partly in cash and partly in
shares. The promoter formed the company, and somebody or other issued a
prospectus, which, if there is no better explanation to be given than has been given,
contains some very gross mis-statements which must have been, not only calculated, D
but intended, to deceive.

I am only going to refer to the prospectus to show what the company was formed
for. It is plain that the company was formed for working this mine, called the
Haven Gold Mine, and for no other purpose. The prospectus was not correct, for
it stated that the mining rights acquired by the company were held at a nominal
rent of £40 per annum. That is not so, although there were two £20 rents. The
prospectus did not state that the lease of rather more than half the property
(if it had been a lease at all, which it was not) would expire in 1882, and that the
other would expire in 1888. The first fact was not known to the directors, but
I think the second was, because, although the time is not stated in so many words
in the agreements, the date is stated, and the number of years, and it was not
likely that it was for a retrospective term of twenty years. When we come to look
at the plan on the prospectus, and compare it with the other plan and with the
boundary, it is clear that the plan on the prospectus comprises a portion of that
which is comprised in the first licence; it comprises a portion if not the whole of
that which is comprised in the lease, and it comprises some land between which
is not either in the lease or in the licence. I have not forgotten that there are
general words in the memorandum of association extending the right to work
mineral property generally; but no doubt the special object of the company, stated
in the memorandum of association, is to work this gold mine; and the point which
we have to consider is whether there was any mine at all as to which the company
had a title, or a contract which might eventuate in a title. G

If I am right as to the construction of the first document, even supposing that
the New Zealander who put his mark to it had any title at all, it would not have
passed anything of any value. The mere right of prospecting is not a very valuable
right, because the more gold you find, the harder are the terms imposed upon you.
But, even assuming that the construction I have put upon the document is not
the correct one, and that the prospector is impliedly to keep any gold that he can
find, it cannot be treated seriously as a title to work a mine represented, as this
was, to the public as a ground for their subscribing with the notion of continuous
working. The term expiring in September, 1882, it would not be sufficient in
itself to be treated seriously as the title to a mine which the company could be
supposed to work, or which the public could be supposed to have subscribed to take
shares in. H

Passing from the consideration of the land in which mining rights are supposed
to have been granted by the deed of November, 1868, we have to consider next the
middle piece. It is clear there never was any title to that. Then I take the other I

A piece, to which the Maori chiefs may or may not have had a title. The evidence as to that stands in this way. The company having been formed, and having made inquiry as to the documents of title, found they were in New Zealand in the hands of Mr. Brigham or of somebody else. They treated for the documents, and eventually paid £1,000 and got the documents away and an assignment from Brigham of his interest. It is plain the directors found very great difficulty about going on.

B As far as regards a very large portion of the property, the fourteen years had nearly expired. As to the rest, only seven years were unexpired. After this—the date is not very satisfactorily proved, but I think it was some time in May, 1881—a telegram was received stating that what I will call the leased part (as to which Mr. Eicke admits he never took any possession) was actually in the possession of and worked by a Mr. Russell, one of the directors of the New Zealand bank, and that

C he had a title earlier in date than the company's, and registered before their title was registered. Therefore, he was doubly prior. As to the part included in the licence, there was a prior registration of a subsequent title. The telegram consequently stated that Eicke's title was bad. Sometime afterwards the telegram was confirmed by a letter from the company's solicitors in New Zealand. On Oct. 13, 1881, when the directors sent out their circular, they were satisfied by

D the evidence that there was no title at all in Eicke, and no title by which he could give the property of any portion of this mine to be worked by a mining company.

Is it to be tolerated that the majority of the shareholders shall bind the minority to go on when they have no title at all, merely because they think it possible they may get a title? Is the minority to be bound by the opinion, as to the value to be given, of the person sent out by the directors, or of the solicitors in New Zealand?

E There is no negotiation at present. There is no reasonable prospect of obtaining the mines from anybody. Nobody says that the owners are willing to sell or willing to grant an extension of the lease. There is nothing at all said about it. Therefore, there is evidence which is satisfactory to me, and, I believe, to the rest of the court, that there is no title at all. There is evidence which is not only

F satisfactory to the judges, but was quite satisfactory to the directors. It is the evidence upon which they advised the company to act. The company in general meeting overruled their directors, refused to act upon their advice, and insisted upon going on with the company. Is not this exactly the thing pointed out by LORD CAIRNS in *Re Suburban Hotel Co.* (1), where "the business which the company was incorporated to carry on has become impossible?" It seems to me exactly

G that case.

The mere fact of there being fraudulent representations in the prospectus, if they should hereafter be proved to be fraudulent, is not sufficient. A company may, if they think fit, waive the fraud and complete the bargain and go on, or they may vary the bargain on the ground of fraud and complete it with variations. As to that, the majority of the company in general meeting assembled are the best

H judges; but where the whole thing has gone, the majority cannot bind the minority to enter into an entirely new speculation, and it never has been so held. I agree also in the argument put forth on the part of the company—that it requires a very strong case to induce the court to interfere, but if what I have said is correct, I think I may safely add that, in my opinion, this is a very strong case indeed—as strong a case as, I think, could very well be put, to show that what has been

I called the substratum of the company has no existence in fact, and, therefore, that the company's money (there being as it appears a very considerable sum of money to be dealt with) ought not to be applied to any such purpose as that which is suggested. It seems to me that we have here a plain case of utter failure of the objects of the company, and a plain case in which the petitioning shareholders have a right to say: "Stop; divide what you have among those entitled to it, and do not involve us in a further speculation which we never consented to be parties to, and which could never be beneficial to anybody." It seems to me that, for these reasons, an order ought to be made on the petition to wind-up the company.

BRETT, L.J.—In this case the company was formed for the purpose of working A
for gold under an alleged plot of land in New Zealand. The only title upon which
the company can rely is the title of Eicke, if he ever had any. The alleged title
of Eicke certainly consists of two separate titles, and these two separate titles
do not comprise the whole of the plot under which it is supposed the company
has a right. Part of their claim is through Eicke, under what my Lord has called B
the licence, which, in his opinion, is not a lease. I care not to inquire myself
whether it was a licence or a lease. Assuming it was a lease, it comes to an end
within a year, and it only relates to a very small portion of the plot which the
company was formed to work. Even supposing, therefore, that Eicke had a title,
or that he had a lease, and supposing that lease was transferred to the company,
if that is all they had it seems to me impossible to say that they had possession
of the subject-matter which they were formed to work. With regard to the other C
plot, which is claimed as by title through Eicke, it seems to me to be clearly proved
that Eicke never had any title to it at all.

The majority of the company want the company to go on. A minority desire
to wind it up compulsorily. The company is not insolvent. Under such circum-
stances, it appears to me that the court cannot interfere unless there is, within a
reasonable meaning of such a phrase, "a total absence of the possession or right D
to possession, by the company of the subject-matter which the company was formed
to work, and no reasonable prospect of the company obtaining possession of such
subject-matter." I have used the words "within a reasonable meaning," because
it seems to me that, even if it were true that a mere minute portion of the subject-
matter was in the possession of the company for an extremely short period, nobody
could allege from that mere fact that there was not, within a reasonable meaning E
of the phrase, a total absence of the possession or right of possession by the company
of the subject-matter. If it were correct that there was a right to work the gold
under a small portion of this alleged plot of land for a limited time, namely, for a
time which does not extend longer than a year, nobody would say that there was
not, within any reasonable and business meaning of the phrase, a total absence of
possession of the subject-matter which this company was formed to work. It seems F
to me that the court ought not to interfere unless the proposition which I have
enunciated can be supported by the evidence.

If that can be done it seems to me to be immaterial whether there was or was
not fraud, either in the directors or promoters of the company. Fraud in the
directors or promoters of the company, to whatever extent it existed, would not
entitle the court to wind-up the company compulsorily, if the proposition which G
I have enunciated could not be supported. Therefore, it seems to me to be
unnecessary that we should judicially determine whether there was any fraud in any
of the promoters of this company, or in the directors. Having, as I always have,
such a hatred of fraud in business men, I desire to state that I am not prepared
to say that there was any fraud on the part of the directors of this company. But
it seems to me this cannot be relied upon at all.

It seems to me obvious that the court ought to come to the conclusion, as a
matter of fact, that Eicke had no title whatever to that larger plot with which he
claimed to deal, but that it was in the possession of and being worked by people
who had a prior claim to him. To my mind, it is clear that that is the proper
inference, and that he never had any title. The directors of this company, upon
receiving information of the facts, and the opinion of their own solicitors in New I
Zealand, came to the opinion—and I see no evidence that they ever departed from
it—that the case was hopeless, and that they had nothing upon which this com-
pany could properly continue to act. They, therefore, advised their shareholders
that the case was hopeless, and that the company ought to be wound-up. I entirely
agree with them that the case was hopeless. But then it was said that Mr. Rice
was sent out to inquire whether their opinion was right, and to make, if he could,
an arrangement by which persons who had claims should give up those claims to
the company; in other words, he was first to see whether the solicitors were mis-

- A taken—for which I see no colour—and secondly, he was to make a new agreement with the persons who were really entitled. Is there any reasonable prospect of his making such an arrangement? It seems to me that there is none. It is hopeless to suppose that he could make a new arrangement for this company with persons who were already working the plot, and working it for the same purpose as that for which this company was formed.
- B I think, therefore, the proposition is made out that there is a total absence of possession or right of possession by the company of the subject-matter which they were formed to work, and that there is no reasonable prospect of the company obtaining possession of such subject-matter. Under the circumstances it seems to me that the opinion of the majority of the shareholders is an unfounded opinion, and that the opinion of that majority ought not to bind the minority.
- C **LINDLEY, L.J.**—I am also of opinion that the company ought to be wound-up, and I have come to that opinion with my mind fully alive to the difficulty of deciding questions of probability or improbability of success as against the views of the majority of the shareholders. What we have to consider is: What are the respective rights of the majority and the minority of the shareholders under the circumstances which have been proved in evidence before us? This company was
- D formed for the purpose of acquiring and working the mine of which we have heard so much, and upon the representation that they could acquire it upon certain terms. Neither the company nor their officers have had possession of the alleged mine, and they cannot get it. They cannot, therefore, work the mine in the manner in which it was intended, although, of course, negotiations with other claimants may
- E result in the purchase or acquisition of this mine. There is no evidence whatever of any agreement by which the company can get this property. It is a pure matter of speculation whether they can get it or not from other people; but it appears to me that that is not a matter in which the minority are bound to embark. They may say: “No, that is not the speculation into which we entered, and we are not bound to embark in any such matter.”
- F It appears to me that it is proved by evidence upon which we must act that the minority have established such a case as entitles them to say to the majority: “The undertaking in which we all embarked is proved to be impossible to carry out; we decline to enter into any further speculation or to join you in trying to get this property from other people and upon other terms.” Upon that short ground I think a case is made out that the company ought to be put a stop to. The
- G minority are entitled to say they insist upon a winding-up. The directors themselves are satisfied upon their own inquiries that it is hopeless to go on. It is not a controversy now whether there ought to be a compulsory winding-up, as distinguished from a voluntary winding-up. The majority do not want to wind-up. They want the company to go on in the speculative hope of getting this property somehow or other. The majority not wanting winding-up voluntarily, but wanting
- H to go on, the minority are entitled to say: “It is time to stop, and we are entitled to stop the company.”

Appeal allowed.

Solicitors: *Beall & Co.; Harrisons; Longcroft & Myers.*

[Reported by FRANK EVANS, ESQ., Barrister-at-Law.]

CALEDONIAN RAIL. CO. v. WALKER'S TRUSTEES

[House of Lords (Lord Selborne, L.C., Lord O'Hagan, Lord Blackburn and Lord Watson), February 16, 17, 20, March 29, 1882]

[Reported 7 App. Cas. 259; 46 L.T. 826; 46 J.P. 676; 30 W.R. 569]

Compulsory Purchase—Compensation—"Injurious affection"—Obstruction of access to land—Action competent in absence of statutory powers, but merely personal—Damage by use, not execution, of works—Loss of trade by work not affecting land on which trade carried on.

Compensation under the Lands Clauses Consolidation Act, 1845, s. 63, is not payable in a case where, although a right of action would have existed if the work in respect of which compensation is claimed had not been authorised by Parliament, that action would have been merely personal, without reference to land or its incidents, nor is it payable when damage arises, not out of the execution, but only out of the subsequent use of the works. Nor is loss of trade or custom by reason of works not otherwise directly affecting the house or land in or on which a trade has been carried on, or any right properly incident thereto, by itself a proper subject for compensation. But the obstruction, not from time to time by the use of the work, but permanently, by the execution of the works of a man's direct access to his house or land, whether such access be by public road or by private way, is a proper subject for compensation.

The respondents were the owners of land and buildings in Glasgow which formerly had direct and easy access to one of the principal thoroughfares of the city. The appellants, by their railway works, obstructed the direct access, and compelled the respondents to make a long detour, with steeper gradients, to reach the main thoroughfare from their land.

Held: the lands of the respondents had been "injuriously affected" within the meaning of the Act, and they were entitled to compensation.

Caledonian Rail. Co. v. Ogilvy (1) (1855), 2 Macq. 229, distinguished.

Metropolitan Board of Works v. McCarthy (2) (1874), L.R. 7 H.L. 243, applied.

House of Lords—Decision as authority—Maintenance of authority in later cases—Weight to be given to reasons of learned Lords.

Per LORD SELBORNE, L.C.: It is the duty of the House of Lords to maintain, as far as possible, the authority of all former decisions of the House, and, although later decisions may have interpreted and limited the application of the earlier, they ought not, without some unavoidable necessity, to be treated as conflicting. The reasons which the learned Lords who concurred in a particular decision may have assigned for their opinions have not the same degree of authority as the decisions themselves. A decision which is right, and consistent with sound principles, on the facts and circumstances of the case which the House had to decide, need not be construed as laying down a rule for a substantially different state of facts and circumstances, though some propositions, wider than the case itself required, may appear to have received countenance from those who then advised the House.

Notes. Considered: *Furness Railway v. Cumberland Co-operative Building Society* (1884), 52 L.T. 144; *A.-G. v. Metropolitan Railway*, [1894] 1 Q.B. 384; *Blundy, Clark & Co., Ltd. v. London and North Eastern Rail. Co.*, [1931] All E.R.Rep. 160; *Marriage v. East Norfolk Rivers Catchment Board*, [1949] 2 All E.R. 1021. Referred to: *Ford v. Metropolitan and Metropolitan District Railways* (1886), 17 Q.B.D. 12; *Re Holliday and Wakefield Corpn.* (1888), 20 Q.B.D. 699; *Cowper Essex v. Acton Local Board*, [1886-90] All E.R.Rep. 901; *Davidson v. McRobb or Officer*, [1918] A.C. 304.

A As to compensation for injurious affection, see 10 HALSBURY'S LAWS (3rd Edn.) 147 et seq.; and for cases see 11 DIGEST (Repl.) 140 et seq. For Lands Clauses Consolidation Act, 1845, see 3 HALSBURY'S STATUTES (2nd Edn.) 890.

Cases referred to :

- (1) *Caledonian Rail. Co. v. Ogilvy* (1855), 25 L.T.O.S. 106; 2 Macq. 229, H.L.; 11 Digest (Repl.) 149, 276.
- B** (2) *Metropolitan Board of Works v. McCarthy* (1874), L.R. 7 H.L. 243; 43 L.J.C.P. 385; 31 L.T. 182; 38 J.P. 820; 23 W.R. 115, H.L.; 11 Digest (Repl.) 152, 289.
- (3) *Ricket v. Metropolitan Rail. Co. Directors* (1865), 5 B. & S. 149; 34 L.J.Q.B. 257, Ex. Ch.; on appeal (1867), L.R. 2 H.L. 175; 36 L.J.Q.B. 205; 16 L.T. 542; 31 J.P. 484; 15 W.R. 937, H.L.; 11 Digest (Repl.) 150, 281.
- C** (4) *Hammersmith and City Rail. Co. v. Brand* (1869), L.R. 4 H.L. 171; 38 L.J.Q.B. 265; 21 L.T. 238; 34 J.P. 36; 18 W.R. 12, H.L.; 11 Digest (Repl.) 106, 29.
- (5) *Chamberlain v. West End of London and Crystal Palace Rail. Co.* (1863), 2 B. & S. 617; 2 New Rep. 182; 32 L.J.Q.B. 173; 8 L.T. 149; 9 Jur.N.S. 1051; 11 W.R. 472; 121 E.R. 1202, Ex. Ch.; 11 Digest (Repl.) 150, 278.
- D** (6) *R. v. London Dock Co.* (1836), 5 Ad. & El. 163; 2 Har. & W. 267; 6 Nev. & M.K.B. 390; 5 L.J.K.B. 195; 111 E.R. 1127; 11 Digest (Repl.) 149, 275.
- (7) *Beckett v. Midland Rail. Co.* (1867), L.R. 3 C.P. 82; 37 L.J.C.P. 11; 17 L.T. 499; 16 W.R. 221; 11 Digest (Repl.) 151, 287.
- (8) *Iveson v. Moore* (1699), 1 Ld. Raym. 486; Carth. 451; Comb. 480; 1 Com. 58; Holt, K.B. 10; 1 Salk. 15; 91 E.R. 1224; sub nom. *Jeveson v. Moor*, 12 Mod. Rep. 262; 26 Digest (Repl.) 520, 1965.
- E** (9) *Duke of Buccleuch v. Metropolitan Board of Works* (1872), L.R. 5 H.L. 418; 41 L.J.Ex. 137; 27 L.T. 1; 36 J.P. 724, H.L.; 11 Digest (Repl.) 143, 228.
- (10) *Lyon v. Fishmongers' Co.* (1876), 1 App. Cas. 662; 46 L.J.Ch. 68; 35 L.T. 569; 42 J.P. 163; 25 W.R. 165, H.L.; 26 Digest (Repl.) 347, 641.

F Also referred to in argument :

- Eagle v. Charing Cross Rail. Co.* (1867), L.R. 2 C.P. 638; 36 L.J.C.P. 297; 16 L.T. 593; 15 W.R. 1016; 11 Digest (Repl.) 155, 306.
- Senior v. Metropolitan Rail. Co.* (1863), 2 H. & C. 258; 2 New Rep. 334; 32 L.J.Ex. 225; 8 L.T. 544; 9 Jur.N.S. 802; 11 W.R. 836; 159 E.R. 107; 11 Digest (Repl.) 150, 280.
- G** *City of Glasgow Union Rail. Co. v. Hunter* (1870), L.R. 2 Sc. & Div. 78; 34 J.P. 612, H.L.; 11 Digest (Repl.) 160, 349.

Appeal from a decision of the Second Division of the Court of Session (the Lord Justice Clerk (LORD MONCRIEFF) and LORD YOUNG) affirming a decision of the Lord Ordinary (LORD CURRIEHILL).

H The respondents were the owners of a piece of land, with buildings on it, in the city of Glasgow, which had a frontage north and south to two streets, Canal Street and Victoria Street, both of which formerly afforded easy access at a distance of about ninety yards, on a level, to Eglinton Street, one of the main thoroughfares of the city. The appellant company, acting under a private Act of 1873, constructed a line of railway between the land of the respondents and Eglinton Street, the effect of which was that to reach Eglinton Street from Canal Street a long detour was rendered necessary, while Victoria Street was carried over the railway by a bridge with a steep gradient. When the works were executed the respondents claimed compensation, on the ground that their property had been "injuriously affected." The matter was referred to arbitration, and the umpire, on the assumption that the company were liable, awarded £1,200 as compensation for the detour from Canal Street, and £300 for the change of gradient in Victoria Street. The present action was brought to enforce the award of the umpire, the Lord Ordinary decided in favour of the plaintiffs, and his decision was affirmed by the Second Division. When the Bill of the appellant company was before

Parliament the respondents, and other persons, petitioned against it, but they afterwards withdrew their opposition in consideration of an agreement in writing, by which the company agreed that, if arbitrators or a jury should decide that their land was "injuriously affected" within the meaning of the Acts, their claim for compensation should not be barred by the fact that the company did not propose to take any part of their lands for the construction of their works. A

The Lord Advocate (Balfour, Q.C.) and Benjamin, Q.C., for the appellants. B

The Solicitor-General (Sir Farrer Herschell, Q.C.) and the Solicitor-General for Scotland (Asher, Q.C.) for the respondents.

Their Lordships took time for consideration.

Mar. 29, 1882. The following opinions were read.

LORD SELBORNE, L.C.—The only facts in this case which I think material to the question of principle to be decided are that, before the construction of the appellants' works under the authority given by their Act of 1873, the property of the respondents had a frontage to Canal Street in Glasgow, and had by that street a direct, straight, and practically level access, at the distance of about ninety yards, for all sorts of traffic to Eglinton Street, one of the main thoroughfares of that city, and that by the works of the appellants that direct access to Eglinton Street has been altogether cut off and taken away, a more circuitous and distant access, crossing the railway by a bridge with a rather steep gradient, being substituted for it. Another direct access from the back of the respondents' property has also been rendered less convenient, but upon that part of the case I do not think it necessary to dwell. C
D

When the Bill was before Parliament in 1873, the respondents and some other persons who, like them, had petitioned against it, withdrew their opposition in consideration of an agreement in writing by which the appellant company undertook that if, and so far as, they or any of them might in the judgment of the arbiters, or oversman, or jury, to be appointed under the Lands Clauses Consolidation (Scotland) Act, 1845, be injuriously affected by the construction of any of the works proposed to be authorised by the Bill, their claim for compensation should not be barred by reason of the company not taking any part of their respective lands, and that the amount of such compensation, if not agreed upon, should be determined in the manner provided by that Act. When the works were executed the respondents made a claim for compensation, and arbiters and an oversman were appointed, under protest on the company's part. After an ineffectual attempt by the company to stop the arbitration, the oversman finally made an award by which he found the facts, and, on the assumption that the claimants were legally entitled to be compensated by the company for the injury caused to them, assessed the pecuniary amount of the compensation at £1,500, allocating £1,200 thereof as applicable to compensation for damage by detour, and £300 to compensation for change of gradients. In the view which I take of the case this division of the difference between the value of the access taken away and that of the new access substituted for it is not material. If the respondents were entitled to compensation, it was right to award the whole estimated amount of the damage actually sustained by them, and I see no objection in principle to the manner of measuring that damage which the oversman thought fit to adopt. Whether a mere change of gradient would have been itself a subject of compensation, if the direct access to Eglinton Street had in all other respects remained unchanged, is a point on which I do not think it necessary, under the circumstances of this case, to express an opinion. E
F
G
H
I

It was argued for the respondents that the agreement on the faith of which the opposition to the Bill was withdrawn ought, in the case of those petitioners, among whom were the respondents, from whom no land was taken by the company, to be deemed an admission for valuable consideration of the right to compensation. But with that argument, which seems to have found some degree of favour in the

A court below, I cannot agree. All that the company did was to bind themselves not to object on one particular ground, namely, because no land was taken. It was said that an objection on that ground only would have been manifestly untenable in law, and to this I agree; but the parties nevertheless seem to have thought that it was worth their while to guard against it; and I think it impossible to infer an implied waiver of all objections from an express waiver of one, whether

B that was an objection which was obviously untenable or not.

Upon the more important question of the respondents' right to the compensation which the oversman has awarded them, reliance was placed in the argument at the Bar on decisions of your Lordships' House. For the appellants it was contended that compensation was excluded by *Caledonian Rail. Co. v. Ogilvy* (1), and *Ricket v. Metropolitan Rail. Co. Directors* (3). The respondents relied on *Metropolitan Board of Works v. McCarthy* (2). It is your Lordships' duty to maintain, as far as you possibly can, the authority of all former decisions of this House; and although later decisions may have interpreted and limited the application of earlier, they ought not, without some unavoidable necessity, to be treated as conflicting. The reasons which the learned Lords who concurred in a particular decision may have assigned for their opinions have not the same degree of authority

D with the decisions themselves. A decision which is right, and consistent with sound principles, upon the facts and circumstances of the case which the House had to decide, need not be construed as laying down a rule for a substantially different state of facts and circumstances, though some propositions, wider than the case itself required, may appear to have received countenance from those who then advised the House.

E With this preface I think it right to say that all the three decisions of this House to which I have referred appear to me to be capable of being explained and justified upon consistent principles; the propositions which I regard as having been established by them, and by another decision of your Lordships in *Hammer-smith and City Rail. Co. v. Brand* (4), being these: (i) Where a right of action, which would have existed if the work in respect of which compensation is claimed

F had not been authorised by Parliament, would have been merely personal, without reference to land or its incidents, compensation is not due under the Acts; (ii) when damage arises, not out of the execution, but only out of the subsequent use, of the works, then also there is no case for compensation; (iii) loss of trade or custom by reason of works not otherwise directly affecting the house or land in or upon which a trade has been carried on, or any right properly incident thereto, is

G not by itself a proper subject for compensation; (iv) the obstruction, by the execution of the works, of a man's direct access to his house or land, whether such access be by a public road or by a private way, is a proper subject for compensation.

In *Caledonian Rail. Co. v. Ogilvy* (1) (2 Macq. at p. 234), LORD CRANWORTH stated the question to be

H "whether a proprietor who holds land adjoining a newly-constructed railway can, under the clauses of the general Act and the special Acts, which give him a right of compensation in respect of any injurious effect upon his lands, claim from the company compensation because, at a short distance from the entrance to his grounds, the railway traverses an important public road on a level,"

I that road, as his Lordship immediately afterwards proceeded to say, "being the most common," though not the only, "and the best approach to [the pursuer's] house." All that your Lordships then decided was that it was not competent to the sheriff "to give any redress in respect of this level crossing." It is material, in order to understand rightly the reasons assigned for that decision, to bear in mind that, unless the mere fact of rails being laid across the public road ought to have been held, if there had been no Act of Parliament, to constitute an actionable obstruction of the pursuer's right to use it, that right was not obstructed by the execution of the works of the railway. The pursuer complained of a "constant

liability to great inconvenience, interruption, and delay" by reason of the closing A
of gates across the public road as often as trains were passing or about to pass,
and of danger and alarm to those passing to and from the house "from the risk
of the startling of horses when detained in a narrow road facing the barrier by
the passing and noise of the engines and trains." These were not distinct heads
of claim—one for delay, etc. by closing the gates, and another for danger, etc.
by the noise of engines and trains, but were only specifications of the manner in B
which the pursuer proposed to establish his main proposition, that "very material
injury" had been

"done to the place as a residence, and deterioration caused to the amenity and
value of the house and policy by the railway crossing the approach to the lodge
and gate on the level immediately in front of and within a few yards of the
gate, whereby the present free and open communication with the high road at
a very short distance was cut off, and all access prevented, without a constant
liability to . . ." C

The communication was not cut off, and access was not prevented, except when
trains were passing; the temporary obstruction of the public road by shutting
gates across it at those times, as well as the noise complained of, were incidents, D
not of the construction, but of the use of the line.

The decision, therefore, would have been justified assuming that the mere
placing of rails, etc., across the road would have given no right of action to the
pursuer, upon the same grounds on which this House afterwards decided *Hammer-*
smith and City Rail. Co. v. Brand (4), by which the second of the four propositions
which I have stated was established. The peculiar circumstances of the latter E
case, in which Mr. Brand's real estate suffered physical injury from the vibration
of trains, made it necessary for this House to enter into a minute criticism of the
language of the compensation clauses in the Acts of Parliament, which in *Ogilvy's*
Case (1) was not necessary because LORD CRANWORTH and LORD ST. LEONARDS
both thought that the injury for which Mr. Ogilvy might have brought his action,
if the railway had not been authorised by Parliament, would have been personal F
to himself, and not an injury to his land, or to any right incident thereto. But,
although the judgment in *Ogilvy's Case* (1) was not expressly rested on the distinction
between injuries from the construction and injuries from the use of the railway,
such a distinction did nevertheless exist in the facts, and, as it seems to me, was
implied in the reasoning of the noble and learned Lords, especially of LORD CRAN-
WORTH; and in the argument for the appellants in *Brand's Case* (4) it was so re- G
garded. The mere act of placing rails, etc., across the road at the level crossing,
by itself, and apart from the contemplated use of the railway for the passage of
engines and trains, was considered by the House not to affect injuriously the
access to Mr. Ogilvy's land. If the prospective liability to the obstruction of
the road by the use of the railway for the purposes for which it was made had been,
in the judgment of the House, such an injury as would have been actionable had H
there been no statutory authority, then I should have thought the conclusion ought
to have been that this was an injury, not to Mr. Ogilvy personally, but to his
estate, and, therefore, a proper subject for compensation.

The House evidently considered that there would have been no right of action
in respect of such a merely prospective liability to obstruction; and the reasoning
of the noble and learned Lords was, therefore, addressed to the legal consequences I
of obstructions de facto, when they might actually happen by the use of the line.
As to these they thought—and I am not myself satisfied that they were mistaken
in thinking, though the decision in *Brand's Case* (4) makes the point now of little
or no practical importance—that each particular detention when Mr. Ogilvy or his
servants, being upon the road, might happen to be stopped by the closing of the
gates for passing trains, would, like the nuisance from noise, etc., be an injury
ejusdem generis with that which any other person using the road might suffer,
though occurring to him more frequently than to others, and that any right of

A action which he might have had for each such detention, if Parliament had not authorised the use of the railway, would have been personal, and not incident to the ownership of his land.

B But the only point, as it seems to me, which was really determined in *Ogilvy's Case* (1) was that the mere fact of a railway crossing at a level the access, by a public road, to a landowner's house or estate, with its incidental liability to frequent stoppages by the passage of trains after the line should be used for traffic, would not have been a cause of action if the work had not been authorised, and, therefore, was not a subject for compensation under the Acts. I suppose that, unless the mere laying of the rails, etc., would have been a cause of action, this was an unavoidable consequence of the technical interpretation of the words "injuriously affected" as applicable only to something which would have been a legal
C injuria in the case of an unauthorised work—an interpretation which it is too late to criticise now, though, if the point were open, I should myself think it questionable if there were not a fallacy in such a test depending upon the hypothesis of the same work being executed without authority, which, having regard to the nature and operation of Acts for the execution of that class of public works, can hardly be supposed to have been within the contemplation of Parliament.

D In *Brand's Case* (4) the question whether a prospective liability to necessary injury, from the use of the railway for the purpose for which it was made and authorised, was not a subject for compensation properly arising out of the execution of the works, was again raised, and was argued at great length. The opinion of LUSH, J., in that case, approved and adopted by LORD CAIRNS, who dissented from your Lordships' judgment, was in accordance with that view. But that argument
E was rejected by the House, LORD CHELMSFORD, who moved the judgment, saying (L.R. 4 H.L. at p. 204):

"To argue that, as the injury could not have occurred unless the railway had been previously constructed, therefore it was caused 'by the construction thereof,' is certainly a strong example of the illogical reasoning of post hoc ergo propter hoc, and would extend to every accident or injury occurring upon
F the railway after its construction, which, of course, could not have happened if it had not been constructed."

I should not myself have thought that the argument did involve that consequence, or that the propter hoc could well be denied; but, however that may be, the argument did not prevail.

G I have thought it necessary to say so much as this as to *Caledonian Rail. Co. v. Ogilvy* (1), because I am aware that, to one at least of my noble and learned friends, it appears to present more difficulty than it does to myself. Whether, however, my view of it is correct or not, that case ought not to govern the present, because here the respondents' access to and from their property by Canal Street was stopped up and taken away, not from time to time by the use, but once for
H all by the construction of the works of the appellants' railway. The respondents' claim is not founded upon a mere liability, whether constant or otherwise, to obstruction, but on obstruction de facto, and that by the works themselves. If, therefore, such an interference with the access to their property by this public street would have been an actionable wrong if the railway had not been authorised, it is consistent both with *Ogilvy's Case* (1) and *Brand's Case* (4) to hold them
I entitled to compensation under the Acts.

It is, however, contended, on the authority of *Ricket's Case* (3), that, although the respondents' access to Eglinton Street by Canal Street was entirely taken away, that access was not a right so connected with or incident to their estate fronting on Canal Street as to entitle them to compensation for its loss. It was in *Ricket's Case* (3) that the third of the four propositions to which I have referred was established by this House. There is at first sight some apparent similitude between the circumstances of *Ricket's Case* (3) and those of the present; but it disappears when the facts of that case and the exact nature of the claims made in

it are rightly understood. There was no obstruction at all which could interfere with the direct access to or from the public-house of which Mr. Ricket was lessee and occupier for foot passengers. No claim for compensation was made on the ground of any actual or supposed interest of the plaintiff Ricket in any of the carriage roadways which were obstructed, or any other ground except the loss of custom to his trade as a publican. He did indeed allege in his claim that his public-house had been "injuriously affected," but loss of custom was the only ground stated for that allegation. The question came before the courts in the form of a Special Case, and the opinion of the Court of Queen's Bench was that

"the loss of customers in the plaintiff's trade [under the circumstances stated,] was such damage as entitled him to recover compensation from the company."

That judgment was reversed in the Exchequer Chamber, from which the plaintiff Ricket appealed to your Lordships' House.

The ground of the reversal in the Exchequer Chamber was stated by ERLE, C.J., in the following words (5 B. & S. at p. 162):

"Even if the action would lie for this obstruction, whereby the plaintiff was damaged in his trade, still such damage did not accrue to the plaintiff in his capacity of owner of an estate in land. . . . The trading carried on in the house is entirely distinct from the estate in the house."

That learned judge distinguished the case from *Chamberlain v. West End of London and Crystal Palace Rail. Co.* (5), in the decision of which against the railway company he had himself concurred. He said (5 B. & S. at p. 165):

"It is certain that the houses themselves of the then plaintiff were found to be injuriously affected, and for that injury alone that compensation was awarded. . . . The principle is that the value of a house is affected by the relation of its situation to the adjoining highway, that is, by the convenience of the private rights of ingress and egress from one to the other, and by the circumstances of the highway itself tending to make it useful and agreeable to the occupier of the house."

When *Ricket's Case* (3) came before your Lordships' House the judgment of the Exchequer Chamber was affirmed, LORD CHELMSFORD, L.C., and LORD CRANWORTH concurring in the result, though not in all their reasons. LORD WESTBURY dissented, calling in question the rule that the words "injuriously affected," in the compensation clauses of the Lands and Railways Clauses Acts, mean only such technical injuria as would have been actionable if the work had not been authorised by the legislature. Much of LORD CHELMSFORD's reasoning was founded upon a distinction between temporary and permanent damage under s. 68 of the Lands Clauses Act, and ss. 6 and 16 of the Railway Clauses Act, in which LORD CRANWORTH did not concur; and it certainly does not appear to me that the decision in *Ricket's Case* (3), either in this House or in the Exchequer Chamber, can be satisfactorily explained by any such distinction. But both those noble and learned Lords agreed that the damage by loss of custom of which the plaintiff complained was a consequence of the work of the railway company too remote and indefinite to bring it within the scope of any of the compensation clauses of the Acts; and this I consider to have been the true ground of that decision, and also of an earlier decision in the Court of Queen's Bench in *R. v. London Dock Co.* (6), in which a claim for compensation was made under a special Act passed before the Consolidation Acts on similar grounds, which was referred to with approval by ERLE, C.J., in the Exchequer Chamber in *Ricket's Case* (3), and by both the learned Lords whose view was adopted by this House. I may add that the same view of *Ricket's Case* (3) was afterwards taken by WILLES and BYLES, JJ., in *Beckett v. Midland Rail. Co.* (7), where the former of those very learned judges spoke of it as deciding that an injury for which compensation is due

A "must be in respect of the property itself, and not of any particular use to which it may from time to time be put;"

and the latter, as proceeding on the ground that the injury was not only temporary, but "indirect and to the trade only."

B In the present case (as in *Chamberlain's Case* (5) and *Beckett's Case* (7), both which were approved and followed by this House in *Metropolitan Board of Works v. McCarthy* (2)) the claim was made in respect of a direct and immediate injury to the respondents' estate by cutting off their direct and immediate access to Eglinton Street. The circumstances of *Chamberlain's Case* (5) closely resembled those of the present case. In *Beckett's Case* (7) the width of the public road immediately opposite the plaintiff's premises was reduced, so as to render it, not useless to the premises for the purpose of access, but less convenient than before. In *McCarthy's Case* (2) this House gave compensation for the obstruction of access to the river Thames from the plaintiff's premises through a public dock lying on the other side of a public road adjoining those premises. It was argued for the appellants that these authorities ought not to be extended to any case of the obstruction of access to private property by a public road, when such obstruction is not immediately ex adverso of the property. This limitation, however, seems to me arbitrary and unreasonable, and not warranted by the facts either of *Chamberlain's Case* (5) or of *McCarthy's Case* (2). A right of access by a public road to particular property must, no doubt, be proximate, and not remote or indefinite, in order to entitle the owner of that property to compensation for the loss of it, and I apprehend it to be clear that it could not be extended, in a case like the present, to all the streets in Glasgow through which the respondents might from time to time have occasion to pass for purposes connected with any business which they might carry on upon the property in question. But it is sufficient for the purposes of the present appeal to decide that the respondents' right of access from their premises to Eglinton Street, at a distance of no more than ninety yards, was direct and proximate, and not indirect or remote. The Court of Session has so decided, and I think that your Lordships cannot, consistently with your decision in *McCarthy's Case* (2) do otherwise than affirm their judgment. I, therefore, so move your Lordships.

F LORD O'HAGAN.—Two questions have arisen in this case. The first, as to the true construction and effect of the letter of July 4, 1873, on the faith of which opposition to the Bill introduced by the railway company was withdrawn, may, I think, be briefly disposed of. It was contended that by that letter the company bound themselves to submit to the arbitrators the claims of the petitioners, whatever they might be, which they might think fit to put forward in the allegation that their property had been "injuriously affected" by the making of the railway. I have no doubt that the true meaning of the understanding was that attached to it by the Lord Ordinary. It could scarcely have been in the contemplation of the parties to have made any demand, however wild, unreasonable, or illegal, the subject of inquiry before arbitrators or a jury. Of course the company might have bound themselves by clear words, for the avoidance of risk or expense, to forego the right of objection even to any such demand, but the words should be very clear to warrant us in attributing to them so improbable a purpose, and should not be strained to justify the imputation of it. The letter seems to me to give no such warrant. It merely provides in terms that, although no part of the lands of the claimants and petitioners should be taken by the company, they should have all the rights they could have legally enjoyed if it had been otherwise. Larger rights than those given within the operations of the Railway Acts were not conceded to them, and whether, as has been mooted, the undertaking, so regarded, was of any or of no effect in affording a consideration for the withdrawal of the opposition, it seems to me to have entitled the claimants to nothing more. If within the scope and operation of the statutes they could establish a claim, it was not to be barred because land was not taken from them; but that claim was

not to be extended beyond the limit to which it would have statutorily reached A
if it had been connected with the taking of land.

On the second subject of dispute the cases are not, perhaps, quite easy of recon-
cilement, but I think they may be reconciled, and, in my opinion, the question is
settled by the authority of this House. I need not refer in any detail to the
circumstances under which the controversy arises, but the umpire to whom the
parties referred their dispute has ascertained facts which must be taken as B
established, and upon which we must determine whether the claim to compensa-
tion, on the ground that the respondents' property has been "injuriously affected"
within the meaning of the statutes by the works of the company, has been sus-
tained. Taking the facts so found, the case seems to me wholly undistinguishable
from *Metropolitan Board of Works v. McCarthy* (2). I was a party to the judg-
ment in that case, and I see no reason to alter in any respect the view which I C
then adopted or the reasons which I urged in support of it; and, if it be correct,
the respondents are clearly entitled to succeed. In that case, as in this, there
was a public way, and in that, as in this, access to it was obstructed by the works
complained of. There, as here, the obstruction produced inconvenience to the
general public who had the use of the way; but there, as here, there was, in
addition, a particular and appreciable damage to the premises of an individual, D
rendering them less available for his purposes, and, therefore, diminishing their
value. In the language of an old case, he "did necessarily suffer an especial
damage more than the rest of the king's subjects": *Iveson v. Moore* (8). There,
as here, the works which founded the complaint did not infringe upon the premises
which they injured, and the makers of them were not held answerable because of
any close propinquity, or any ex adverso position. Such circumstances were not E
there held necessary to ground the judgment, as we were pressed to hold them
to be here. There the premises were pronounced to have been "injuriously
affected," and the proprietor to have suffered damage to his estate, although no
land was taken from him, and, although no land of his was touched, the physical
obstruction of access being deemed in itself an injury to the premises which it
damnified within the meaning of the compensation clauses. I can recognise no F
distinction in substance between that case and this, and if there be none we are
bound to follow it.

For my own part I fully concurred in the decision, and I repeat it cheerfully,
for I have never been able to understand the reason why premises should not be
held to be "injuriously affected" if they are injured under such circumstances by
the construction of a railway, so as to be diminished in usefulness and lowered in G
value, or why, if there be real and appreciable injury, there should not be adequate
compensation. The words of the Acts are large enough to accomplish justice as
between the company and the claimants, and while on the one side the selfishness
of private persons should not be permitted to forbid the progress of needful improve-
ments, on the other individuals should not be made to suffer remediless wrong
from an overstrained apprehension of the prevention of useful works by the H.
admission of unreasonable claims for compensation. It is desirable that there
should not be excess of favour either for the individual interest as antagonistic to
a general benefit, or for the promotion of public improvements at the cost of
personal injustice. The rule of action was well stated by LORD PENZANCE in the
case to which I have been referring:

"The right to compensation will accrue whenever it can be established to the I
satisfaction of the jury or arbitrator that a special value attached to the
premises in question by reason of their proximity to or relative position with
the highways obstructed, and that this special value has been permanently
abridged or destroyed by the obstruction."

The full discussion which the Lord Chancellor has applied to the other cases
cited in the course of the argument dispenses me from the necessity of dwelling
on any of them. I shall only say that some of those cases appear to me equally

A and wholly indistinguishable from *McCarthy's Case* (2), and that with which we are dealing. I do not know that any intelligible distinction has ever been suggested as to *Beckett's Case* (7) and *Chamberlain's Case* (5). In the former, the narrowing of a highway which permanently damaged the premises of the claimant by obstructing his access to the river Thames, was held to entitle him to compensation, and in the latter the stopping up of a high road near the complainant's
 B houses, preventing the thoroughfare past them which theretofore existed, and so producing to him, in the words of the Chief Justice, "a particular damnification," sustained his claim. All the elements of the right to damages which these cases present occur in this, and they have been repeatedly approved in this House.

As to the authorities which have been pressed as countervailing or minimising the force of the decision in *McCarthy's Case* (2), namely, *Ricket's Case* (3), and
 C *Ogilvy's Case* (1), they seem to me sufficiently distinguished by their diverse circumstances, and the ratio decidendi of the judges in each of them. In the first, the loss of customers was the gist of the subject-matter of complaint, and it was determined that, though the claimant might have been personally injured in that way, he had not suffered from any damage to his house or estate such as would entitle him to compensation. In the second, the crossing on the level and its
 D consequences, by inconvenience, delay, and otherwise, were held not to constitute an injury to the house or land of the complainant, but to be personal to himself, and not to constitute a ground for damages within the provisions of the statutes. LORD CRANWORTH, L.C., declared that all attempts at arguing that there was a damage to "the estate" made "a mere play upon words." He said (2 Macq. at p. 237):

E "It is no damage at all to the estate, except that the owner of that estate would oftener have a right of action from time to time than any other person, inasmuch as he would traverse the spot oftener than other people would traverse it."

LORD ST. LEONARDS spoke to the same effect, and with equal clearness. He said
 F (2 Macq. at p. 250):

"I can see nothing by which this gentleman would sustain damage beyond what everybody else sustains. His estate is not damaged."

These passages, and the general tenor of the judgments, seem to me to have fully justified ERLE, C.J., in *Chamberlain's Case* (5) (2 B. & S. at p. 638) in affirming in the Exchequer Chamber that

G "the principle of that judgment [in *Ogilvy's Case* (1)] was that the respondent was claiming compensation for a personal inconvenience or annoyance, and not for injury to his property."

Besides, in that case, the injury might have been held to arise from the user rather than the construction of the railway, within the principle afterwards established in *Brand's Case* (4); and there was further room for contention, as was expressly noted by LORD ST. LEONARDS, that Mr. Ogilvy had not suffered such special and particular damage as would give him a claim unshared by all the travellers of the neighbourhood, and "the rest of the Queen's subjects."

As I said in *McCarthy's Case* (2), I should have been disposed, if the matter had been res integra, to doubt whether the statutes were designed to make the
 I possibility of bringing an action, if they had not been passed, essential to ground a claim for compensation; and I should also have doubted whether the injury done to Mr. Ogilvy's house by diminishing its comfort and convenience, and so deteriorating it, was not an injury to his estate in it warranting a demand against the company. But, assuming that the general construction now irrevocably put upon the words "injuriously affecting," and the decision in that particular case, were as correct as they are binding upon us, it seems to me that at least their effect need not be pushed further than is unavoidable; and that the points of distinction to which I have adverted relieve us from any necessity for regarding *Ogilvy's*

Case (1) or Ricket's Case (3) as inconsistent with McCarthy's Case (2), with which that before us appears to me unquestionably identical. On these grounds I entirely concur with the Lord Chancellor, and I advise your Lordships to affirm the ruling of the Court of Session, and to dismiss the appeal.

LORD BLACKBURN.—The respondents, as pursuers below, sought to enforce payment of £1,500 awarded to them by the decret arbitral of the oversman to whom had been referred a claim for compensation for their lands situated in the suburbs of Glasgow on the south side of Clyde, having been injuriously affected by the exercise of the powers conferred on the then respondents, now appellants, by a special Act which incorporates the Lands Clauses Consolidation (Scotland) Act, 1845, and the Railways Clauses Consolidation (Scotland) Act, 1845. It is not disputed that the oversman had before him evidence to justify his finding of fact, and that being so, we must, I apprehend, accept his findings as true, and that the pursuers have in fact sustained substantial and appreciable loss from the works of the appellants, not touching their land, but altering the mode of access to it by public ways, so as to compel those occupying their lands when going in certain directions, not in all, to use a longer road than before, or, as it is phrased, "to make a detour," and also when going in certain directions, not in all, to use a road less commodious because steeper than before, or, as it is phrased, "by change of gradients"; and the question of law arises whether the pursuers are entitled to compensation for those two heads of damage.

Some things, I think, are now no longer open to discussion. No action can be maintained for anything which is done under the authority of the legislature, though the act is one which, if unauthorised by the legislature, would be injurious and actionable. The remedy of the party who suffers the loss is confined to recovering such compensation as the legislature has thought fit to give him: see *Hammersmith and City Rail. Co. v. Brand* (4). The Lands and Railways Clauses Acts of 1845 give some compensation. I do not think that there is any difference between the legislation for England and for Scotland, and it must now be considered settled that, on the construction of these Acts, compensation is confined to damage arising from that which would, if done without authority from the legislature, have given rise to a cause of action. LORD WESTBURY strongly held and expressed an opinion that this was too narrow a construction of the statutes; but in *Duke of Buccleuch v. Metropolitan Board of Works* (9) he admitted that what he thought the wrong construction was put upon the statutes by this House, and it must, I think, also be now considered settled that the construction of these statutes is confined to giving compensation for an injury to land, or an interest in land; that it is not enough to show that an action would have lain for what was done if unauthorised, but it must also be shown that it would have lain in respect of an injury to the land or an interest in land.

The pursuers in the present case rested their claim on two grounds—first, that compensation was given by the statutes for such damage as the oversman had found to exist in fact. The Court of Session have based their judgment in their favour on this ground, and I have come to the conclusion that they were right. Secondly, that there was a special agreement between the pursuers and the respondents below, under which the pursuers were entitled to compensation even if the construction of the statutes was adverse to them. The Court of Session did not decide this, but intimated an inclination of opinion favourable to the pursuers. This question is not likely ever again to arise, but my impression is against the pursuers on this ground. I do not think, however, that it is necessary to form a final opinion on it, and I shall confine my remarks exclusively to the first question, which depends upon the true construction of the statutes of 1845.

There have been many decisions on those statutes. I shall refer to five in this House, which it is certainly not easy, and, to my mind, not possible, altogether to reconcile. The first in point of date is *Caledonian Rail. Co. v. Ogilvy* (1), decided in 1856. It was on this decision that the appellants' counsel principally

A relied. In it the claim of the respondent (pursuer below) for compensation had been tried before the sheriff. The jury had given a verdict assessing compensation, among other things, "for £560 in respect of severance and level crossing," but without distinguishing how much had been assessed for each. The Court of Session had given judgment for the landowner, and this judgment was reversed. LORD CRANWORTH, L.C., expressed great embarrassment as to the mode in which
 B the question was raised, but concluded (2 Macq. at pp. 243, 244) that there was nothing to prevent the House from deciding

C "that the sheriff first, and the Court of Session afterwards, have fallen into an error in supposing that this level crossing was a subject for compensation at all; that it is a *damnum sine injuria*; that so the sheriff ought to have told the jury; that the verdict on the face of it is bad, is a verdict which cannot stand, but ought to be overturned; and that the interlocutor of the Court of Session ought to be reversed."

Since the decision of this case it has, after great diversity of judicial opinion, been finally decided in *Hammersmith and City Rail. Co. v. Brand* (4), by a majority of this House, LORD CAIRNS dissenting, that the legislation of 1845 did not give a
 D right to compensation for any damage to lands arising from the authorised use of the railway, though it took away the owner's right of action for such damage; and I think it cannot be denied that much the greater part of the damage occasioned by a level crossing—certainly the greater part of what was claimed in *Ogilvy's Case* (1)—arises only from the use of the railway. But though there are some expressions in the opinions both of LORD CRANWORTH, L.C., and of LORD ST. LEONARDS that
 E seem to show that an idea somewhat akin to this was in their minds, I do not think that either makes it the ground of his judgment. It was not till 1869 that it was decided in *Brand's Case* (4) that on the true construction of the Acts no compensation was given in such a case; and I cannot find that it was suggested by anyone in the discussion of that case that *Ogilvy's Case* (1) was an authority in
 F favour of the view which ultimately prevailed. I think the ground on which both LORD CRANWORTH, L.C., and LORD ST. LEONARDS decided in *Ogilvy's Case* (1) was that no compensation is given for damage occasioned by the works of the company if the thing done was one for which, if done without any statutory powers, no action could have been maintained, however certain it may seem that it would never have been done but for the creation of the company, which, notwithstanding LORD WESTBURY's strong opposition, is, I think, now settled to be correct law.

G Next, that though an action would have lain for the thing done, yet no compensation is given unless the ground of action would be that land, or some interest in land, was injuriously affected, which also is, I think, now settled law; and they thought that the pursuer could not have maintained an action at all, or, if he could, it would have been an action in respect of personal loss or inconvenience, and not an action in respect of an injurious affection of his land or house. LORD
 H CRANWORTH, in *Ricket v. Metropolitan Rail. Co. Directors* (3) in 1867 repeated what he had said in *Ogilvy's Case* (1) in 1856. He there says (L.R. 2 H.L. at p. 198):

I "Both principle and authority seem to me to show that no case comes within the purview of the statute, unless where some damage has been occasioned to the land itself in respect of which but for the statute the complaining party might have maintained an action. The injury itself must be actual injury to the land itself, as by loosening the foundations of buildings on it, obstructing its light or its drains, making it inaccessible by lowering or raising the ground immediately in front of it, or by some such physical deterioration. Any other construction of the clause would open the door to claims of so wide and indefinite a character as could not have been in contemplation of the legislature."

It was not disputed that, if this passage is a correct statement of the law, the decision now appealed against could not be supported; and, if there had been no subsequent decisions on this point, I should have felt very great difficulty in

refusing to follow what I think was the decision of this House in *Ogilvy's Case* (1), A even if convinced that it was a mistake.

But there have been many decisions since 1856, four of them being decisions of this House. There was a decision of the Exchequer Chamber in *Chamberlain v. West End of London and Crystal Palace Rail. Co.* (5), which is not easy to reconcile with what, I think, was the view of the law taken in *Ogilvy's Case* (1). The next case in this House was *Ricket's Case* (3) in 1867. LORD CHELMSFORD, L.C., agreed in the result with LORD CRANWORTH, but gave a judgment, which, as he afterwards explained it in *Metropolitan Board of Works v. McCarthy* (2), was not intended to express an agreement in the passage I have just read, saying that in *Ricket's Case* (3) there was no finding which related to the premises, but merely of personal damage. LORD WESTBURY dissented from that judgment altogether. The House in coming to this decision can hardly be said to have departed from the view of the law taken in *Ogilvy's Case* (1), but it gives it no additional authority. The next case which came before this House was that of *Duke of Buccleuch v. Metropolitan Board of Works* (9), in 1872. The question in that case was so complicated with others that I have great doubts whether it can properly be said that this House decided anything on the point now before us, though LORD CAIRNS in his opinion distinctly showed what his view of the law was. B

Then, in 1874, came *Metropolitan Board of Works v. McCarthy* (2), on which the respondents principally relied. LORD CAIRNS, L.C., said (L.R. 7 H.L. at p. 252): C

"The present case . . . appears to me to amount to this; the occupier or tenant of a house has got in front of his house two highways, the one being a road or street, and the other immediately beyond or abutting upon the road or street being a highway by water. The highway by water is taken away from him; the highway by land remains. It appears to me that it is impossible to doubt that the destruction of the highway by water, situate as I have described it, is otherwise than a permanent injury to the property in question, by whomsoever or for whatsoever purpose that property may be occupied. The case appears to me to be extremely analogous to . . . *Beckett v. Midland Rail. Co.* (7), in which there was in front of the premises in question one single highway, the further half of which was taken off, and blocked up by the execution of the defendant company's works. It was there held that that was an injury which permanently and injuriously affected the premises in question, and it appears to me to be a matter entirely indifferent whether you have one highway, the further half of which is blocked up and destroyed, or whether you have a double highway, first by land and then by water, and the part of the highway which consists of water is blocked up and destroyed. . . . Mr. Thesiger stated that the test which he would submit as one which he thought would explain and reconcile the various cases upon this subject was this: that where by the construction of works there is a physical interference with any right, public or private, which the owners or occupiers of property are by law entitled to make use of in connection with such property, and which right gives an additional market value to such property, apart from the uses to which any particular owner or occupier might put it, there is a title to compensation, if by reason of such interference the property, as a property, is lessened in value." D

I think it sufficiently appears that this judgment did not proceed on the ground that the obstruction to the water highway was opposite to the plaintiff's premises, but this appears more clearly by a reference to the case at large. LORD CHELMSFORD, as I have said, explained his judgment in *Ricket's Case* (3) as proceeding on the ground that the damage there claimed was merely a personal damage, and that he meant to affirm the decision in *Chamberlain's Case* (5). At the same time, he certainly treats *Ogilvy's Case* (1) as rightly decided. LORDS HATHERLEY, PENZANCE, and O'HAGAN all agreed in the result. E

- A I think this decides that the right of access by a public way to land is a right attached to the land, and that, if an obstruction to the public right of way occasions particular damage to the owner or occupier of that land by diminishing its value, the action which he might bring for that particular damage would be an action for an injury in respect of the land; and that is in direct conflict with what I understand to have been the ground of the decision in *Ogilvy's Case* (1). It
- B certainly seems to me that, if it be conceded that the oversman had before him materials on which he could legitimately find the facts which he has found, the present case is indistinguishable from *McCarthy's Case* (2). I do not dispute that an obstruction to a highway may be so distant from lands that no one could reasonably find that the lands were appreciably damaged by the obstruction; but it is enough to say that in this case the distance is not too great.
- C I have only further to notice the decision of this House in *Lyon v. Fishmongers' Co.* (10). The question there was on a different statute, but I think the decision much in point. By the Thames Conservancy Act, 1857, s. 53, powers were conferred on the conservators of the Thames to license any owner or occupier of land to make any work immediately in front of his land and into the body of the river. No compensation was given by that Act, but s. 179 provided that nothing in the
- D Act should extend to take away or abridge any right to which any owner or occupier of land on the banks of the river were now by law entitled. The question raised was whether the right which Lyon, as owner of a wharf, had to access to the river on the side of his wharf as well as in front of it, was a right saved by this s. 179, so as to entitle him to an injunction against an obstruction to it authorised by a licence granted under s. 53. The Court of Appeal decided that
- E it was not, but their decision was reversed by the unanimous opinion of the House of Lords, LORD CAIRNS, L.C., saying (1 App. Cas. at p. 672) that it was decided by the House in the *Duke of Buccleuch's Case* (9) and *McCarthy's Case* (2), that when the public right is connected with access to a particular wharf it becomes

F "a portion of the valuable enjoyment of the land, and any work which takes it away is held to be an 'injurious affecting of the land,' that is to say, the occasioning to the land of an injuria or infringement of the right."

LORD CHELMSFORD said (*ibid.* at p. 681):

G "When this House decided in the above cases that the owners of lands on the river were injuriously affected by having their access to the river cut off, as the test of such injury was the right to maintain an action, if no statutory powers had been granted, the decisions are directly opposed to the judgment of the lords justices, and, if they had considered them, must, I venture to think, have led them to a different conclusion."

H Both these noble and learned Lords had been parties to the decision in *McCarthy's Case* (2), and their opinions in this case show how they understood their own decisions. LORD SELBORNE had not, as far as I know, been a party to any previous decision; but he very clearly stated the point on which there is a difference between the view of the law taken by this House in *McCarthy's Case* (2) and that taken by LORD CRANWORTH certainly, and I think by this House, in *Ogilvy's Case* (1). He says:

I "It was admitted that, if the case had been for compensation under the Lands Clauses Acts, the land of the riparian proprietor would, by the deprivation of this water frontage, be injuriously affected. But unless this was an interference with some right or privilege recognised by law as belonging or incident to land, it would be no actionable wrong as an injury to the land, although not authorised by Parliament, and in that case the land would not be injuriously affected. If, on the other hand, it is an interference with a right or privilege recognised by law as belonging to the land, that right or privilege is certainly not identical with the public right of navigation."

This seems to me a direct decision both that an action for such particular damage as the deterioration of land from the obstruction of a public way is an action for an infringement of a right attached to the land, and also that this was deliberately determined to have been the ratio decidendi of this House in *McCarthy's Case* (2). If this is in conflict with the previous decision in *Ogilvy's Case* (1)—and in candour I must admit that I think it is—I think we ought to follow the later and more deliberate decision. In this case, if I were forming a judgment independent of the authority of this House, I should come to the same conclusion; but I prefer to base my judgment on the authority of the later decisions.

LORD WATSON.—The award of the arbiter cannot receive effect if in those circumstances the respondents' property has not been "injuriously affected" within the meaning of the Lands Clauses Consolidation (Scotland) Act, 1845. The words "injuriously affected" must have precisely the same meaning in the Scottish Act as in the similar statute passed for England in that year, and, in my opinion, the present case is within the principle established by the judgment of this House upon the construction of the English Act in *Metropolitan Board of Works v. McCarthy* (2). In that case LORD CAIRNS, L.C., said:

"The proper test is to consider whether the act done in carrying out the works in question is an act which would have given a right of action if the works had not been authorised by Act of Parliament. I do not pause to consider whether or not, if the question was now to be decided for the first time, it is not a test somewhat narrow. I accept that test as being the test which has been laid down, and has formed the foundation for the decision of so many cases before the present."

The rule was stated in similar language by LORDS HATHERLEY and PENZANCE, and it appears to have been accepted by the other noble and learned Lords who took part in the decision of the case.

The rule thus formulated does not apply with precision to the law of Scotland, which does not, in cases like the present, recognise that distinction between the remedies of action and indictment upon which the test is founded. But that which satisfies the test—that which gives a right of action in England—has been defined in *McCarthy's Case* (2) as well as in the previous decisions. When an access to private property by a public highway is interfered with the owner can have no action of damages for any personal inconvenience which he may suffer in common with the rest of the lieges. But should the value of the property, irrespective of any particular uses which may be made of it, be so dependent upon the existence of that access as to be substantially diminished by its obstruction, then I conceive that the owner has, in respect of any works causing such obstruction, a right of action, if these works are unauthorised by Act of Parliament, and a title to compensation under the Railway Acts, if they are constructed under statutory powers.

The facts of the present case appear to me so clearly to bring it within the rule thus explained, that I consider it quite unnecessary to institute a minute comparison between these and the circumstances in which *McCarthy's* property was held to have been injuriously affected. Indeed, the similarity, if not the identity, of the two cases was so apparent that the argument by which the counsel for the appellants sought to distinguish the present from *McCarthy's Case* (2) mainly consisted in an endeavour to show that there were certain physical conditions attaching to the rule laid down in that case by the House. These conditions were that, in order to found a claim of compensation, the works causing obstruction to access must be in proximity to and also ex adverso of the property alleged to be injuriously affected. I cannot find a single word in the opinions of the noble and learned Lords who decided *McCarthy's Case* (2), or anything in the facts of that case, capable of giving a colour to the appellants' contention. It was also maintained by the appellants that the present case is ruled by the decision of the House in *Ogilvy's Case* (1), and that the injury sustained by the respondents must there-

A fore be held to be of the same kind as the personal inconvenience experienced in a greater or less degree by all members of the public who may have occasion to use the streets in question. The two noble and learned Lords by whom that case was decided agreed that the verdict could not stand, inasmuch as the claim disclosed matters amounting to personal inconvenience which did not affect injuriously the claimant's property. It does not admit of dispute that the judgment agrees in its result with subsequent decisions of the House so far as regards those elements of the claim which were derived from "the passing and noise of the engines and trains," and since *Brand's Case* (4) these would be rejected, not as being matters of personal inconvenience merely, but as matters in respect of which, however injurious to property they might be, all claim for compensation has been excluded by the policy of the Railway Acts. That being so, it was impossible that the claim as made, or the verdict following upon it, could be sustained in law. But, as I understand their judgments, both the noble and learned Lords dealt with the claim as in substance a claim in respect of injury to property arising from the proximity of a level crossing.

The present case does not involve any question of level crossing, nor are any of the inconveniences for which the arbiter has awarded compensation due to the uses which the appellants make of their line. The judgment in *Ogilvy's Case* (1) has, in my opinion, no real bearing upon the questions raised in this appeal, and, therefore, I do not express any opinion upon the question which was raised in the argument whether *Ogilvy's Case* (1) and *McCarthy's Case* (2) are or are not in all respects reconcilable; I am not prepared to say that they are not. On the other hand, were a jury or arbiter to find that, apart from all inconveniences arising from the use of the railway, the selling value of a house was depreciated by the formation of a level crossing upon a highway affording access to it, I am not at this moment prepared to hold that it would be consistent with the principle of *McCarthy's Case* (2) to deny effect to that finding. I have nothing to add to what has been said by your Lordships in regard to the undertaking given to the respondents in consideration of their withdrawing their opposition to the Bill promoted by the appellants. I am, accordingly, of opinion that the interlocutors under appeal ought to be affirmed.

Appeal dismissed.

Solicitors: *Grahames, Wardlaw & Currey*, for *Hope, Mann & Kirk*, Edinburgh; *Martin & Leslie*, for *Ronald & Ritchie*, Edinburgh.

[Reported by C. E. MALDEN, Esq., Barrister-at-Law.]

SHEPARD AND ANOTHER *v.* JONES

[COURT OF APPEAL (Sir George Jessel, M.R., Brett and Cotton, L.JJ.), June 21, 1882]

[Reported 21 Ch.D. 469; 47 L.T. 604; 31 W.R. 308]

Mortgage—Mortgagee—Expenditure on mortgaged property—Improvement—Right to recover expenditure from mortgagor.

Where a mortgagee adduces prima facie evidence that he has incurred reasonable expenditure for a matter which prima facie might be a lasting improvement of the property he is entitled to an inquiry regarding what, on redemption of the mortgage or the sale of the property under his power of sale, he should be allowed in respect of that expenditure. If he proves that the works on which he has made the expenditure have in fact resulted in improvement of the property and increased its value, he will be entitled to an account for the sum he laid out. Where there is evidence of a reasonable and lasting expenditure on an improvement it is immaterial whether or not the mortgagee gave the mortgagor notice of what he was about to do. If, however, there be a doubt whether the expenditure was reasonable or not, evidence of notice by the mortgagee and acquiescence by the mortgagor does away with the need to consider that question.

Mortgage—Mortgagee in possession—Occupation rent—Occupation by agent—Purchaser of mortgaged property under power of sale let into possession pending completion.

A mortgagee cannot be charged an occupation rent in respect of the mortgaged property unless he occupies the property either actually or by a servant or agent. Where a mortgagee had sold the mortgaged property under his power of sale and allowed the purchaser to enter into possession pending completion, **held**, that the mortgagee was not in such occupation of the property as to render him liable to pay an occupation rent.

Notes. Applied: *Bright v. Campbell* (1885), 54 L.J.Ch. 1077. Followed: *Henderson v. Astwood*, *Astwood v. Cobbold*, *Cobbold v. Astwood*, [1894] A.C. 150. Referred to: *Powell v. Brodhurst* (1901), 70 L.J.Ch. 587.

As to the liabilities of a mortgagee in possession and expenses which he is entitled to recover, see 27 HALSBURY'S LAWS (3rd Edn.) 286-292, 326-330; and for cases see 35 DIGEST (Repl.) 460, 461, 724-730.

Cases referred to:

- (1) *Trulock v. Robey* (1846), 15 Sim. 265; 60 E.R. 619; on appeal (1847), 2 Ph. 395, L.C.; 35 Digest (Repl.) 725, 3914.
- (2) *Sandon v. Hooper* (1843), 6 Beav. 246; 12 L.J.Ch. 309; 49 E.R. 820; affirmed (1844), 14 L.J.Ch. 120, L.C.; 35 Digest (Repl.) 729, 3972.

Also referred to in argument:

Tipton Green Colliery Co. v. Tipton Moat Colliery Co. (1877), 7 Ch.D. 192; 47 L.J.Ch. 152; 26 W.R. 348; 35 Digest (Repl.) 729, 3960.

Appeal by the defendant from a decision of KAY, J., in an action for the balance of purchase money received by a mortgagee on the sale of the mortgaged property under his power of sale, and an account.

The plaintiffs were Harry Shepard and Howel Davies, trustees in bankruptcy of Thomas Manby. On Oct. 10, 1878, Manby was adjudicated a bankrupt. Down to the time of his bankruptcy he carried on the business of a brewer, at the Victoria Brewery, Wrexham, which was his own property, but he had mortgaged it together with other property to the defendant, Edward Jones, to secure advances. The trustees took possession of the brewery and continued to carry on the business till the beginning of 1879, with the object of selling it as a going concern. They paid no interest or rent to the mortgagee, and he never demanded any. In Febru-

A ary, 1879, the defendant offered the premises for sale by auction under the power of sale in his mortgage and by private contract, but he failed to find a purchaser. He alleged that the reason of this was the inadequate supply and inferior quality of the water in the well on the premises, which was occasionally nearly dry and used to fail while the premises were in the occupation of the mortgagor. In August, 1879, the defendant took possession of the brewery and plant, and placed a person in it to take care of it, but did not himself occupy it. Early in 1880 the defendant B was alleged, with the knowledge, consent, and acquiescence of the plaintiffs—though this was denied by them—bored for lower springs in the well at the brewery, and in two months the works were completed, and a copious supply of water obtained, which was of excellent quality for brewing purposes. On May 12, 1880, the defendant again offered the property for sale by auction, and sold it for C £5,000 to David Johnson, with the condition that he should pay £200 further for plant and fixtures. After the sale the purchaser was allowed by the defendant to take possession of the brewery, but no rent was required from him. One other condition of the sale was, that the purchase should be completed on Sept. 29 following. At that date the principal sum of £4,000 and considerable arrears of interest were due to the defendant. The purchase was not completed, nor the D purchase money paid on Sept. 29.

The plaintiffs alleged that on Oct. 1, 1880, the defendant was in possession of funds considerably more than sufficient to pay the whole of the principal, interest, and proper costs due to him under the mortgage, and that he delayed accounting to the plaintiffs and paying over the balance to them, notwithstanding frequent applications from the plaintiffs' solicitor, until Dec. 18, 1880. When the defendant E furnished accounts to the plaintiffs he did not debit himself with any occupation rent or allowance for the period during which he had had possession of the brewery, although he charged £83 ls. for well-sinkers, £102 10s. for miscellaneous payments, £221 9s. 4d. for solicitors' costs, and £378 3s. 4d. for interest. The balance which the defendant considered to be due to the trustees was £509 18s. 4d., and this amount he tendered to them, but they refused to accept it. The plaintiffs brought F this action claiming the balance of the purchase money, and asking for accounts against the defendant as mortgagee in possession. The action was heard before KAY, J., who decided that, as the defendant had chosen to let Johnson into possession and use of the brewery he must be charged as though he had been in possession himself from the time when Johnson took possession. Accordingly, from the time when Johnson took possession the defendant should be charged G with occupation rent. Therefore, his Lordship directed the usual account in a redemption suit as against the mortgagee in possession, and the usual inquiry as to what he ought to be charged with as an occupation rent from the time when Johnson took possession of the estate. The defendant appealed.

Cozens-Hardy, Q.C., and *Swinfen Eady* for the defendant.

Rigby, Q.C., and *T. A. Roberts* for the plaintiffs.

H SIR GEORGE JESSEL, M.R.—My present opinion is that the defendant is entitled to succeed on both the points in this case. I have always understood that occupation rent is only charged against a mortgagee who occupies. If one wants authority for that proposition he will find it in *Trulock v. Robey* (1). SHADWELL, V.-C., there says (15 Sim. at p. 273)

I “A man may have been in possession of an estate without having been in the occupation of an acre of it. Anyone is in possession of an estate who receives rent from the tenants who do occupy it. Why did not the plaintiff amend her bill by stating that the defendant had been in the occupation of part of the tenement? How can the court make a decree on a fact that does not appear on the bill?”

Therefore, the plaintiffs had to show that the defendant, the mortgagee, was in occupation. A man may be in occupation in law by occupying the house himself

personally, or by an occupation through his servants. In that sense I agree with the argument that a man need not be in what is called personal occupation, but occupation, like most other things in law, is a complex term, and it is impossible for a man to be in occupation if somebody else is in occupation—that is, excluding the case of joint tenants or tenants in common. A

In the present case the sale by auction was to a purchaser of the name of Johnson, and before the time of completion arrived Johnson asked the defendant, the vendor, to let him into possession. It seems the defendant employed a caretaker. Therefore, he was in occupation through the caretaker up to the time that Johnson was let into possession. Johnson was let into possession on the terms of paying a part of the outgoings, as I understand. Whether they were proper terms or not is a question for inquiry. I have heard nothing to show that they were not proper terms, but upon that I give no opinion, because there is the usual account directed for wilful default, and if it turns out that he was not let in on proper terms, or on reasonable terms, the defendant may be liable for not getting all he might have got. But in no legal sense was the vendor in occupation after he let the purchaser into occupation. The purchaser was not his servant or his agent, but he was a purchaser entering in his own right, and obtaining, not only legal possession, but legal occupation. It appears to me, therefore, there is no case whatever for charging the defendant an occupation rent, simply because at that time he was not in occupation. That, I think, is sufficient to dispose of that part of the appeal which relates to the occupation rent. B C D

With regard to the other point, it is one of more general interest. I have always understood the practice to be quite settled. If upon the hearing of a redemption suit the mortgagee, having charged in his pleadings that he has laid out money in lasting improvements, produces general evidence of the laying out of the money, and that the works are *prima facie* improvements, that is sufficient for an inquiry. If he proves more, that is, if he not only proves that he has laid out money in permanent works, but they are really improvements, and have improved the property to the extent of the money laid out, he will then get, not only an inquiry, but an account for the sum laid out in the lasting improvements. But to get the account, he must prove a good deal more than to get an inquiry. E F

Upon that point I will quote some of the words of LORD LANGDALE in *Sandon v. Hooper* (2). That case went too far on another point and was varied on appeal, but on this point there has been no appeal. LORD LANGDALE says this (6 Beav. at p. 249):

"Now, in this case, it has also to be considered whether it is a matter of course to direct an inquiry whether any money has been laid out in lasting improvements. Many such inquiries have been directed where the fact of any money having been laid out has been proved, and brought to the attention of the court. I quite agree with the argument that has been used on this occasion, that it was not necessary for the defendant to prove the items of sums of money laid out in the permanent improvements alleged to have been made. . . . He may have done something towards the improvement of the estate; and if he had entered into any general proof without going into the terms, it is very probable that the proof might have been such as would have induced the court to direct an inquiry upon the subject." G H

That is, you want general proof of money laid out, and you want general *prima facie* proof that it has been laid out in lasting improvements. I

That being so, we only have to consider whether there was in this case proof of both those facts. There was not only general proof, but, as I understand, there was detailed proof, as to the money laid out. There is no dispute about that. The money laid out was about £200. But was it proved generally and *prima facie* to be laid out in lasting improvements? It stands in this way. The money was laid out in boring for water. That was not at first productive, and then more money was laid out. That was productive, and the quantity of water was largely

A increased. Whether or not that was an increase which added much to the saleable value of the property would be a matter for inquiry, but the two conditions laid down by LORD LANGDALE were satisfied—that the defendant had laid out money, and that the money was *prima facie* a lasting or permanent improvement. It was lasting and permanent, and it was *prima facie* an improvement, because it very much increased the quantity of the water in the well, whether we look on it as
B a brewery property or even as a property not used as a brewery, because it appears that the water company was no longer required. I think there is sufficient for inquiry, even if there were no special circumstances in this case to distinguish it from the ordinary redemption suit. A mortgagee takes the inquiry at his own risk as to what may be the result.

C There are very special circumstances in this case which I think distinguish it from an ordinary redemption suit and put the right of the mortgagee to the inquiry upon higher grounds. This is not a redemption suit at all. It is a suit brought by the mortgagor for an account from the mortgagee, who has exercised his power of sale, of the application of the proceeds of that sale and a claim for the balance. If it should turn out that the mortgagee has done something to the property at his own expense, which increased its saleable value, I think it is plain,
D on ordinary principles of justice, that that increase should not go into the pocket of the mortgagor without his paying the sum of money the payment of which resulted in the increase in value. It seems to me that, wherever the mortgagee can prove that the selling price was increased by reason of his outlay, then to the extent to which that selling price has been so increased the mortgagor cannot get the benefit of it without paying for the outlay.

E In this case the property was a brewery. It seems that the supply of water was deficient. It is said to have been deficient both in quantity and quality, and that there was a failure to sell the property caused, to some extent at all events, by the defective supply of water. Thereupon, the mortgagee set to work to supply the deficiency. There is a dispute whether he did supply it altogether. It is said that, although he supplied it as regards quantity, he did not do so as regards
F quality. Then there was a second offer for sale when the property sold for a good price, but the purchaser was not a brewer, and it is suggested that the purchaser would have given the same money for the property whether there had been this increase in the supply of water or not. That may be so; but it does not at all follow that the selling value was not increased. It was a sale by auction. A brewer may have attended the sale, or several brewers may have done so, and
G they may have bid up to the last bidding before that which was made by the purchaser, because there was a good supply of water and it was suitable for brewery purposes. If that was so, the price would be increased by reason of the additional supply of water, although the actual final purchaser did not want the water at all. All I can say is that, there being, in my opinion, a *prima facie* case, and a strong *prima facie* case, that the property was increased in value, it is fair
H that there should be an inquiry to ascertain whether it was increased. That inquiry will be whether any and what sum ought to be allowed in taking the accounts of the defendant by reason of lasting improvements, and that will leave the whole case open.

I There is another observation or two I wish to make on the necessity of notice, and there are some words in the judgment of LORD LANGDALE in *Sandon v. Hooper* (2) which I have always declined to read literally and do not appear to me to be warranted by the judgment of LORD LYNDEURST. I am by no means prepared to say that LORD LANGDALE did not mean exactly what I am going to say. I rather think he did, but it was not well expressed, either by himself or by the reporter. As I understand it, notice is not necessary if the improvement is a reasonable one and produces a benefit. The mortgagee cannot be deprived of that benefit because he did not tell the mortgagor of it. If, on the other hand, it is an unreasonable one and produces no advantage, I do not see why the mortgagor should be charged with it because the mortgagee gives him notice of it. He could not

prevent it, the mortgagee being in possession. That being so, it seems to me the real effect of the notice is that where the mortgagee gives the mortgagor notice of the expenditure and the mortgagor agrees to it, then it is unnecessary for the mortgagee to show that the expenditure was reasonable. It is a contract. If the mortgagor does not actually agree to it, but does such acts as, in the view of a court of law, amount to tacit consent, or, as it is sometimes called, "acquiescence," that will put the mortgagee in an equally advantageous position. But if the mortgagee does nothing, it appears to me that notice cannot affect the rights of the parties either way. I think that is the true explanation of what was intended by LORD LANGDALE in *Sandon v. Hooper* (2), and I think that is the real view of the law on the subject. Under these circumstances I think the appeal must be allowed.

BRETT, L.J.—In this case two objections have been taken to the order of KAY, J. The first is, that, besides ordering an inquiry as to wilful default, he has made a specific order for a charge against the defendant for an occupation rent. In order to justify that charge I do not understand that anybody asserted but that it must be shown that the mortgagee occupied, as distinguished from being a mere legal possessor. I am of opinion that counsel for the plaintiffs failed to show that the occupation of Johnson was the occupation of the defendant. If that is so, the express order to charge the defendant for occupation rent cannot be supported.

Another objection was the refusal of the learned judge to allow an inquiry as to an alleged expenditure by the defendant on the property. To justify such an inquiry, it seems to me that the defendant was bound to show before the learned judge some *prima facie* evidence that he had incurred an expenditure; and, secondly, some *prima facie* evidence that that expenditure was incurred for a matter which *prima facie* might be an improvement of the property; and, thirdly, some *prima facie* evidence that such an improvement would be a lasting improvement; and, fourthly, *prima facie* evidence that such expenditure was a reasonable expenditure. It seems to me that he must give *prima facie* evidence before the judge of all those four matters before he would be entitled to an inquiry. If he does give *prima facie* evidence of all those elements, then it seems to me that the question of notice does not arise. I do not think that notice alone can be of any importance as to either head of this question of expenditure. It seems to me that here the defendant did give evidence of expenditure. That is not denied. It seems to me that an expenditure in deepening a well on business premises, whatever be the business, is *prima facie* evidence of an improvement, and it is equally evidence of a lasting improvement, and unless it is clearly proved to the court that the expenditure has been done in a mode which would make it wholly unreasonable, it seems to me *prima facie* evidence also that it is a reasonable expenditure. Therefore, I think in this case the defendant was entitled to the inquiry, wholly irrespective of any question of notice.

The only way in which notice comes to be material is where it may be fairly alleged that the expenditure is not reasonable. Nevertheless, if notice of what is going to be done be given to the mortgagor, and he has acquiesced in it, then the question whether the expenditure was for a reasonable or unreasonable purpose falls to the ground. Having heard read the judgment of LORD LANGDALE in *Sandon v. Hooper* (2), and interpreting that judgment as I think, in justice to every judge, it is necessary to interpret what he says in giving judgment, namely, interpreting his language with reference to the facts before him in that particular case. I think what LORD LANGDALE meant to say, and what, on the proper interpretation of his language, he did say, was that, where there is evidence of a reasonable and lasting expenditure on an improvement, no notice at all is necessary; but that, if there be a doubt whether the expenditure was reasonable or not, evidence of notice and acquiescence takes away the necessity of consideration of the question whether the expenditure was for a reasonable purpose or not. It seems to me that,

A considering his language according to the facts that were before him, that is what he meant to say, and upon a fair interpretation of his language that is what he did say.

COTTON, L.J.—The question here is whether the defendant, the mortgagee, is entitled to an inquiry as to expenditure incurred by him, which, he says, was an improvement to the property. Undoubtedly, a mortgagee has no right as against a mortgagor to improve the mortgagor out of his property, and if he lays out a very large sum in expenditure, that is in itself a thing which he has no right to do. A mortgagor must not be prevented from redeeming by the mortgagee, when in possession, throwing a great burden upon him.

C We have not to consider any such objection in the present case. What we come to is this, that this property being put up for sale either by the mortgagee or the assignees—I know not which—there being no prospect of redemption in the sense of payment off of the mortgage money, there was difficulty in the first sale, and certainly, in one case, a probable bidder was deterred from making a bid or becoming a purchaser by the deficiency of water supply. That was probably a deficiency in quality as well as in quantity. With the intention of putting the property up again for sale, the mortgagee bores and increases the water supply, and then it is put up again and it is sold. Upon the evidence I think there is at least a *prima facie* case that what was done increased the saleable value of the property. Even although the quality of the water was not improved, yet an addition to the production of the well, especially if the property was to be used as a brewery, would *prima facie* be an addition to the value, and be a matter that would encourage persons to come and bid. That being so, in a case of this sort, where there has been no alteration in the nature of the property, which a mortgagee *prima facie* must not make, but merely an expenditure, *prima facie* increasing the saleable value of the estate intended for sale by an addition to its capacity for being used for the purpose for which it was intended, it is, in my opinion, if it can be shown that there has been an increase in the saleable value of the estate, that which the mortgagee is entitled to have repaid to him, or allowed to him as a reasonable expenditure. It is a matter which reasonably might be done for the purpose of improving the actual state of the property—not an alteration, but improving it for the purpose of the intention of the mortgagee, namely, to realise it by a sale. That being so, I have not anything to say about what might happen in any other case. But here, in my opinion, the mortgagee has made out a *prima facie* case that his expenditure was reasonable in amount, and reasonable with reference to the existing purposes of the property, and such as to entitle him to an inquiry by showing *prima facie* he increased the value of the estate for the purpose for which it was intended for sale. In my opinion, therefore, there ought to be the inquiry suggested by the Master of the Rolls, which will be at the risk of the mortgagee, who, if his *prima facie* case breaks down, and he does not establish that the saleable value of the estate has been increased by his expenditure, will have to pay the costs of the inquiry. I think he has made out a *prima facie* case. He will be entitled not to more than he has expended, but to the expenditure to the extent of an increase in the saleable value of the property.

H The other point is a short one. The mortgagee complains that he has been charged with an occupation rent during a period of time intervening between his sale and the time fixed for the completion of the purchase. How was he in occupation? You cannot charge a man with an occupation rent, it is obvious, unless he is in occupation. He was not actually in occupation either by himself or by any servant of his, but it is said that he is to be considered as in occupation, because, without any right under the contract, the purchaser, with his permission and assent, took occupation of the premises.

I In my opinion, that occupation of the purchaser can in no sense be considered in law the occupation of the mortgagee, the vendor, so as to charge him with an occupation rent. In my opinion, this purchaser was in possession as purchaser,

and not in such a way as to make his occupation the occupation of the defendant, either as mortgagee or vendor. Under those circumstances, the mortgagee, whatever else, if anything, he may be liable for during that period, cannot, in my opinion, properly be charged with an occupation rent.

Solicitors : *Field, Roscoe & Co.* for *Evan Morris*, Wrexham; *Abbott, Jenkins & Co.* for *Lewis & Son*, Wrexham.

[Reported by W. C. Biss, Esq., Barrister-at-Law.]

ABRATH v. NORTH EASTERN RAIL. CO.

[COURT OF APPEAL (Sir Baliol Brett, M.R., Bowen and Fry, L.JJ.), June 20, 21, 22, 1883]

[Reported 11 Q.B.D. 440; 52 L.J.Q.B. 620; 49 L.T. 618;
47 J.P. 692; 32 W.R. 50; 15 Cox, C.C. 354]

[HOUSE OF LORDS (the Earl of Selborne, Lord Watson, Lord Bramwell and Lord FitzGerald), March 11, 12, 15, 1886]

[Reported 11 App. Cas. 247; 55 L.J.Q.B. 457; 55 L.T. 63;
50 J.P. 657; 2 T.L.R. 416]

Malicious Prosecution—Matters which must be proved—Burden of proof.

In an action for malicious prosecution the plaintiff must prove (i) that he was innocent of the charge brought against him and has been pronounced innocent by the tribunal before whom that charge was investigated; (ii) want of reasonable and probable cause for the defendant bringing the charge against him, i.e., facts which are inconsistent in the eyes of the judge before whom the action is tried with the existence of reasonable and probable cause; (iii) that the charge against him was preferred in a malicious spirit, i.e., from an improper motive. Where any step is necessary to prove any of these three propositions, e.g., if to show absence of reasonable and probable cause for instituting the prosecution the question is raised whether or not the defendant took reasonable care to inform himself of the true state of the case before beginning proceedings against the plaintiff, the burden is on the plaintiff to prove that step. If, however, the materials before the defendant when he initiated the prosecution are shown to have been untrustworthy, the burden is thrown on the defendant of showing that he took reasonable care, but, e.g., was misled.

Notes. Applied: *Quartz Hill Consolidated Gold Mining Co. v. Eyre* (1884), 50 L.T. 274. Distinguished: *Harrison v. National Provincial Bank of England* (1885), 2 T.L.R. 70. Followed: *Edwards v. Annett* (1887), 3 T.L.R. 671. Applied: *Lea v. Charrington* (1889), 61 L.T. 222. Followed: *Bradshaw v. Goodwin* (1894), 10 T.L.R. 491. Considered: *Cornford v. Carlton Bank*, [1899] 1 Q.B. 392. Not Followed: *Citizen's Life Assurance v. Brown*, [1904-7] All E.R.Rep. 925. Applied: *Cox v. English, Scottish and Australian Bank*, [1905] A.C. 168. Considered: *Herniman v. Smith*, [1938] 1 All E.R. 1. Applied: *Abbott v. Refuge Assurance Co., Ltd.*, [1961] 3 All E.R. 1074. Referred to: *Wakelin v. London and South Western Rail. Co.* (1884), [1896] 1 Q.B. 189, n.; *Penfold v. Grosvenor Bank* (1886), 2 T.L.R. 759; *Brown v. Hawkes*, [1891] 2 Q.B. 718; *Nevill v. Fine Arts and General Insurance*, [1895] 2 Q.B. 156; *Wiffen v. Bailey and Romford U.D.C.* (1914), 78 J.P. 187; *Bradshaw v. Waterlow*, [1915] 3 K.B. 527; *Joseph*

A *Constantine Steamship Line, Ltd. v. Imperial Smelting Corpn., Ltd.*, [1941] 2 All E.R. 165; *R. v. Oliver*, [1943] 2 All E.R. 800; *Tempest v. Snowden*, [1952] 1 All E.R. 1; *Leibo v. D. Buckman, Ltd.*, [1952] 2 All E.R. 1057; *Gliniski v. McIver*, [1962] 1 All E.R. 696.

As to the essentials of an action for malicious prosecution and the burden of proof, see 25 HALSBURY'S LAWS (3rd Edn.) 353-365; and for cases see 33 DIGEST (Repl.) 399 et seq.

Case referred to:

(1) *R. v. Turner* (1816), 5 M. & S. 206; 105 E.R. 1026; 14 Digest (Repl.) 494, 4781.

Also referred to in argument:

C *Johnson v. Emerson* (1871), L.R. 6 Exch. 329; 40 L.J.Ex. 201; 25 L.T. 337; 33 Digest (Repl.) 405, 199.

Edwards v. Midland Rail. Co. (1880), 6 Q.B.D. 287; 50 L.J.Q.B. 281; 43 L.T. 694; 45 J.P. 374; 29 W.R. 609; 37 Digest 181, 75.

Walker v. South Eastern Rail. Co., *Smith v. South Eastern Rail. Co.* (1870), L.R. 5 C.P. 640; 39 L.J.C.P. 346; 23 L.T. 14; 18 W.R. 1032; 33 Digest (Repl.) 436, 551.

D *Turner v. Ambler* (1847), 10 Q.B. 252; 16 L.J.Q.B. 158; 9 L.T.O.S. 36; 11 J.P. 631; 11 Jur. 346; 116 E.R. 98; 33 Digest 427, 451.

Lister v. Perryman (1870), L.R. 4 H.L. 521; 39 L.J.Ex. 177; 23 L.T. 269; 35 J.P. 4; 19 W.R. 9, H.L.; 33 Digest (Repl.) 428, 456.

Mitchell v. Jenkins (1833), 5 B. & Ad. 588; 2 Nev. & M.K.B. 301; 3 L.J.K.B. 35; 110 E.R. 908; 33 Digest (Repl.) 407, 238.

E *McPherson v. Daniels* (1829), as reported in 10 B. & C. 263; 109 E.R. 448; 15 Digest (Repl.) 1205, 12,242.

Sutton v. Sadler (1857), 3 C.B.N.S. 87; 26 L.J.C.P. 284; 30 L.T.O.S. 65; 3 Jur.N.S. 1150; 5 W.R. 880; 140 E.R. 671; 33 Digest (Repl.) 603, 199.

Waring v. Waring (1848), 6 Moo.P.C.C. 341; 6 Notes of Cases, 388; 12 Jur. 947; 13 E.R. 715, P.C.; 33 Digest (Repl.) 586, 11.

F *R. v. Butler* (1803), Russ. & Ry. 61, C.C.R.; 15 Digest (Repl.) 883, 8520.

Appeal from a decision of a Divisional Court (GROVE, J., and LOPES, J.) on a rule nisi obtained by the plaintiff for the new trial of an action for malicious prosecution which he had brought against the defendants.

On Sept. 10, 1880, a collision occurred at Ferry Bridge Station, on the defendants' railway line, and one McMann alleged that he had thereby sustained severe injuries. He was attended by the plaintiff Abrath, who practised as a surgeon, and subsequently an action was brought by McMann against the defendants to recover compensation for the injuries sustained. The case came on for hearing at the Northumberland Summer Assizes, and was settled on the defendants paying £725 damages and £300 costs. Some time after the settlement information was given to Mr. Rayne, a medical practitioner employed by the defendants, by detectives employed to watch the plaintiff. Thereupon an application was made to the directors that the statements of certain witnesses should be taken by Mr. Dix, the solicitor to the defendant company. The directors granted the application, and gave instructions for the statements to be taken. Upon the statements being submitted to them, the directors ordered that the opinion of counsel should be obtained. Counsel having advised that there was good ground for taking criminal proceedings against McMann and Abrath on a charge of conspiracy with intent to defraud the company, an information was laid before justices on Nov. 7, and the plaintiff was committed for trial. He was tried in January, 1882, and acquitted. He then brought the present action for malicious prosecution.

At the trial of the action at Durham Assizes the plaintiff called witnesses, who proved that the injuries to McMann were real and not feigned. The statements of these witnesses had not been taken by the defendants before they laid the information before the magistrates. It was also shown that the persons on whose state-

ments the directors had ordered the prosecution to be instituted against the plaintiff were of bad character, and one of them had been convicted several times. The defendants did not dispute that the plaintiff was innocent of the conspiracy, but they contended that they were justified in instituting the prosecution upon the faith of the statements laid before the directors. CAVE, J., left the following questions to the jury: (i) Did the defendants take reasonable care to inform themselves of the true state of the case? (ii) Did they honestly believe the case which they laid before the magistrates? (iii) Were the defendants actuated by any indirect motive in preferring the charge? The learned judge directed the jury that as to the first two questions it was for the plaintiff to prove that the defendants did not take reasonable care to inform themselves of the true state of the case, and that they did not honestly believe the case which they laid before the justices. The jury answered the first two questions in the affirmative, but did not answer the third. CAVE, J., upon these findings held that the defendants had reasonable and probable cause for instituting the prosecution, and gave judgment for the defendants.

A rule nisi for a new trial, obtained by the plaintiff on the ground of misdirection and of the verdict being against the weight of the evidence, was made absolute by the Divisional Court and the defendants appealed to the Court of Appeal.

Sir Farrer Herschell, Q.C., and *Digby Seymour, Q.C.*, *Gainsford Bruce* and *J. L. Walton* for the defendants.

Sir Hardinge Giffard, Q.C., and *McClymont* for the plaintiff.

SIR BALIOL BRETT, M.R.—In this case the plaintiff sues for malicious prosecution, and it is necessary to consider what he was prosecuted for. It was for conspiracy to cheat and defraud the North Eastern Rail. Co., and the conspiracy was alleged to have been entered into between the plaintiff and a person named McMann. The points which it is necessary for the plaintiff to substantiate in order to make out his case are not in doubt. The question as to this has often been decided, and the rule is well established. It is not enough to show that the plaintiff is innocent of the charge made against him. He must show that the prosecution was instituted without reasonable and probable cause, and with a malicious intention in the mind of the defendant—not a mere intention to carry the law into effect, but a malicious intention to injure the plaintiff. It has been decided that the burden of proving these facts is on the plaintiff; the burden of proving each proposition is on the plaintiff. The difficulty is to be clear in explaining a case of this kind to a jury, and I must say that I envy the clearness of the summing-up of CAVE, J., in the present case. In order to succeed, the plaintiff must make out these propositions, and if he fails in establishing any one of them he fails in establishing his final proposition.

It is admitted that the burden of proof of the whole case is on the plaintiff, and that the burden of proving each of the major propositions lies upon him; but it is said that if a minor proposition is raised, which must be proved in order to establish one of the major propositions, the burden of proof as to this is not on the plaintiff. But it seems to me that, where a claim or defence consists of several necessary parts, the burden of proof as to each of those necessary parts lies on the party on whom the burden of proving the whole lies. The burden of proof is on the plaintiff in an action for malicious prosecution, to show absence of reasonable and probable cause; and if in order to show this it is necessary to decide certain minor questions, the burden of proving each point that has to be established is on the plaintiff. In order to show absence of reasonable and probable cause for instituting a prosecution, I cannot doubt that the plaintiff is bound to give some evidence of the circumstances connected with the prosecution, and I differ from the suggestion that it is enough to show that the plaintiff is innocent of the offence with which he was charged, and that in the end there was shown to be no substantial ground for bringing the charge against him. I think that, without some further evidence than this, the judge could not properly be asked

A to say that there was absence of reasonable and probable cause. There must be evidence of the facts and the circumstances under which the prosecution was instituted.

In the present case, there was evidence of the circumstances under which the prosecution was instituted, and, these facts being in evidence, there arose another question of fact which it was necessary to decide, in order to enable the judge to give an opinion whether there was absence of reasonable and probable cause. That question was whether the defendants had taken reasonable care to inform themselves of the true state of the case before commencing proceedings against the plaintiff. It was proved that certain statements relating to the case had been laid before those who instituted the prosecution, and, if no one had raised the point whether reasonable care had been taken by the defendants to inform themselves of the true state of the case, it would have been assumed that reasonable care had been taken. But, on the other hand, if they had received the statements carelessly, and did not take reasonable care to inform themselves whether those statements were well-founded or not, it is clear that they would be liable. Therefore, in order to enable the judge to give an opinion as to the law, it became necessary to determine the question of fact whether reasonable care had in fact been taken. That question is not a mere question as to the evidence to prove a fact; it is a question which has itself to be decided by the evidence, and it forms a necessary part of the question as to reasonable and probable cause. If there is a want of reasonable care there must be absence of reasonable and probable cause. The burden of proof of want of reasonable care lies on the plaintiff, because that question is a necessary part of the larger question as to want of reasonable and probable cause.

It follows, therefore, that, if the judge's direction amounted only to telling the jury that it was a necessary part of the case that the question as to reasonable care should be decided, and then telling them that the burden of proof as to that proposition lay on the plaintiff, it would be a right direction. I think that what CAVE, J., told the jury in the present case comes in substance to that, and, therefore, it was a right direction. This reduces the matter to the question whether the learned judge so expressed himself that the jury must have so understood him. I think that in that sense there was no misdirection. This, however, does not seem to be the view adopted by the learned judges who heard the case in the Divisional Court, for in delivering judgment GROVE, J., said :

"The misdirection alleged consisted in this, that the learned judge told the jury that it was for the plaintiff to prove that the defendants did not take reasonable and proper care to inform themselves of the true state of the case, and that they did not honestly believe the case which they laid before the magistrates. . . . It was contended for the plaintiff that, where the defendant undertakes to bring forward facts for the purpose of satisfying, not the jury, but the judge, that there was reasonable and probable cause for prosecuting, the onus of proving those facts is upon the person who brings them forward. I am of opinion that this is a right view of the law."

I agree that, if a person gives evidence of a particular fact the burden of proof lies upon him to show that that fact is true; but if the passage I have just quoted means that the onus of showing the existence of reasonable and probable cause lies upon the defendant, I disagree with it. Further on in the judgment GROVE, J., seems to base his opinion on the suggestion that the facts to be proved are all within the exclusive knowledge of the defendants.

This judgment leaves my mind in doubt as to the true ground of the decision. It is contended that if the plaintiff gives evidence which, if not answered, ought to lead the jury to the conclusion that the defendant made no reasonable inquiry, and if the defendant gives no evidence in answer, the verdict ought to be for the plaintiff. That I agree is true. Then it is said that, if the defendant gives evidence of facts, it lies on him to satisfy the jury that those facts really exist.

I agree also that this is true. But the fallacy lies in saying that, if the plaintiff gives *prima facie* evidence, the burden of proof is shifted on to the defendant as to the question itself. If that is the ground of the decision, I do not agree with it. I think the rule may be stated in this way. If the plaintiff gives *prima facie* evidence, which standing alone and uncontradicted would entitle him to succeed, and if the defendant gives evidence in contradiction of the plaintiff's evidence or proves other facts, then the jury are to consider the question, taking all the facts, on which the case is to be determined, into consideration, and if they are satisfied that the plaintiff has made out his case, they ought to find for the plaintiff, but if on consideration of all the facts they are clear that the plaintiff's case is negatived, they ought to find for the defendant. If, however, on all the facts the jury are in doubt as to which way the question ought to be answered, it will come back to this. The burden of proof is on the plaintiff, and if the defendant, by proof of additional facts, has brought the minds of the jury to a state of doubt, the plaintiff has failed to establish his case.

In summing-up the case to the jury, CAVE, J., said, speaking of the question whether the defendants took reasonable care to inform themselves as to the true facts of the case :

"With regard to this question, you must bear in mind that it lies on the plaintiff to prove that the railway company did not take reasonable care to inform themselves. The meaning of that is, if you are not satisfied whether they did or not, inasmuch as the plaintiff is bound to satisfy you that they did not, the railway company would be entitled to your verdict on that point."

He does not tell them that the burden of proof is on the plaintiff as to each particular fact which is in evidence. He says in effect : "Take the evidence which is before you, and answer the question. If your minds are made up one way or the other there is no difficulty, but if you are in doubt as to how the question ought to be answered on the evidence before you, find for the defendants, because the plaintiff will have failed to satisfy you as to the point on which the burden of proof lies on him." It is said that the expression "burden of proof" might be improved upon, but it is a form which has been used often, and is known to juries as it is explained by judges. If it were changed the change might puzzle them. In my opinion, there is no misdirection unless the judge told the jury something that is wrong. Mere non-direction is not misdirection. It must be shown that the judge told the jury something which was wrong, or that he told them what would make them think he meant something which is not law. I think the direction in the present case was an exact and proper direction on this question.

I am of opinion that the defendants' appeal from the order of the Divisional Court ought to be allowed and the plaintiff's appeal from the judgment of CAVE, J., dismissed.

BOWEN, L.J.—I agree with the judgment of the Master of the Rolls. This is a case in which it is not difficult to come to a correct conclusion as to what the law is, but the expression of the law is always difficult in a case of this kind.

The action was brought for malicious prosecution, and in such an action the plaintiff has to prove, first, that he is innocent of the charge brought against him, and has been pronounced innocent by the tribunal before which that charge was investigated; secondly, he must prove what is compendiously called want of reasonable and probable cause for bringing the charge against him, or, in other words, he must prove circumstances which are inconsistent in the eyes of the judge before whom the action is tried with the existence of reasonable and probable cause; and, thirdly, he must prove that the proceedings were initiated in a malicious spirit, that is, from an improper motive. If any step is necessary in order to prove any of these three propositions, the burden of proof as to that step is on the plaintiff, because no chain is stronger than its weakest link. I think the whole fallacy of the argument on behalf of the plaintiff in this case lies in a

A misconception of what CAVE, J., said at the trial, and in a misconception of the sense in which he made use of the expression "burden of proof."

Wherever there is an action to be tried, generally the plaintiff begins. If he proves nothing he fails; if he proves his case and the other side prove nothing in answer to it, they fail. The test is, if no more evidence were given in addition to what has already been proved, which side would win? But the onus of proof does not rest for ever on the shoulders of the party on whom it is cast in the first instance. When he gives evidence which rebuts the evidence given against him he shifts the burden, and it rests on his opponent. The question as to onus of proof is only a mode of deciding who is to go further, not how much further he has to go. It is not a rule by which the jury are enabled to decide as to the value of conflicting evidence. Directly a conflict of evidence arises there ceases to be any question as to burden of proof. As causes are tried the term onus of proof may be used in more ways than one. Sometimes it is left to the jury generally to find for the plaintiff or the defendant, and in such a case it is essential that the judge should tell the jury on whom the burden of proof rests, and when it shifts. Sometimes issues are left to the jury; then the jury should be told on whom the burden of proof lies as to each issue. Often the burden of proof is shifted by presumptions of law, and this has to be explained to the jury. There is also another way of conducting a trial, which is by asking certain definite questions of the jury. If a conflict of evidence arises as to these questions, it is unnecessary to direct the jury as to onus of proof, unless, indeed, presumptions of law have to be considered, such, for instance, as the presumption of consideration for a bill of exchange or for a deed. If the judge asks the jury a plain question, such as whether they believe a particular witness, it is unnecessary to give them any explanation as to onus of proof, for the answer can only be "yes" or "no." If the jury cannot decide such a question the burden rests on the judge of saying which party is entitled to the verdict. I do not forget that there are canons of evidence which are useful to a judge in commenting on evidence and rules for determining the weight of conflicting testimony; but they are not the same thing as onus of proof. In an action for malicious prosecution it is for the plaintiff to show that the circumstances were such that there was no reasonable and probable cause. In one sense it may be said that this is the assertion of a negative, and it has been contended that, when it comes to the question of establishing a negative proposition, the onus of proof is shifted. But if the assertion of a negative is essential to the plaintiff's case the burden of proof is still on the plaintiff. The terms negative and affirmative are relative, not absolute. In dealing with a question of negligence, the proposition to be made out may be either negative or affirmative. Where a person asserts affirmatively that a certain state of facts is present or absent, or that a particular thing is insufficient for a particular purpose, that is a positive averment, and must be proved positively. It is said that there is an exception where the facts are peculiarly within the knowledge of the opposite party, but counsel for the plaintiff does not go so far as to say that this is always so, and I think the general proposition cannot be maintained. The game law cases, which have been referred to, such as *R. v. Turner* (1), are peculiar, and rest on their own grounds. I think in the present case the language used by CAVE, J., at the trial has been misunderstood.

We must consider how a case like this can be tried, and what mode he selected.

I A case may be tried in this way. The judge may leave it to the jury to find a general verdict, telling them that if they find the disputed facts in favour of the plaintiff or the defendant, his opinion as to reasonable and probable cause will differ according to their finding, and telling them what in each alternative his view will be, and on that leaving it to them to find their verdict. That method can be adopted in very simple cases, but it is obvious that in complicated cases it would be attended with great difficulty. A habit, therefore, exists of adopting a different course where the case is complicated. The judge may tell the jury what the questions are which he wishes them to decide, and may tell them what their effect

upon the verdict will be, leaving it to the jury to answer the particular questions and then find a general verdict. That is how CAVE, J., has dealt with the present case. There is a third way of dealing with these cases, which is to put specific questions to the jury and give judgment on their findings. That differs only slightly from the second method to which I have referred, which has been adopted in the present case. If the judge adopts this second method of dealing with the case, it is obvious that he is not required to explain the question as to onus of proof to the jury to the same extent as he would be if he were only asking them to find a verdict generally on the case. In answering specific questions, as to which a conflict of testimony exists, they do not require any direction as to where the onus of proof lies, provided the alternative is left open to them to say they do not think the materials before them sufficient to enable them to answer any particular question. Still, the judge would probably in such a case let the jury know the result of what they were doing, and, in order to do so, would explain the law. A B C

I do not think what CAVE, J., did in the present case amounted to more than that. When he addressed the jury the whole case was before them. The question as to reasonable and probable cause depended on the materials in possession of the defendants when the prosecution was instituted, and also upon the care with which those materials had been collected and considered. There might be two views as to those materials. One might say that they were obviously not to be relied upon, or that they were to be relied upon, according to the view one might take of the facts, and the burden of proof as to the care with which the inquiry was made would be shifted according to this view. If the materials were clearly untrustworthy, this would be a reason for throwing upon the defendants the burden of showing that they had taken reasonable care but had been misled; but, if the materials were obviously trustworthy, the defendants would *prima facie* be justified in acting upon them. The view put forward for the plaintiff seems to be that, as a matter of law, CAVE, J., ought to have assumed the former state of facts, viz., that the materials were worthless, and ought to have directed the jury to consider whether the defendants had so conducted themselves as to be relieved from the onus cast upon them from having acted upon worthless materials. I think that would have been a blunder, for the worth of the materials was, to some extent, a question of fact. I think CAVE, J., would have been wrong if he had divided into two parts the questions of fact, assuming that one-half must necessarily be decided one way, and telling the jury the burden of proof was shifted as to the other. He put the two together, and left to the jury a question covering the whole matter in controversy, namely, whether the defendants took reasonable care to inform themselves as to the true state of the case, at the same time telling the jury that it lay upon the plaintiff to prove that the defendants did not take reasonable care so to inform themselves. This means that, unless the jury were satisfied that the defendants had not taken reasonable care, the defendants would be entitled to the verdict. I think that direction was correct. The learned judge did not tell the jury that they ought to approach the inquiry in a state of hostility to the plaintiff's evidence, but was only informing them that the result ought to be that, unless they answered the questions left to them in favour of the plaintiff, there should be a general verdict for the defendants. D E F G H

It was contended for the plaintiff that the onus of proof lay on the defendants, because the plaintiff had been shown to be innocent of the charge made against him, and innocence is *prima facie* proof of absence of reasonable and probable cause. I do not agree that this is so. I think it is not such *prima facie* proof. No doubt, sometimes it looks like it, but that is where the question of innocence involves other facts, as where the prosecutor must have known from the circumstances of the case, or with reasonable care could have ascertained, whether the person whom he accuses is guilty or innocent. The whole question comes back to this. Under the circumstances of the case, who is putting forward, and is bound to prove, the proposition as to absence of reasonable and probable cause? Clearly the plaintiff. For these reasons I am of opinion that the defendants' appeal from the decision of I

A the Divisional Court ought to be allowed, and the plaintiff's appeal from the judgment of CAVE, J., dismissed.

B **FRY, L.J.**—I will express my agreement with the other members of the court in a very few words. It is said on behalf of the plaintiff that the inquiry whether the defendants had taken reasonable care to inform themselves of the true facts of the case was an inquiry with regard to a new fact without which the defendants could not succeed, but, on the evidence for the plaintiff alone, I think he would have failed to make out his case, and the burden of proving new facts must rest on the person who wants them proved, in order to establish the case which he is bound to make out. In the present case that person is the plaintiff. I agree with both the judgments which have been delivered.

C *Appeal allowed.*
The plaintiff appealed to the House of Lords (11 App. Cas. 247) who merely expressed the opinion that the Court of Appeal were right in their view of the law and dismissed the appeal on the ground that there had been no misdirection of the jury whose verdict was not against the weight of the evidence.

D Solicitors: *J. Balfour Allan*, for *W. M. Skinner*, Sunderland; *Williamson, Hill & Co.*, for *George S. Gibb*, York.

[Reported by DUNLOP HILL, Esq., and P. B. HUTCHINS, Esq., Barristers-at-Law.]

E

R. v. GANZ

F [QUEEN'S BENCH DIVISION (Pollock, B., and Manisty, J.), March 30, 1882]

[Reported 9 Q.B.D. 93; 51 L.J.Q.B. 419; 46 L.T. 592]

Extradition—"Fugitive criminal"—Person not citizen of or domiciled in country where crime committed.

G

Whatever rights, civil or otherwise, a man may have which may be affected by his status and his domicile, it is perfectly clear by the law of every nation that each person who is within the jurisdiction of a country in which he commits a crime is subject to that jurisdiction, whatever his nationality or domicile.

Extradition—Conditions precedent to order—Requisition for extradition by foreign State—Evidence satisfying magistrate of commission of extradition crime—Liability of criminal to conviction in England.

H

Before a fugitive criminal can be extradited there are two essential requisites. The first is a requisition for extradition by a diplomatic representative of the foreign State, which may follow instead of preceding the steps taken to arrest the fugitive criminal. The other essential is that the magistrate before whom the matter is brought should be satisfied by evidence that a crime has been committed, that it is one included in the extradition treaty between this country and the foreign country, and that the evidence is such as would convict the criminal in this country.

I

Notes. Considered: *R. v. Governor of Brixton Prison, Ex parte Savarkar*, [1908-10] All E.R.Rep. 603; *R. v. Governor of Brixton Prison, R. v. Governor of Holloway Prison*, [1912] 2 K.B. 578. Referred to: *Ex parte Piot* (1883), 48 L.T. 120.

As to persons liable to extradition and procedure on extradition proceedings, see 16 HALSBURY'S LAWS (3rd Edn.) 564 et seq.; and for cases see 24 DIGEST (Repl.) 988 et seq. For Extradition Act, 1870, see 9 HALSBURY'S STATUTES (2nd Edn.) 893.

Case referred to :

- (1) *Re Counhaye* (1873), L.R. 8 Q.B. 410; 42 L.J.Q.B. 217; 28 L.T. 761; 38 J.P. 39; 21 W.R. 883; 24 Digest (Repl.) 1003, 106.

Also referred to in argument :

- R. v. Jacobi and Hiller* (1881), 46 L.T. 595, n., D.C.; 24 Digest (Repl.) 997, 50.

Application for a rule nisi calling upon the governor of Holloway Gaol to show cause why a writ of habeas corpus should not issue calling upon him to bring up for release the body of Edward Nathan Ganz, who had been committed to his custody under an extradition warrant granted by the Chief Magistrate at Bow Street Police Court on the application of the government of the Netherlands.

Edward Nathan Ganz, alias Bernhardt Wyprecht, was charged, at the instance of the government of the Netherlands, with an extraditable offence amounting to the obtaining of money under false pretences during the year 1881. Ganz, whose offices were a small room in a street in Rotterdam, inserted during 1881 an advertisement in various newspapers on the continent to the effect that customers dealing with his firm would save a considerable amount per annum by purchasing their grocery supplies direct from his "warehouses" in Rotterdam. His firm was styled "Bernhardt Wyprecht & Co." In the advertisement appeared the notice,

"All our goods are picked out at the place of growing by our own factories, and the most conscientious warranty for utmost purity and best weight."

On receipt of an order the prisoner sent to the customer a circular requiring payment in advance, and in terms repeating the statements put forward in the advertisement. A large number of persons sent the prisoner orders from Berlin and other parts of Germany and, on receipt of the circular, remitted the amount of their orders as directed. The prisoner, as "Bernhardt Wyprecht & Co.," did not send any goods in return for the money, nor had he "warehouses" in Rotterdam nor "factories" elsewhere. Ganz came to England towards the latter part of the year 1881. In consequence of the representations made through the governments of those persons who alleged that they had been swindled by the prisoner, criminal proceedings were taken in the Arrondissement Court (or the Criminal Court of first instance) in Rotterdam, which held that the offence had not been made out. But the Court of Criminal Appeal at the Hague reversed the decision of the court below, and issued a document authorising the prisoner's arrest.

By the treaty made between Her Majesty the Queen and the King of the Netherlands for the mutual surrender of fugitive criminals, signed June 19, 1874 :

"Article 1. It is agreed that Her Britannic Majesty and His Majesty the King of the Netherlands shall, on requisition made in their names by their respective diplomatic agents, deliver up to each other reciprocally any person who, being accused or convicted of any of the crimes hereinafter specified, committed within the jurisdiction of the requiring party, shall be found within the territories of the other party. . . . Article 3. No subject of the Netherlands shall be delivered by the government of the Netherlands to the government of the United Kingdom; and no subject of the United Kingdom shall be delivered by the government thereof to the government of the Netherlands. With reference to the application of the present treaty, there are comprised in the denomination of "subject," not only naturalised citizens of the country, but also such foreigners as, according to the laws of either of the contracting parties, are assimilated to subjects, as well as such foreigners who, being domiciled in the country, and having married a citizen thereof, have one or more children by that marriage born there. . . . Article 8. The requisition for extradition shall be made through the diplomatic agents of the high contracting parties respectively. The requisition for the extradition of an accused person must be accompanied by a warrant of arrest issued by the competent authority of the state requiring the extradition, and by such evidence as, according to the

A laws of the place where the accused is found, would justify his arrest if the crime had been committed there."

Besley (*Tickell* with him) moved for the writ of habeas corpus.

The Attorney-General (*Sir Henry James, Q.C.*) and *A. L. Smith* opposed the motion.

B **POLLOCK, B.**—The prisoner Ganz has been brought before this court upon habeas corpus, and on the argument before us Ganz's counsel has presented to us all the points that could be urged why Ganz is entitled to his discharge.

C Two points which were prominent in counsel's argument certainly deserve the consideration of this court, because they involve questions of general principles affecting the liberty of the subject. The first of these points is this. It is said that Ganz is not subject to the extradition treaty existing between this country and the Netherlands, by reason of his being not a domiciled subject of that country. That was put before us in two ways. It was put before us in the first instance by evidence which had been already given before the magistrate of his having been a naturalised subject of the United States. That evidence is now before us.

D It has, however, also been supplemented by an affidavit which for this purpose we admit, evidently by Ganz himself, stating that not merely has he been naturalised in the United States, but that also there is no reason to believe he was born in the Netherlands. On the contrary, he says he has reason to believe he was born in a city in Hungary. Therefore, it is said that the extradition treaty between this country and the Netherlands cannot be made to apply in such way as to render E him liable to be given up to the government of the Netherlands.

F This is a matter which depends not merely upon the English statute, but also on the treaty which exists between this country and the government of the Netherlands respecting this matter. Before I allude to that treaty, I will merely say that the leading principle which underlies all questions of nationality as applied to crime committed within any particular country is this. Whatever rights, civil or G otherwise, a man may have which may be affected by his status and his domicil, it is, and must be, perfectly clear by the law of every nation that each person who is within the jurisdiction of a country in which he commits a crime is subject to that jurisdiction, otherwise the criminal law could not be administered according to any civilised method. That has been the law from all time; it is recognised by the earliest writers upon civil law; it has been adopted again and again, and alluded to both in treaties and in dealings between this country and other countries of Europe, and is to be found stated in the law books and cases in which this matter has been discussed. Subject to that general rule, we must construe this treaty.

H Our attention was called by the Attorney-General to the very general form in which the first and third articles of the treaty are framed. Article 1 of the treaty provides for the mutual delivery up of persons accused or convicted of certain crimes. Here it is, according to all rules of law and diplomacy, that you would expect to find any limitation on the status of the persons who are to be given up. Here not only are the most general words "any persons" used, but the article goes on and refers to their being persons who are accused or convicted of crime I within the jurisdiction of the requiring party, clearly showing that the definition of a person to be delivered up is any person who commits a crime which is specified in the later article within the jurisdiction of the requiring party. When we get to art. 3, there is an express definition of what is meant by the word "subject," which is made to include not only

"naturalised citizens of the country, but also such foreigners as, according to the laws of either of the contracting parties, are assimilated to subjects, as well as such foreigners who, being domiciled in the country, and having married a citizen thereof, have one or more children by that marriage born there."

The first part tends to show that the person who is assimilated to a subject must be so in respect to the subject-matter with which the court is dealing in the criminal law. It is clear that a person who commits a crime within a particular territory, and is for all purposes connected with that crime, is assimilated to a subject. The only other article to which it is necessary to refer, viz., art. 11, and the single word which gives any assistance to his argument, is this. After providing how a person

“shall be discharged as well in the United Kingdom as in the Netherlands, if within fourteen days a requisition shall not have been made,”

the article says, “for his surrender by the diplomatic agent of his country.” I do not think there is any great stretching the meaning of the word “his” to say that “his country” means that country which he is in for the purposes of the criminal law administered there, and also for the purposes of this treaty. If you ask the question: What is the country of this criminal?, it is the country in which he committed the crime. I do not feel in any way pressed by this objection, nor should I have thought it necessary to call on the Attorney-General for any answer to it except that it is a matter of general importance for us as well as for other countries that this matter should be thoroughly understood.

The next point is a more technical one, but still not less important when we are dealing with the liberty of the subject, and that depends, not upon the treaty, but upon the true construction of the domestic statute under which we are acting while the prisoner is here in England, and by which all our English procedure must be governed. The objection raised was this, and it was an objection certainly at first sight entitled to some weight. It was said that there was no proper warrant of arrest produced before the magistrate who was called upon to detain and imprison for the time Ganz. That is a matter of great importance, essential to a person upon all ordinary principles of justice. A person when arrested in a foreign country would be entitled to know in respect of what crime or offence he is arrested; therefore it is a careful provision made in the statute for the protection of persons charged that the warrant authorising the arrest should be produced. I cannot, however, help thinking that there has been a little confusion of thought on this subject, in supposing that any effect was intended to be given by this statute to a warrant drawn up in a foreign country. I can only say for myself, and I think it will be echoed by everybody who has thought of how the laws are passed in this country, and the jealousy with which the interference of any foreign power in this country would be treated, it never could have been intended or contemplated that any of the Extradition Acts should give power or currency to any foreign warrant within this kingdom.

What was intended was this. To establish machinery at the cost of the liberty of the subject, in which we were interested with reference to our own subjects in other countries, as well as to the subjects of other countries when they were here, whereby, if it could be shown to any properly constituted tribunal of this country that a person had committed an offence in another country, and then had come here to escape the ends of justice, evidence should be given before a magistrate here, who upon that evidence should commit the prisoner until there was an opportunity of handing him over to the proper authorities of his country. Looking at the statute in that light we need now only see what precautions the legislature laid down as preliminary to the exercise of the jurisdiction of the magistrate in this country. It seems to me that everything in the present case was done in the most strict form, and that there was no point of time at which the prisoner was not being dealt with in accordance with the most rigid compliance with the provisions of the statute.

This point depends upon the meaning of the word “warrant” in s. 10 of the Extradition Act, 1870. By that section:

“In the case of a fugitive criminal accused of an extradition crime, if the foreign warrant authorising the arrest of such criminal is duly authenticated,

A and such evidence is produced as . . . would . . . justify the committal for trial of the prisoner if the crime of which he is accused had been committed in England the police magistrate shall commit him to prison . . ."

What, then, is this "foreign warrant"? If the interpretation section [s. 26] is looked at, it is found that

B "The term 'warrant', in the case of any foreign state, includes any judicial document authorising the arrest of a person accused or convicted of crime."

Therefore, it is upon the production, not of a warrant of a foreign power according to the technical rules of English law, but of any judicial document authorising the arrest of a person accused of a crime. We have before us this document in the shape of a copy of a decree of a foreign court. It begins by reciting what
C had been done by an inferior tribunal which had come to the conclusion that there had not been sufficient evidence to establish any charge against Ganz. Having reviewed the different allegations with great minuteness (even to putting down the names of the persons who are alleged to have been defrauded by Ganz, and the amounts of which they are said to have been defrauded) it goes on to say:

D "Taking into consideration that these acts are punishable by art. 405 of the Penal Code, [having] seen the arts. 88 and 89 of the Law Book of Demands for punishment. That the before-mentioned report of the Court of Arrondissement, at Rotterdam, will not be accepted. Authorised proceedings with order for arrest against Bernhardt Wyprecht (calling himself so), last living at Rotterdam, thence absconded. Done at the Hague on Nov. 21, 1881, by the following gentlemen."

E Then follow the signatures of the president, and others described as, councillors of the court, and of the actuary. It is impossible to say that that is not a judicial document authorising the arrest of this person.

Then comes the further question. This being in existence at the Hague, what evidence have we got of it here in England? It is this. We have a copy of it
F endorsed as follows: "Delivered on demand of the O. M., the actuary of the courts of justice at the Hague." This is signed again by certain authorities. Lastly, come the words, "The Hague, Dec. 2, 1881. For the Minister of Justice, the Secretary-General, (signed) Clamm." It is sealed with the seal of the Ministry of Justice. Is that copy so identified and attested that it can be received under this statute? That depends upon s. 15. It is common knowledge in dealing with a
G matter of this kind that the prosecution would not produce before the police magistrate in London all the original documents of foreign countries where they were the judgments of courts, and, accordingly, in s. 15 the use of copies is provided for. By s. 26 of the Act in foreign warrants are included foreign judicial documents authorising the arrest of a person accused, and s. 15 provides that a foreign warrant shall be deemed duly authenticated for the purposes of the Act if, inter alia, it purports to be signed by a judge, magistrate, or officer of the State
H where the same was issued. A little later on there is a more general provision. In every case the warrants—including the judicial documents—are authenticated by the oath of some witness, or by being sealed with the official seal of the Minister of Justice or some other minister of state. This particular document is sealed with the seal of the Minister of State for the department of Justice. It appears to
I me, therefore, that in this case all the provisions of the statute have been clearly complied with. In coming to this conclusion I do not think we have in the least degree extended either technically or in spirit the provisions of this Act, which are most carefully set round all persons who are charged under it with every precaution which is requisite and necessary for the maintenance of the liberty of the subject.

MANISTY, J.—I am of the same opinion. It seems to me, looking at the Extradition Act, 1870, and the treaty of 1874, that there are two essential requisites before the fugitive criminal can be extradited. The first essential requisite is a requisition for extradition by the diplomatic representative of the foreign State.

That is necessary for giving effect to all the subsequent proceedings; but that requisition may follow instead of precede the steps taken to arrest the fugitive criminal. Another is that the magistrate before whom the matter is brought should be satisfied by evidence that a crime has been committed, that it is one specified in the treaty, and that the evidence is such as would convict the criminal in this country. No doubt in the treaty it is stated that the requisition for the extradition must be accompanied by a warrant of arrest (that is, the requisition issued by the competent authority of the state requiring the extradition). But if an information is laid before any justice of the peace or a police magistrate that the accused is a fugitive criminal and has been convicted of a crime within the power of such magistrate, the latter may issue his warrant and arrest the criminal before any requisition is produced. That, I think, throws a good deal of light on the subject, and shows that, with reference to the decision which the court arrived at when they held, as they did in a case to which I will advert presently, the Secretary of State may waive certain conditions, because, by s. 6 of the Act of 1870:

"Where this Act applies in the case of a foreign State, every fugitive criminal of that State who is in or suspected of being in any part of Her Majesty's dominions, or that part which is specified in the order applying this Act (as the case may be), shall be liable to be apprehended and surrendered in manner provided by this Act . . ."

What is the manner provided by this Act? Section 7 enacts:

"A requisition for the surrender of a fugitive criminal of any foreign State . . . shall be made to a Secretary of State by some person recognised by the Secretary of State as a diplomatic representative of that foreign State. A Secretary of State may, by order under his hand and seal, signify to a police magistrate that such requisition has been made, and require him to issue his warrant for the apprehension of a fugitive criminal."

That is a case where a requisition has been received and acted upon by the Secretary of State of this country. Now comes a most important section, viz., s. 8:

"A warrant for the apprehension of a fugitive criminal, whether accused or convicted of crime, who is in or suspected of being in the United Kingdom, may be issued—(1) By a police magistrate on the receipt of the said order of the Secretary of State, and on such evidence as would in his opinion justify the issue of the warrant if the crime had been committed or the criminal convicted in England."

Then follows an important provision that a warrant may be issued

"(2) By a police magistrate or any justice of the peace in any part of the United Kingdom"

not upon the receipt of an order from the Secretary of State, but

"on such information or complaint and such evidence or after such proceedings as would in the opinion of the person issuing the warrant justify the issue of a warrant if the crime had been committed or the criminal convicted in that part of the United Kingdom in which he exercises jurisdiction"

without any intimation from the Secretary of State, or any requisition to the Secretary of State. Certain guards are then provided to protect the criminal:

"Any person issuing a warrant under this section without an order from a Secretary of State shall forthwith send a report of the fact of such issue together with the evidence and information or complaints . . . to a Secretary of State, who may, if he think fit, order the warrant to be cancelled, and the person who has been apprehended on the warrant to be discharged."

Further:

"A fugitive criminal, when apprehended on a warrant issued without the order of a Secretary of State, shall be brought before some person having power to

A issue a warrant under this section, who shall by warrant order him to be brought before a police magistrate. A fugitive criminal apprehended on a warrant issued without the order of a Secretary of State shall be discharged by the police magistrate, unless the police magistrate, within such reasonable time as, with reference to the circumstances of the case, he may fix, receives from a Secretary of State an order signifying that a requisition has been made for the
B surrender of such criminal."

It will be found that he is to be discharged unless within fourteen days a requisition is received.

C In my opinion, therefore, a requisition is an essential element in the proceedings under the Extradition Act, 1870. The Act does not say that the requisition must precede the issuing of a warrant by a magistrate, but it must ultimately come, otherwise there is no power to deliver up the prisoner. That, I think may well account for the decision in *Re Counhaye* (1). It was objected there that some of the conditions had not been complied with; but BLACKBURN, J., says (L.R. 8 Q.B. at p. 416):

D "As to the objection that the terms of the treaty have not been complied with, and the order of the Secretary of State ought, therefore, not to have been made, I do not think that affects the magistrate's jurisdiction; if the conditions of the treaty have not been complied with the Secretary of State might have refused to order a magistrate to proceed, but these conditions are not in the Act of Parliament; and the Secretary of State having made an order, and the magistrate having acted under it, all we have to do is to look at the Act to see
E whether he had jurisdiction under it."

We are, I believe, also all agreed that s. 14 makes depositions properly authenticated evidence that may be taken in the absence of the person accused, and for good reason, because, although the requisition must sooner or later come by art. 11 of the treaty, the fugitive criminal is to be discharged as well in the United Kingdom as in the Netherlands if within fourteen days a requisition shall not have
F been made for his surrender. That is, after the arrest. So that both in the treaty and in the Act of Parliament that is the course of procedure. The fugitive, though he may be arrested without the interference of the Secretary of State, or by the interference of the Secretary of State after a requisition has been received, may be arrested before that, although he must be discharged if within fourteen days a requisition is not received by the Secretary of State. The Act of Parliament
G and the treaty are at one on the subject. If the crime which has been committed comes within the treaty, and the evidence satisfies the magistrate that it is a crime which would have been punishable in England, he may issue a warrant, but the delivering up of the criminal depends upon whether or not a requisition is made by the diplomatic representative of the foreign State.

H I am clearly of opinion that the document here objected to came within the meaning of a warrant in s. 21 of the Extradition Act. It was an order of the Court of Justice at the Hague, and bore the official seal of the court. It has been properly attested, and is an original document and no copy at all. We are of opinion that all proper forms have been complied with.

Rule discharged.

I Solicitors: *Greenfield & Abbott; Solicitor to the Treasury.*

[Reported by W. P. EVERSLEY, Esq., Barrister-at-Law.]

SCOTT v. SAMPSON

[QUEEN'S BENCH DIVISION (Mathew and Cave, JJ.), March 1, 20, 1882]

[Reported 8 Q.B.D. 491; 51 L.J.Q.B. 380; 46 L.T. 412;
46 J.P. 408; 30 W.R. 541]*Libel—Damages—Mitigation—Proof of plaintiff's general bad character—Particular acts of misconduct—Rumours to same effect as words complained of.*

In an action for libel, for the purpose of reducing the damages, evidence of rumours circulating before the publication of the libel that the plaintiff had done what was charged in the libel, and evidence of particular acts of misconduct on the part of the plaintiff tending to show his character and disposition, is not admissible, but evidence of general bad character is admissible as being material in mitigation of damages.

Notes. By R.S.C. (Revision), 1962, Ord. 82, r. 7, in actions for defamation in which the defendant does not by his defence assert the truth of the statement complained of, the defendant shall not be entitled on the trial to give evidence in chief, with a view to mitigation of damages, as to the circumstances under which the libel or slander was published, or as to the character of the plaintiff, without the leave of the judge, unless seven days at least before the trial, he furnishes particulars to the plaintiff of the matters as to which he intends to give evidence. In *Mangena v. Wright*, [1909] 2 K.B. 958, it was held that this rule did not alter the common law as laid down in the present case, *Scott v. Sampson*.

Followed: *Wood v. Cox* (1888), 4 T.L.R. 652. Approved: *Hobbs v. C. T. Tinling & Co.*, *Hobbs v. Nottingham Journal, Ltd.*, [1929] All E.R. Rep. 33. Applied: *D. and L. Caterers, Ltd. and Jackson v. D'Ajou*, [1945] 1 All E.R. 563. Approved: *Plato Films, Ltd. v. Speidel*, [1961] 1 All E.R. 876. Referred to: *Wood v. Durham* (1888), 21 Q.B.D. 501; *Scaife v. Kemp* (1892), 61 L.J.Q.B. 515; *Mangena v. Wright*, [1909] 2 K.B. 958; *Waters v. Sunday Pictorial Newspapers, Ltd.*, [1961] 2 All E.R. 758; *Associated Newspapers, Ltd. v. Dingle*, [1962] 2 All E.R. 737.

As to evidence in mitigation of damages in a libel action, see 24 HALSBURY'S STATUTES (3rd Edn.) 116-119; and for cases see 32 DIGEST 166 et seq.

Cases referred to:

- (1) *Earl of Leicester v. Walter* (1809), 2 Camp. 251, N.P.; 32 Digest 168, 2057.
- (2) *Knobell v. Fuller* (1797), Peake, Add. Cas. 139, N.P.; 32 Digest 168, 2056.
- (3) *Eamer v. Merle* (circa 1808), cited in Camp. at p. 253, N.P.; 32 Digest 167, 2048.
- (4) *Kirkman v. Oxley* (undated), Phillips on Evidence, 4th Edn., 189, n.; Starkie on Evidence 3rd Edn., Vol. 2, 306, n.; 32 Digest 166, 2029.
- (5) *Williams v. Callender* (1810), Holt, N.P. 307, N.P.; 32 Digest 167, 2031.
- (6) — *v. Moor* (1813), 1 M. & S. 284; 105 E.R. 106; 32 Digest 167, 2049.
- (7) *Newsam v. Carr* (1817), 2 Stark. 69, N.P.; 33 Digest (Repl.) 437, 570.
- (8) *Waithman v. Weaver* (1822), 11 Price, 257 n.; Dow. & Ry. N.P. 10; 147 E.R. 466; 32 Digest 169, 2068.
- (9) *Jones v. Stevens* (1822), 11 Price, 235; 147 E.R. 458; 32 Digest 92, 1236.
- (10) *Ellershaw v. Robinson* (1824), Starkie on Slander and Libel, 3rd Edn., 538; 2 Starkie on Evidence, 3rd Edn., 641, n.; 32 Digest 167, 2033.
- (11) *Mawby v. Barber* (1826), Starkie on Slander and Libel, 3rd Edn., 538, n.; 2 Starkie on Evidence, 3rd Edn., 642, n.
- (12) *Moore v. Oastler* (1836), 2 Starkie on Slander and Libel, 3rd Edn., 538, n.; 2 Starkie on Evidence, 3rd Edn., 642, n.; 32 Digest 167, 2035.
- (13) *Hardy v. Alexander* (1837), Starkie on Slander and Libel, 3rd Edn., 538, n.; 32 Digest 167, 2036.
- (14) *Richards v. Richards* (1844), 2 Mood. & R. 557, N.P.; 32 Digest 168, 2052.
- (15) *Thompson v. Nye* (1850), 16 Q.B. 175; 20 L.J.Q.B. 85; 16 L.T.O.S. 234; 15 Jur. 285; 117 E.R. 846; 32 Digest 168, 2053.

- A (16) *Bracegirdle v. Bailey* (1859), 1 F. & F. 536, N.P.; 32 Digest 167, 2037.
 (17) *Bell v. Parke* (1860), 11 I.C.L.R. 413; 32 Digest 166, g.

Rule Nisi for the new trial of an action tried by LORD COLERIDGE, C.J., with a special jury, and brought against the defendant as proprietor and editor of "The Referee," for publishing in that newspaper a libel imputing to the plaintiff that he had extorted £500 from one Admiral Carr Glyn by threatening to make public certain matter defamatory of the character of an actress who was then dead.

- B In support of the plaintiff's case the Admiral was called, and denied that he had parted with the £500 for the reason imputed in the libel, stating that the plaintiff had simply borrowed the money from him as a friend, and in this he was corroborated by the plaintiff, who was called by the defendant as his witness.
 C The defence set up was that the words complained of were true. For the defence evidence of rumours before the publication of the libel to the effect that the plaintiff had been guilty of the misconduct imputed to him, and also of previous acts of the plaintiff which were said to have been of a discreditable character, was tendered and rejected by the Lord Chief Justice. The jury found for the plaintiff, and awarded him £1,500 damages. A rule for the new trial having been obtained by the defendant on the ground of the improper rejection of evidence,

- D *Charles Russell, Q.C.*, and *F. O. Crump* showed cause.
Willis, Q.C., and *Macdonell (Moloney with them)* supported the rule.

Cur. adv. vult.

Mar. 20, 1882. The following judgments were read.

- E **MATHEW, J.**—This was an action brought for publishing in a paper called "The Referee" a libel imputing to the plaintiff that, by threatening to publish in a journal called "The Theatre" defamatory statements with reference to a deceased actress, he had extorted a sum of £500 from Admiral Glyn. The case was tried before the Lord Chief Justice and a special jury, when the defence set up was that the alleged libel was true. The jury returned a verdict for the plaintiff, damages
 F £1,500. A rule was afterwards obtained to set the verdict aside, on the ground that the Chief Justice had refused to admit evidence of rumours, before the publication of the libel, that the plaintiff had been guilty of the misconduct imputed to him, and also had declined to permit the defendant to give evidence of previous acts of the plaintiff, which were said to have been of a discreditable character.

- G It was urged for the defendant, upon the argument of the rule, that, even upon the assumption that the libel in question was false and malicious, it was open to the defendant to attack the character of the plaintiff with a view to reducing the damages. This, it was said, might be accomplished either by calling witnesses to show that before the libel was published they had been told that the plaintiff was guilty of the misconduct charged against him, or by giving evidence of any acts of the plaintiff in the course of his life from which a jury might infer that he was
 H not a person of good conduct or reputation, and, therefore, ought not to be compensated in damages as if he were. The learned counsel for the defendant did not insist upon the right to disparage the character of the plaintiff in reduction of damages as one peculiar to publishers of newspapers, but he claimed it on behalf of all persons who were shown to the satisfaction of a jury to have published what was defamatory and had failed in the attempt to prove a justification. It was
 I treated as a matter too clear for argument that evidence of such rumours about a plaintiff's conduct ought to influence the minds of a jury in reduction of the damages, even though the rumours were admitted to be false; and it was insisted that the defendant might give this evidence in the course of the case, although the effect would be to make it extremely difficult for a jury to discriminate between evidence which might appear to be, but which was not, legitimate proof of the truth of the libel and that which was offered merely in reduction of damages.

If rumours of the truth of the libel might be proved in reduction of damages, it would seem to follow that rumours of any other misconduct on the part of the

plaintiff ought also to be admitted. In each case the jury might infer that the plaintiff was not a person of good character, and the evidence would, therefore, become relevant in mitigation of damages; but this extreme view of the defendant's right was not insisted upon by counsel for the defendant. The contention that, for a similar purpose, any previous misconduct of the plaintiff might be proved was referred to the same supposed rule of law. It was pointed out, on behalf of the plaintiff, that if the defendant were right, a plaintiff in an action for libel would be placed in a position of great difficulty, for he might not be prepared to meet charges of which he would have had no notice, and an unscrupulous or vindictive defendant might thus make use of the action brought to clear the plaintiff's character to heap calumnies upon him as unfounded as the original libel. The result would be that a court of law would be less dreaded by the worst libellers than by their victims, for few men would face a trial at the risk of having to encounter charges which the malicious ingenuity of a defendant might render it almost impossible to meet. Thus a man of the highest reputation in his own country who had been cruelly libelled might be charged with having done something many years before and in another country; while it would be practically out of his power to disprove the charge by any other evidence than his own testimony, and thus the jury might be asked to disbelieve.

It was not disputed by the counsel for the defendant, when pressed with these considerations, that where such evidence was offered on behalf of the defendant it might be reasonable to permit the plaintiff to call witnesses to contradict the witnesses for the defendant; and, if the plaintiff were not able to do so at once, it was pointed out that the court possesses a power to adjourn any trial in order that further evidence might be obtained, and that this power would doubtless, in a proper case, be exercised in the plaintiff's favour. When it was pointed out for the plaintiff that such a course must inflict grievous hardship, the counsel for the defendant insisted that considerations of hardship were not admissible in discussing the question, because, as he maintained, the law upon the subject was settled, and must continue to be enforced.

In support of his contention, counsel for the defendant mainly relied on *Earl of Leicester v. Walter* (1), a decision which he asserted was recognised by writers of authority on the subject of defamation, to several of whose works he referred. I have had the advantage of seeing the judgment which my brother CAVE is about to deliver, and I agree with him in the conclusion at which he has arrived after a careful examination of the cases. I think that under our old system of pleading the more weighty authority was in favour of the admissibility of general evidence of bad character, even though no notice were given to the plaintiff of the intention to raise any such issue. I do not think that evidence of rumours that the plaintiff had done what was charged against him in the libel, or of particular acts of misconduct, would have been admissible. But I rest my judgment in this case upon the consideration that the authorities relied upon by the defendant have no application to the pleadings which have been prescribed by the Judicature Acts. Under our new procedure a statement of the material facts upon which the defendant intended to rely ought to have appeared in his pleadings. But there had been no notice upon the statement of defence in this case that evidence would be offered at the trial of the matters with respect to which the ruling of the Lord Chief Justice is complained of; and, on this ground, I am of opinion that the evidence was properly rejected [see R.S.C. (Revision), 1962, Ord. 82, r. 7, referred to in Notes, *supra*].

A further ground upon which the rule was opposed by the plaintiff was that under R.S.C., Ord. 39, even upon the assumption that the evidence should have been admitted, a new trial ought not to be granted unless the defendant could show that some substantial wrong had been done him. The particular acts of misconduct which were sought to be proved at the trial, and with reference to which the evidence was rejected, arose out of the plaintiff's relations with two newspapers, the "Daily Telegraph" and "The Hornet." It was asserted that the plaintiff

A had published in the "Daily Telegraph" in the year 1878 a hostile criticism of an actor with whom it was alleged he had quarrelled. The only information before this court with respect to the article was the statement of counsel that he had read it, and that it was severe. I cannot say upon this information that any substantial wrong was done the defendant within the meaning of Ord. 39 by the rejection of this evidence. With respect to "The Hornet," it was said that the plaintiff had
B instituted, in 1873, a prosecution against that paper, from which he had withdrawn under discreditable circumstances. But this evidence was withdrawn by the defendant at the trial, and I understand it to have been admitted in the course of the argument that there was no such rejection of the evidence by the Lord Chief Justice as amounted to a misdirection. With respect to the rumours which the defendant was prevented from giving in evidence, I may add that I am not
C satisfied that any substantial wrong has been thereby done the defendant, for the defendant was not prepared to show that the rumours were believed. The heavy damages would seem to be due to the vindictive spirit in which the action was defended. For this the jury appear to have thought that the defendant deserved to be punished in an exemplary manner. I see no reason to think that the rejected evidence would have had any effect in inducing the jury to take a more indulgent
D view of the defendant's conduct towards the plaintiff. The rule, therefore, must be discharged.

CAVE, J.—The defendant claims a new trial on the ground that the Lord Chief Justice misdirected the jury in rejecting (i) evidence of the plaintiff's general bad character; (ii) evidence that rumours to the same effect as the libel complained of
E were in general circulation before the publication of the libel. The action was for a libel published by the defendant of the plaintiff alleging that the latter had extorted a sum of £500 from Admiral Carr Glyn, by threatening to publish defamatory matter of Miss Neilson, an actress then lately dead. The questions which were rejected consisted in part of questions put to the plaintiff, who was called by the defendant as his own witness, and in part of questions put to other witnesses called
F by the defendant. The questions put to the plaintiff were directed to prove, first, that being engaged as a theatrical critic on the "Daily Telegraph," he had, after a quarrel with Mr. Vezin, the actor, written for the "Daily Telegraph" a false and dishonest criticism of Mr. Vezin's acting, for the purpose of gratifying his spite against that gentleman; secondly, that he had apologised to other people for libels he had published of them; and, thirdly, that he had taken proceedings for libel
G against a paper called "The Hornet," and in the course of those proceedings had made statements on oath diametrically opposed to those he had made in the witness-box on the then proceeding trial. The questions put to the other witnesses were, first, questions put to Mr. Martin, chief clerk at the Guildhall Police-court, directed to prove what had been sworn by the plaintiff in the course of his proceedings against "The Hornet"; and, secondly, a question put to Mr. Ledger whether
H he had anywhere heard from anyone before the publication of the libel in question a statement about the plaintiff to the same effect as the libel.

As to the questions put to the plaintiff himself, the case is a little complicated from the adoption by the defendant of the very unusual course of calling the plaintiff as his own witness. The consequence of this was that the questions could not, as was admitted, be justified as going to the plaintiff's credit, since the defendant, by
I electing to call him as his own witness, had disabled himself from impeaching his credit. The rule was moved and obtained on the ground that the evidence was admissible in mitigation of damages, but on the argument it was also contended that the evidence was admissible under the plea of justification.

The authorities on the subject consist principally of decisions at nisi prius, some of which are contained in nisi prius reports, while others are to be found only in the shape of short extracts in textbooks, in which last cases the principle underlying the admission of the evidence is not always easy to discover. These decisions relate to the admissibility, first, of evidence of reputation; secondly, evidence of

rumours and suspicions to the same effect as the defamatory matter complained of; and, thirdly, evidence of particular facts tending to show the character and disposition of the plaintiff. The case most often cited is that of *Earl of Leicester v. Walter* (1), decided in 1809, which was an action for a libel in a newspaper alleging that the plaintiff had been guilty of unnatural practices. SIR JAMES MANSFIELD allowed the defendant to call witnesses to prove in mitigation of damages that before the publication of the libel there was a general suspicion of the plaintiff's character and habits; that it was generally rumoured that such a charge had been brought against him, and that his relations and former acquaintances had on this ground ceased to visit him. The learned judge in summing-up told the jury that they would have to consider in assessing the damages whether the reports which had been proved were sufficient to show that the plaintiff could receive little injury, and that in this point of view it did not matter whether the reports were well or ill-founded provided they got into many men's mouths. SIR JAMES MANSFIELD in that case expressed his own dissatisfaction with the arguments adduced in support of the admissibility of the evidence, but yielded to three cases which were cited to him. One was *Knobell v. Fuller* (2), where EYRE, C.J., held that the defendant may on the general issue prove in mitigation of damages such facts and circumstances as show a ground of suspicion not amounting to actual proof of the plaintiff's guilt. The second was *Eamer v. Merle* (3), where LORD ELLENBOROUGH, in an action for words imputing insolvency, permitted the defendant to prove that at the time there were rumours in circulation that the plaintiff's acceptances were dishonoured. The third was an anonymous case, in which LE BLANC, J., was stated to have received evidence under the general issue that the plaintiff had been guilty of attempts to commit the crime which the defendant had imputed to him.

In *Eamer v. Merle* (3) the evidence admitted fell under the second of the above heads, while in *Knobell v. Fuller* (2) and the anonymous case the evidence was admitted on the principle that facts not amounting to a complete justification might, under the plea of not guilty, be proved in mitigation of damages as in some way excusing the defendant. This principle has long been exploded, as it is obvious that it was impossible in practice to draw the line between facts amounting to suspicion only and facts amounting to a justification. In *Earl of Leicester v. Walter* (1) there seems to have been some confusion between evidence of general reputation and evidence of rumours and suspicions which may account for SIR JAMES MANSFIELD's doubts as to the admissibility of the evidence.

In *Kirkman v. Oxley* (4), the date of which I have not been able to ascertain precisely, HEATH, J., in an action for slander, allowed the defendant to go into evidence of the plaintiff's bad character in mitigation of damages. Here the evidence admitted would seem to fall under the first head. In *Williams v. Callender* (5), decided in 1810, LORD ELLENBOROUGH held that, in libel, the defendant might give in evidence somewhat of the real character of the plaintiff, and show that it was not unblemished and entire; and in this case again the evidence appears to range itself under the first head. In — v. *Moor* (6), decided in 1813, the question came before a court in banco, consisting of LORD ELLENBOROUGH, C.J., and GROSE and BAILEY, JJ. That was an action for words imputing to the plaintiff unnatural practices, and the declaration alleged that the plaintiff had never been suspected to have been guilty of the misconduct alleged, and claimed general damages. GROSE, J., allowed the witness who proved the words to be asked on cross-examination whether he had not heard reports in the neighbourhood that the plaintiff had been guilty of similar practices. This was done upon the authority of *Earl of Leicester v. Walter* (1), and on the ground that it was evidence to contradict the plaintiff's allegation that he was of good fame, and that the speaking of the words occasioned the injury to it, whereupon the plaintiff elected to be nonsuited. Upon motion for a new trial the rule was refused on the ground that a person of disparaged fame is not entitled to the same measure of damages with one whose character is unblemished, and that it was competent to show that by evidence. In this case the evidence fell under the first head.

A In *Newsam v. Carr* (7), decided in 1817, which was an action for malicious prosecution, Wood, B., refused to allow a witness to be asked whether he had not searched the plaintiff's house upon a former occasion, and whether he was not a person of suspicious character, but expressed an opinion that such evidence was admissible in slander in mitigation of damages. In *Waithman v. Weaver* (8), decided in 1822, which was an action for a libel in attributing to the plaintiff that having sold two shawls he had re-purchased them the next day from a man of suspicious character at a much lower price, ABBOTT, C.J., expressed a doubt whether evidence was admissible that rumours were prevalent at the time of the publication of the libel to the effect of the facts there stated, and in deference to the judge's doubt the evidence was withdrawn. The evidence here appears to fall under the second head. In *Jones v. Stevens* (9), which was an action for a libel on the plaintiff in the way of his profession of an attorney, the judge, at the trial, had rejected evidence that the plaintiff was of general bad character and repute in his practice and profession of an attorney. On a rule for a new trial the evidence was held inadmissible on the ground that it would allow the defendant to impeach all the transactions of the plaintiff's life, and throw on him the difficulty of showing a uniform propriety of conduct during all his existence. Looking at the reasons given by the learned judges, it would almost appear that they regarded the evidence tendered in that case as evidence of particular facts tending to show the plaintiff's disposition, or evidence under the third of the heads given above. Although this case was decided by a court in banco in 1822 it seems to have attracted but little attention, and does not appear to have been cited in any of the five cases next following.

E In *Ellershaw v. Robinson* (10), decided in 1824, an action for words imputing adultery to the plaintiff, a widow, HOLROYD, J., held that it was competent to the defendant to go into general evidence to impeach the plaintiff's general character for chastity. So in *Mawby v. Barber* (11) decided in 1826, LORD TENTERDEN, C.J., admitted general evidence of the plaintiff's bad character; and in *Moore v. Oastler* (12), decided in 1836, LORD DENMAN, C.J., did the same, after consulting PARKE, B. A similar course was adopted by COLTMAN, J., in *Hardy v. Alexander* (13), decided in 1837; but CRESSWELL, J., in *Richards v. Richards* (14), stated from his own recollection that in that case the evidence was received without opposition. In all of these last four cases the evidence admitted fell under the first head.

G In *Richards v. Richards* (14), decided in 1844, which was an action of slander for imputing to the plaintiff that he had grossly ill-treated a woman, CRESSWELL, J., after consulting WIGHTMAN, J., allowed the defendant to cross-examine the plaintiff's witnesses for the purpose of showing that the supposed misconduct of the plaintiff had been a frequent topic of conversation among those who were employed by the plaintiff in his business, and was commonly rumoured in the town in which the plaintiff resided before the conversation which was the subject of the action, H for the purpose of showing that the defendant was at all events not the inventor of the slander, and that the injury arising from the slander could not be wholly ascribed to him. In this case the evidence would seem to fall under the second head. In *Thompson v. Nye* (15), decided in 1850, which was an action for words imputing unnatural practices, it was held that a witness could not be asked generally whether he had heard that the plaintiff was addicted to such practices, the I question being general and not confined to reports existing before the time of the slander. The other judges declined to express an opinion whether the question would have been admissible if limited to rumours in existence before the date of the alleged slander, but COLERIDGE, J., stated that his impression was that evidence of rumours that the plaintiff had been guilty of the conduct imputed to him by the defamatory matters complained of was not admissible. The question in this case was very loosely put, and the evidence which was rejected hardly seems to have amounted to general evidence of reputation. In *Bracegirdle v. Bailey* (16), decided in 1859, which was an action for slander, imputing a forgery, BYLES, J., after

consulting WILLES, J., held that the plaintiff, not having been examined in chief, could not in mitigation of damages be cross-examined as to his past conduct and life. The evidence here rejected would seem to fall under the third head as evidence of particular facts tending to show the disposition of the plaintiff.

In *Bell v. Parke* (17) decided in 1860, which was an action of slander for imputing to the plaintiff that he had attempted to steal a gold chain, the judge at the trial had rejected evidence of rumours that the plaintiff had committed the act imputed to him by the slander, which was tendered in mitigation of damages. Upon the argument of a conditional order for a new trial, PICOTT, C.B., was of opinion that not only could evidence of general reputation of general bad character, or of habitual vice, or of habitual misconduct be adduced, but also what he called general evidence of a general reputation of the particular crime alleged in the imputed slander to have been committed by the plaintiff; but FITZGERALD and HUGHES, BB., were of opinion that the latter class of evidence was not admissible. The evidence rejected in this case seems to have fallen under the second head.

From this review of the authorities it will be seen that there is a considerable conflict of opinion, and before discussing them further it seems desirable to consider the principles underlying them. Speaking generally, the law recognises in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit, and if such false statements are made without lawful excuse, and damage results to the person of whom they are made, he has a right of action. The damage, however, which he has sustained must depend almost entirely on the estimation in which he was previously held. He complains of an injury to his reputation and seeks to recover damages for that injury, and it seems most material that the jury who have to award those damages should know, if the fact is so, that he is a man of no reputation. As is observed in *STARKIE ON EVIDENCE*:

"To deny this would be to decide that a man of the worst character is entitled to the same measure of damages with one of unsullied and unblemished reputation. A reputed thief would be placed on the same footing with the most honourable merchant, a virtuous woman with the most abandoned prostitute. To enable the jury to estimate the probable quantum of injury sustained, a knowledge of the party's previous character is not only material, but seems to be absolutely essential."

It is said that the admission of such evidence will be a hardship upon the plaintiff, who may not be prepared to rebut it, and under the former practice, where the damages could not be pleaded to and general evidence of bad character was allowed to be given under a plea of not guilty, there was something in this objection, which, however, is removed under the present system of pleading which requires that all material facts shall be pleaded, and a plaintiff who has notice that general evidence of bad character will be adduced against him, can have no difficulty whatever, if he is a man of good character, in coming prepared with friends who have known him to prove that his reputation has been good. On principle, therefore, it would seem that general evidence of reputation should be admitted; and on turning to the authorities previously cited, it will be found that it has been admitted in the great majority of those cases, and that its admission has been approved by a great majority of the judges who have expressed an opinion on the subject.

As to the second head of evidence, or evidence of rumours and suspicions to the same effect as the defamatory matter complained of, it would seem that on principle such evidence is not admissible as only indirectly tending to affect the plaintiff's reputation. If these rumours and suspicions have in fact affected the plaintiff's reputation, that may be proved by general evidence of reputation; if they have not affected it, they are not relevant to the issue. To admit evidence of rumours and suspicions is to give anyone who knows nothing whatever of the plaintiff, or who may even have a grudge against him, an opportunity of spreading

A through the means of the publicity attending judicial proceedings, what he may have picked up from the most disreputable sources, and what no man of sense who knows the plaintiff's character would for a moment believe in. Unlike evidence of general reputation, it is particularly difficult for the plaintiff to meet and rebut such evidence; for all that those who know him best can say is, that they have not heard anything of these rumours. Moreover, it may be that it is the defendant
B himself who has started them.

Turning to the authorities, it will be seen that, while such evidence appears to have been admitted by LORD ELLENBOROUGH, C.J., in *Eamer v. Merle* (3), and by CRESSWELL, J, with the approbation of WIGHTMAN, J., in *Richards v. Richards* (14), and while its admissibility was supported by PIGOTT, C.B., in *Bell v. Parke* (17), it was doubted by ABBOTT, C.J., in *Waithman v. Weaver* (8), and by
C COLERIDGE, J., in *Thompson v. Nye* (15), and it was held inadmissible by FIRZGERALD and HUGHES, BB., in *Bell v. Parke* (17), and by the whole Court of Exchequer in *Jones v. Stevens* (9). In *Earl of Leicester v. Walter* (1) evidence of rumours and suspicions was admitted by SIR JAMES MANSFIELD against his own judgment; but in that case it was proposed to prove that the plaintiff's relations and former acquaintances had ceased to visit him on account of these rumours and
D suspicions, so that the evidence would seem really to have amounted to evidence of general reputation. Upon the whole both the weight of authority and principle seem against the admission of such evidence.

As to the third head, or evidence of facts and circumstances tending to show the disposition of the plaintiff, both principle and authority seem equally against its admission. At the most it tends to prove, not that the plaintiff has not, but
E that he ought not to have, a good reputation, and to admit evidence of this kind is in effect, as was said in *Jones v. Stevens* (9), to throw upon the plaintiff the difficulty of showing an uniform propriety of conduct during his whole life. It would give rise to interminable issues which would have but a very remote bearing on the question in dispute, which is, to what extent the reputation which he actually possesses has been damaged by the defamatory matter complained of. Among all
F the cases which have been reviewed there is not one which can be cited in support of the admissibility of this evidence. In *Bracegirdle v. Bailey* (16) such evidence was rejected by BYLES, J., after consulting with WILLES, J.; and in *Jones v. Stevens* (9) the evils attending its admission are eloquently pointed out.

To apply these principles to the cases in hand. In the course of his examination in chief of the plaintiff, counsel for the defendant asked him whether he had used
G his position as a critic of the "Daily Telegraph" to injure or annoy an actor. The witness answered "Never," whereupon a discussion ensued between counsel for the plaintiff and counsel for the defendant as to the admissibility of the question. Ultimately counsel for the defendant proposed to pursue the inquiry further by asking the witness whether, on May 16, 1881, he reviewed in the "Daily Telegraph" Mr. Vezin's appearance as Iago at Drury Lane. The question was objected to,
H and counsel for the defendant supported the question on the ground that it was material to the justification, as showing that the plaintiff had abused his position as a critic for other purposes than that of extorting money, viz., for the purpose of grossly abusing a man he personally disliked. LORD COLERIDGE held, as I think rightly, that the question was not admissible as tending to prove justification, the natural meaning of the libel being that the witness abused his position as a critic
I for the purpose of extorting money. Counsel for the defendant now contends that it was also admissible as evidence tending to show the plaintiff's general bad character. I am of opinion that it falls under the third head of evidence above discussed, viz., evidence of particular facts tending to show the plaintiff's disposition, and is, therefore, inadmissible.

Counsel for the defendant next asked the witness whether he had published libels himself, to which the witness answered: "No; not within my knowledge." Counsel for the plaintiff objected that this was cross-examination to credit. LORD COLERIDGE thereupon said: "It is open to every conceivable objection"; and the

topic was not further pursued. Counsel for the defendant next asked: "Have you apologised for libels?" This question was objected to, and rejected by his Lordship. Counsel, who appears at the time to have acquiesced in this decision, now contends that he should have been allowed to pursue the first question and put the second; but I am clearly of opinion that both were inadmissible on the same grounds as the first question about the article in the "Daily Telegraph." In re-examination the plaintiff was asked whether he took criminal proceedings in 1873 at the Guildhall against "The Hornet," and afterwards stopped those proceedings. This question was objected to as not arising out of the cross-examination, and on counsel's admission that it did not so arise, it was rejected. The rejection of the evidence on this ground was a matter for the discretion of the judge who presided at the trial, and that discretion appears to have been rightly exercised, as the question was clearly inadmissible on the same ground as those already discussed. Counsel for the defendant then called on Mr. Martin, the chief clerk at the Guildhall police-court, to prove what took place at the Guildhall in 1873, when the plaintiff took proceedings against "The Hornet" with a view to show by this, among other instances, what the plaintiff's character was, and that he had been in the habit of libelling persons. This evidence was objected to and rejected, and I think rightly rejected, for the same reason as the former questions.

Lastly, Mr. Ledger was called on behalf of the defendant, and was asked whether he had heard anywhere the story which was the libel in question before he saw it in "The Referee." This question was also objected to and rejected. The form of the question shows, to my mind, very forcibly the injustice of admitting evidence of rumours. The witness was asked whether he had heard the story anywhere, but in the discussion which ensued it was stated that he had heard it in some club. The defendant was charged with having published a false and malicious libel in a newspaper, and it is suggested that he ought to be allowed to call a witness to say that he had previously heard the same story from some one in a club. How can the gossip of some idler in a club be material to the issue in this case? How is it shown that the plaintiff's reputation was in the slightest degree affected by such gossip? And how can the plaintiff meet such evidence as this? The person who repeated the story to Mr. Ledger might, if he were put into the witness-box, be compelled to admit, on cross-examination, that he had himself heard the story from the defendant, or that he had told the story without the slightest ground for it, or be shown to be a person whom no one who knew him would believe for a moment. I hold that the evidence was rightly rejected as falling under the second head of evidence, viz., evidence of rumours and suspicions, discussed above.

I have now gone through the whole of the evidence which was tendered, and, in my opinion, the whole of it was properly rejected. There is, however, still another ground on which, even assuming the evidence to have been material, it was rightly rejected. The defendant proposed to prove certain facts which he alleged were material, but these facts were not stated or referred to in the pleadings as required by R.S.C., Ord. 19, r. 4 [see now Note supra], and it appears to me that on that ground their rejection might have been supported had they been material, which, however, I have said, I think they were not.

Rule discharged.

Solicitors: *Lewis & Lewis; Watson, Sons & Room.*

[Reported by DUNLOP HILL, ESQ., Barrister-at-Law.]

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PATMAN v. HARLAND

[CHANCERY DIVISION (Sir George Jessel, M.R.), May 13, 1881]

[Reported 17 Ch.D. 353; 50 L.J.Ch. 642; 44 L.T. 728;
29 W.R. 707]

B

Sale of Land—Restrictive covenant—Erection of private dwelling-houses only—Subsequent lease of land—No investigation by tenant of landlord's title—Tenant's constructive notice of covenant.

Land was conveyed in fee simple to a purchaser, subject to a restrictive covenant contained in a collateral deed binding the purchaser and his assigns to erect private dwelling-houses only on the land. The land was afterwards leased. The lessee did not investigate the freehold title, and he erected upon the land a corrugated iron building as an art studio which was within the curtilage of a house. The lessee claimed that the lessor had represented that this would be permitted. In an action by the original vendor against the lessee for breach of covenant,

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Held: a lessee had constructive notice of his lessor's title, a doctrine not affected by the Vendor and Purchaser Act, 1874 (repealed), the result being that a lessee who after the Act did not expressly stipulate to see the lessor's title was in the same position as a lessee who previously had expressly bargained not to look into the title; as the lessee had constructive notice of the deed imposing the restrictive covenant, and as the deed necessarily affected the lessor's title, the lessee had constructive notice of its contents notwithstanding any representation of the lessor; accordingly, the lessee was bound by the covenant, and the erection of the studio constituted a breach of it.

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Notes. The Vendor and Purchaser Act, 1874, s. 2, has been replaced by the Law of Property Act, 1925, s. 44 (2). The rule laid down in the present case that an intending lessee was held to have notice of matters appearing on the title for which he was in fact precluded from calling, does not apply where the contract is made after 1925: Law of Property Act, 1925, s. 44 (5). However, as this sub-section is not retrospective, where the lease was made before 1926, a tenant, his successors in title and assigns, are bound by a restrictive covenant which binds the reversion and was imposed before the date of the lease, provided that the tenant would have had notice of the covenant if he had investigated the reversioner's title. Further, this sub-section does not protect an intending lessee or assignee from having notice of any instrument or matter registered under the Land Charges Act, 1925: see the Law of Property Act, 1925, s. 198 (1); nor does it apply in the case of registered land, as the leasehold interest is subject to the encumbrances and other entries appearing on the charges register whether they apply to the leasehold or freehold title: Land Registration Act, 1925, ss. 18 (1), 20, 50 (2), and 52, and *White v. Bijou Mansions, Ltd.*, [1937] 3 All E.R. 269; affirmed, [1938] 1 All E.R. 546. To this extent, the rule in *Patman v. Harland* remains in force.

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Applied: *Nottingham Patent Brick and Tile Co. v. Butler* (1885), 15 Q.B.D. 261. Considered: *Gainsborough v. Watcombe Terra Cotta Clay Co.*, *Dunning v. Gainsborough* (1885), 54 L.J.Ch. 991; *Garnham v. Skipper* (1885), 53 L.T. 940. Applied: *Tritton v. Bankart* (1887), 56 L.T. 306. Considered: *English and Scottish Mercantile Investment Co. v. Brunton*, [1892] 2 Q.B. 700. Applied: *Mogridge v. Clapp*, [1892] 3 Ch. 382; *Spencer v. Bailey* (1893), 69 L.T. 179. Considered: *Imray v. Oakshette*, [1897] 2 Q.B. 218; *Hopper v. Bromet, Raphael, Third Party* (1903), 89 L.T. 37; *Jones v. Lavington*, [1903] 1 K.B. 253. Applied: *Teape v. Douse* (1905), 92 L.T. 319; *Re Nisbet and Potts' Contract*, [1904-7] All E.R.Rep. 865. Distinguished: *Wilkes v. Spooner*, [1911] 2 K.B. 473. Applied: *Re Chafer and Randall's Contract*, [1916-17] All E.R.Rep. 867. Referred to: *London, Chatham and Dover Rail. Co. v. Bull* (1882), 47 L.T. 413; *Leschallas v. Woolf*,

[1908] 1 Ch. 641; *Torbay Hotels v. Jenkins*, [1927] 2 Ch. 225; *White v. Bijou Mansions, Ltd.*, [1937] 3 All E.R. 269.

As to title to leaseholds, see 34 HALSBURY'S LAWS (3rd Edn.) 273-274; as to investigation of landlord's title, see 23 HALSBURY'S LAWS (3rd Edn.) 447-449; as to covenants to use premises as a private dwelling-house, see *ibid.* 623-624; as to liability to observe restrictive covenants binding in equity, see *ibid.* 647-648; as to notice, see 14 HALSBURY'S LAWS (3rd Edn.) 542-549, and 27 HALSBURY'S LAWS (3rd Edn.) 224-226. For cases see 30 DIGEST (Repl.) 418-419. For the Law of Property Act, 1925, ss. 44, 198, see 20 HALSBURY'S STATUTES (2nd Edn.) 519, 821; for the Land Registration Act, 1925, ss. 18, 20, 50 and 52, see *ibid.* 958, 962, 986, and 987; and for the Land Charges Act, 1925, see *ibid.* 1063.

Cases referred to:

- (1) *Jones v. Smith* (1841), 1 Hare, 43; 11 L.J.Ch. 83; 6 Jur. 8; 66 E.R. 943; affirmed (1843), 1 Ph. 244, L.C.; 35 Digest (Repl.) 598, 2727.
- (2) *Wilson v. Hart* (1866), 1 Ch. App. 463; 35 L.J.Ch. 569; 14 L.T. 499; 30 J.P. 582; 12 Jur.N.S. 460; 14 W.R. 748, L.JJ.; 31 Digest (Repl.) 164, 3003.
- (3) *Carter v. Williams* (1870), L.R. 9 Eq. 678; 39 L.J.Ch. 560; 23 L.T. 183; 34 J.P. 468; 18 W.R. 593; 31 Digest (Repl.) 165, 3005.
- (4) *Coles v. Sims* (1854), 5 De G.M. & G. 1; 2 Eq. Rep. 951; 23 L.J.Ch. 258; 22 L.T.O.S. 277; 18 Jur. 683; 2 W.R. 151; 43 E.R. 768, L.JJ.; 40 Digest (Repl.) 345, 2794.
- (5) *Tulk v. Moxhay* (1848), 2 Ph. 774; 1 H. & Tw. 105; 18 L.J.Ch. 83; 13 L.T.O.S. 21; 13 Jur. 89; 41 E.R. 1143, L.C.; 40 Digest (Repl.) 342, 2774.

Also referred to in argument:

Feilden v. Slater (1869), L.R. 7 Eq. 523; 17 W.R. 485; sub nom. *Fielden v. Slater*, 38 L.J.Ch. 379; 20 L.T. 112; 31 Digest (Repl.) 164, 3004.

✓ **Motion** by the plaintiff, J. P. Patman, the former owner of certain land, for an injunction against Harland, the present owner, and Louisa Jane Bennett, the present lessee, defendants, to restrain them from continuing to erect an art studio on the land, and from permitting the same to remain on the land.

By an indenture, dated Oct. 25, 1876, two freehold lots of land, parts of a building estate at South Wimbledon, owned by the plaintiff, J. P. Patman, were conveyed by him in fee to E. Hervé, subject to the conditions and covenants contained in an indenture of even date. The last-mentioned indenture was an indenture made between J. P. Patman and the various purchasers of the building lots, whereby the parties entered into mutual covenants with respect to the user and enjoyment of the whole estate and the portions purchased by them, and by it E. Hervé, for himself, his heirs, executors, administrators, and assigns, covenanted with J. P. Patman, his heirs and assigns, and also with the other purchasers, their heirs and assigns, to observe the several stipulations and conditions contained in the schedule thereto, comprising amongst them a provision that on the lots purchased by him, E. Hervé, private dwelling-houses only should be erected. This indenture was executed by E. Hervé, who afterwards sold his lots to the defendant Harland, and the same were by an indenture, dated June 18, 1878, conveyed to Harland, subject to the covenants and conditions contained in the indenture of Oct. 25, 1876.

Harland erected a private dwelling-house on the lots of land, and by an indenture, dated Mar. 29, 1881, demised the land and house to the defendant, Louisa Jane Bennett, for a term of seven years. The lease contained the usual covenants to repair and deliver up all erections to the lessor at the determination of the term, subject to a proviso that the lessee should be at liberty to erect in the garden belonging to the premises a studio, with necessary rooms connected therewith, of corrugated iron, on a brick foundation, and to remove the same at any time during the continuance of the term, making good any damage occasioned thereby. And in the lease was also contained a covenant by the lessee not to carry on any trade.

A business, or employment on the premises without the consent in writing of the lessor, but to use the premises as a private dwelling-house. There was, however, a proviso that the user of the premises for the purpose of a school for instruction in art or otherwise should not be deemed a breach of any covenant contained in the lease.

The defendant Bennett, who had taken the house for the purposes of an art school for ladies, commenced erecting a corrugated iron building to be used as an art studio in connection with the school, and the plaintiff now moved for an injunction restraining the defendants Harland and Bennett from continuing to erect such art studio, and from permitting the same to remain on the land comprised in the sale by him to E. Hervé. The defendant Bennett and her solicitor, who negotiated the lease, stated that they had no notice of the restrictive covenants contained in the indenture of Oct. 25, 1876.

By the Vendor and Purchaser Act, 1878, s. 2 :

"In the completion of any such contract as aforesaid," [i.e. a contract of sale of land made after Dec. 31, 1874,] "and subject to any stipulation to the contrary in the contract, the obligations and rights of the vendor and purchaser shall be regulated by the following rules; that is to say, [inter alia]

First. Under a contract to grant or assign a term of years, whether derived or to be derived out of a freehold or leasehold estate, the intended lessee or assign shall not be entitled to call for the title to the freehold."

Ince, Q.C., and *Shebbeare* for the plaintiff.

Byrne for the defendant Bennett.

SIR GEORGE JESSEL, M.R.—I must say that on the point of law I hold a very clear opinion, and not the less so because there are dicta to be found in the books which at first sight appear to lead to a different conclusion. I say at first sight, because when carefully examined they do not bear out the argument which has been supposed to be fortified by them.

The first question I have to consider is the notice which a man who takes a lease has of his lessor's title. It has been settled law for more than a century that he has constructive notice of his lessor's title. LORD ELDON treated it something like, I think, seventy years ago, as settled law. The law is that the man who takes a lease is in a similar position as regards constructive notice as a man who buys outright. There could not be any reason for any distinction between the cases of purchasing a fee simple, and taking a lease for 10,000 years. If a man who purchases a fee simple is bound to look into the title in a regular way, so is a man who takes a lease for 10,000 years or for 100 years, or who takes any lease at all; a lessee is bound to make reasonable inquiry into the lessor's title. Well, what is reasonable inquiry? It has been held that he is to take the usual title, whatever the usual title may be. In this case the lessor's title began in 1878, and if the lessee had only asked to see the conveyance to the lessor, that is, without going back forty years, the lessee would have found that it was subject to this restrictive covenant; because the grantor in 1876 took care to convey the land subject to the covenants, though the covenants themselves were in a separate deed.

It is not to be supposed that I am going to restrict the doctrine to looking at a single conveyance; not at all, because that would be to destroy it altogether. He has constructive notice of the whole title. If the vendor had a conveyance made to him the day before, that would not be enough; the purchaser must ask for the conveyance to his vendor, and a fair and reasonable deduction of title. In this case, as I said before, the actual conveyance shows it, but if it had not shown it I should have come to the same conclusion, but the conveyance of 1876 showed it, and that must have been apparent on any investigation. The result, therefore, is that the lessee had constructive notice.

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It has been argued before me that if the lessee having this constructive notice were told by the lessor that there was no restrictive covenant that that representation would in equity do away with the effect of constructive notice. I entirely dissent from that proposition. Constructive notice of a deed is constructive notice of its contents, subject to what I am going to say in a moment. If, therefore, you have notice of a deed relating to the title, and forming part of the chain of title, you have notice of the contents of that deed, and it is no excuse for not asking to look at it that you are told that the deed contains nothing which it is necessary for you to look at. Otherwise, in every case you might be satisfied with a statement of the contents of the deed without going to look at it. Of course there may be cases where the deed cannot be got at, or for some other reason where, with all the exercise of prudence in the world, you cannot see it, and then there may be no constructive notice, but that is another question. Where you know of the deed, it is no answer at all to be told that it does not prejudicially affect your title, for if you know that it at all affects the title you are bound by its contents. B C

There is a class of cases, of which I think *Jones v. Smith* (1) is the best known example, where it was held that you are protected where you have notice of a deed which may or may not affect the title, and you are told at the same time that it does not affect the title. *Jones v. Smith* (1) itself is a good illustration. D
Supposing you are buying land of a married man, and you are told that he made a settlement on his marriage, and you are told at the same time that the deed does not affect the land in question, you have no constructive notice of it, because, although you know there is a settlement, you are told it does not affect the land. E
If every marriage settlement necessarily affected all a man's land, then you would have constructive notice; but, as a settlement may not relate to his land at all, or only to some other portions of it, the mere fact of your having heard of a settlement does not give you constructive notice of its contents if you are told at the same time that it does not affect the land. I take it that, under the modern practice, you are not even bound to inquire, because the abstract furnished you is an abstract of every document affecting the land, and although you have heard F
that the man made a marriage settlement, you are not entitled to assume that the solicitor improperly suppressed the deed of settlement. I take it, if you asked for it, he might say that it is nothing to you; but *Jones v. Smith* (1) and that line of cases has no bearing at all on a case where a person knows that the deed does affect the land, and the question as to what extent the deed affects the land is to be ascertained merely from looking at the deed. There you have no right to G
rely on the statement of somebody else that the deed you can look at does not contain something which it does contain.

I have said so much about it because there is no doubt one observation let fall by TURNER, L.J., in *Wilson v. Hart* (2), which does to some extent countenance the contrary doctrine. As regards *Carter v. Williams* (3), before JAMES, V.-C., that case, as I read it, entirely confirms my view. It is not fair to criticise the words used by the Vice-Chancellor; but, when you look at the argument addressed to him, the objection there was that the covenant was contained in a collateral deed, and was not recited. That was the argument in *Coles v. Sims* (4). The Vice-Chancellor says that the covenant is contained in a separate deed; but what he means is this, that it is not noticed either by way of recital or by being referred to in the deed of conveyance, so that a person might get a complete chain of title without any notice of that deed. That is what he means, and, that being so, of course if the tenant had asked for a title and got it, he would not by any means necessarily have got that information. The solicitor ought to have put it on the title if he knew of it. The Vice-Chancellor says in effect that as the deed of covenant is not recited in the deed of title, he will not hold that the tenant has constructive notice. Therefore, it appears to me that his decision rather follows out the doctrine of *Jones v. Smith* (1), and by no means affects the other cases H I

A cited, where the document in question affecting the title is actually recited or otherwise noticed in such a way on the necessary title deeds.

Nobody could have accepted the title here without having notice of the contents of the deed of covenant of even date. I am, therefore, of opinion that the constructive notice which the lessee obtained in this case would not have been done away with by the most express notice obtained on the part of the lessor that there
B was no restrictive covenant. I must say that I am not satisfied in this case that there was any such representation. What appears to have occurred was this: The lessor did not, of course, show his title; but he was aware that the lessee intended to use this property in the way she attempts to use it, and there was a covenant which excepted such user from the covenant in the lease, and consequently a person reading that lease would have assumed, and fairly assumed,
C that she had a right to use it in the way mentioned in the exception from the covenant. In that way there was a representation—an indirect representation—and there were in addition to that some further words in the lease which tended in the same direction. Therefore, I think that there was sufficient evidence to put the lessee off her guard. I may say so, seeing that she had, as I say, constructive notice which no representation could have destroyed the effect of.

D I only wish to notice one other point. It was said that the new law as to the extent of title to be required by purchasers alters the rule. The fact is, it does not at all. All the Vendors and Purchasers Act does is this: it makes an express stipulation necessary to obtain a title, whereas formerly the rule was the other way, that without express stipulation the lessee had a right to the title. Formerly, if the lessee had expressly stipulated not to look into the title, that would not
E have protected him from constructive notice. That is the right meaning of the doctrine. You may bargain to shut your eyes, but if you do wilfully shut your eyes, whether as a bargain or not, you must be held liable to the consequences of shutting your eyes. If, therefore, the lessee had formerly expressly bargained to take a lease without looking into the lessor's title, the lessee would have been bound; and now if the lessee says nothing, it is exactly the same as if the lessee
F had bargained expressly not to look into the lessor's title. It seems to me, therefore, that in this respect the law is unaltered, and, therefore, that the doctrine of *Tulk v. Moxhay* (5) and that line of cases applies.

The lessee being bound by the covenant, the only remaining question is, what is the covenant, and whether there has been a breach of it? The covenant is not well worded, and will not perhaps carry out the full intention of the covenantee,
G but it is a covenant that they "shall erect private dwelling-houses only" on the piece of land. The lessee is building something which it would be rather absurd for any one to describe as a private dwelling-house, and I am glad to see that nobody does so describe it; it is described in the affidavit as a corrugated iron building, not in any way connected with the dwelling-house, or so situated at present as
H possibly to be used for a private dwelling-house. The lessee says it has been built as an addition to the house which it is intended to be used as an art studio for ladies. There is no question that it has been erected for that purpose, and not for a private dwelling-house. It has been argued that this building, being within the same curtilage as the house, must be treated as appurtenant to the dwelling-house, and forming part of it, in the same way as a billiard-room or smoking room might be. But this is a thing of a totally different character. It could not be
I suggested that having built a private dwelling-house with a garden, if you then built a church or chapel at the other end of the garden, that church or chapel would be treated as a portion of the private dwelling-house, merely because it happened to be within the same curtilage—it would be a separate erection and not a private dwelling-house.

This erection is in my opinion a clear breach of the covenant, and being so I shall restrain further proceeding with the construction of it. As regards the mandatory injunction to take it away, I do not grant that for this reason, I am not sure that I have a right to order it to be taken away. All I have a right to

order to be done with it is, that it shall not be completed, and of course if it is not taken away before the trial I may order it to be taken away; but before the trial I think the defendant has a right to convert the building if she can into a fair and reasonable adjunct to a private dwelling-house. I shall not grant any injunction against the defendant Harland, and his costs and the costs of all parties will be costs in the action.

Solicitors: *W. H. Bennett; Edmund Newman; John Mackrell & Co.*

[*Reported by REGINALD B. SCHOMBERG, Esq., Barrister-at-Law.*]

MORRELL AND OTHERS v. MORRELL AND OTHERS

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir James Hannen, P.), February 11, March 14, 1882]

[Reported 7 P.D. 68; 51 L.J.P. 49; 46 L.T. 485; 46 J.P. 328;
30 W.R. 491]

Probate—Grant—Errors in will—Words introduced without knowledge or approval of testator—Omission from probate.

A testator, in giving the instructions for his will, directed that all his shares in a company should be given to his nephews, but, by an error, the word "forty" was inserted several times in his will before the word "shares." The will was duly executed by the testator with this word "forty" in it. The jury found that the word "forty" was introduced by mistake, that the clauses in which it was were never read over to the testator, and that he had only approved of the will in the belief that all his B. shares were by it given to his nephews.

Held: the word "forty" wherever it occurred in the will should be struck out.

Notes. Applied: *Collins v. Elstone*, [1893] P. 1. Referred to: *In the Goods of Boehm*, [1891] P. 247; *Garnett-Botfield v. Garnett-Botfield*, [1901] P. 335; *Karunaratne v. Ferdinandus*, [1902] A.C. 405; *Gregson v. Taylor*, [1917] P. 256; *In the Goods of Beech, Beech v. Public Trustee* (1922), 127 L.T. 787; *In the Estate of Beech, Beech v. Public Trustee*, [1923] P. 46.

As to exclusion of words from probate, see 16 HALSBURY'S LAWS (3rd Edn.) 190; and for cases see 23 DIGEST (Repl.) 136-139.

Cases referred to:

- (1) *Harter v. Harter* (1873), L.R. 3 P. & D. 11; 42 L.J.P. & M. 1; 27 L.T. 858; 37 J.P. 583; 21 W.R. 341; 23 Digest (Repl.) 136; 1402.
- (2) *Fulton v. Andrew* (1875), L.R. 7 H.L. 448; 44 L.J.P. 17; 32 L.T. 209; 23 W.R. 566, H.L.; 23 Digest (Repl.) 133, 1332.

Action in which the plaintiffs propounded the will and codicil, dated respectively July 19, 1880, and June 11, 1881, of John Morrell, late of Mordansweld Road, Birkdale, in the county of Lancaster, gentleman, who died on June 16, 1881. They also alleged that the will named the plaintiffs as the legatees of the testator's fully paid-up shares in John Morrell & Co., Ltd.; that the word "forty" had been inserted as limiting the number of such shares, and that the word, wherever inserted, had been inserted by mistake, and the insertion thereof had neither been known to the testator nor approved by him at the time of either the execution of the will or codicil. The defendants, the executors, and also the residuary legatees denied the

A allegations that the word "forty" had been inserted by mistake or without the knowledge or approval of the testator.

B The testator, Mr. John Morrell, had carried on business in Liverpool as a provision merchant until May, 1880, when he had converted his business into that of a limited liability company, under the style of "John Morrell & Co., Ltd." The capital of this company was £100,000, divided into shares of £100 each, and the testator had received £30,000 in money and £40,000 in fully paid-up shares. This last mentioned sum was in 400 shares of £100 each, which were called B. or deferred shares. At this same time, and before his shares had been in fact allotted to him, the testator gave instructions to his solicitor, Mr. Jevons, to draw up his will. Mr. Jevons reduced these instructions to written memoranda, of which he made several successive drafts. In Mr. Jevons' written "estimate of value and income of property of John Morrell, Esq.," there appeared, among other items, shares in "John Morrell & Co., Ltd., £40,000" and in the memoranda of instructions for the will Mr. Jevons wrote:

C "Bequeathed testator's share in John Morrell and Co. Limited to his nephews, George Morrell and Thomas Morrell (sons of testator's brother George), John Morrell the younger (son of testator's brother, Robert Morrell), and Thomas Dove Foster (son of testator's sister, Mary Foster, deceased), in equal shares."

D The memoranda so worded were sent to conveyancing counsel in London, to whom were also forwarded the articles of association of "John Morrell and Co. Limited." Counsel in drawing the will put the bequest of the shares to the four nephews thus:

E "In equal shares the forty fully paid-up or deferred shares, of the value of £100 each, in John Morrell & Co., Ltd."

F In four different passages the bequest was alluded to in these same terms, and in a passage making the bequest free of legacy duty, the solicitor had copied the words used by the conveyancing counsel. In effect, by these terms only £4,000, instead of £40,000, was given to the four nephews, the conveyancer having treated the shares as if they had been only 40 in number, whereas, in fact, they were 400. It further appeared that, though Mr. Jevons' draft instructions for the will had been more than once read over to the testator, the will as a whole never had been, Mr. Morrell himself having said that it was unnecessary to read it to him when, in July, 1880, he had been about to execute it. It had thus, in fact, been executed with the bequest of the shares as drawn by the conveyancing counsel. Some of the future residuary legatees were children unborn.

G Mr. Jevons gave evidence to the effect that beyond all doubt it had been the intention of the testator that the whole of the 400 shares of £100 should be divided equally amongst his nephews, and Mrs. Morrell, the widow, who had been examined on commission, deposed to the same effect. She said that the testator had told her of his intention so to bequeath the shares before he had executed his will, and had said to her on different occasions between the date at which he had executed it and that of his death that he had left each of his nephews shares of the value of £10,000. As to this point, corroborative evidence was given by Mr. Stead, a friend of the testator.

H I *Inderwick, Q.C.*, and *C. A. Middleton* for the plaintiffs.
Sir Hardinge Giffard, Q.C., and *Bayford* for the defendants.
Dr. Deane, Q.C., and *Bargrave Deane* for the residuary legatees.

SIR JAMES HANNEN, P.—Gentlemen of the jury, this case, though it may appear simple in itself, is one of very great importance with reference to other cases hereafter, in which the facts may not be so clear as they appear to be here. There can be no graver question brought into a court of law than the question what is a man's last will when he is dead and no longer able to speak for himself,

and his property has to be distributed according to the particular words that have been used in a particular instrument. A

The law has established certain rigid safeguards in order to have attested evidence of what such intention was, and no amount of proof that a man intended to give A. or B. the whole or part of his property avails. He must put his intentions in writing, and that writing and his signature to it must be attested by two witnesses. If, therefore, a mistake is made—it matters not how plainly—in leaving out words, however much you may regret their omission, we cannot after his death correct that because his intention would not have been put into writing, and attested as the law requires. B

There is a second class of mistake which may be put at the other extreme—that is where words are inserted of which the testator knows nothing. To take a familiar instance, suppose people about the testator at the time of his death fraudulently take his instructions to leave his property to certain persons, introduce into the will their own names instead and say, "I leave to Tom Smith, £10," and never read that over to him. In that case you may strike out the passage, because he did not know it was there or intend that it should be, and, therefore, it was not his will in any sense of the word. C

But there is a middle case, and this case is somewhat of that kind. It is the case of a man who feels himself unable to express his intentions in a legal or formal manner or phrase, and who confides to somebody else the duty of expressing his wishes. I should say that in the majority of cases where a lawyer is employed that is the state of things. The testator prefers to rely on the judgment and skill of a trained mind to express his wishes rather than to run the risk of selecting words himself, and when that is the case he adopts the words used by that person just as though they were his own. There is also a difference between the case of his referring it to a particular person to express his wishes, who makes the mistake, and setting himself about to express them and making a mistake. He might foolishly attempt to use technical language, as if, for instance, he had put down heir-at-law when in fact he had meant next-of-kin; he must bear the consequences; and so if he trusts to anybody else to express his wishes, and adopts the words used by that person as his own, then that alone can remain as the evidence of his intention. You must bear these observations in mind while I comment on the particular questions which, I trust, will lay the foundation for a clear, if not perfectly satisfactory, conclusion in this case. I shall take them in the order in which I gave them. Counsel for the plaintiffs, for his own reasons, has taken them in his order, and I will take them in mine. D E F

As the case is presented on the pleadings, the alleged mistake is that the word "forty" has been introduced throughout the will before the word "shares." In order to see whether there was the particular mistake of the insertion of the word "forty" before "shares," or whether there was any other mistake in the drawing up of that clause, it is well to look, in the first instance, to the instructions which were given by the deceased to Mr. Jevons. In that document there is no mention whatever of the number of shares, but the testator's property, which we now know was of the value of £40,000 in the company, is spoken of simply as his shares. There is no mention of anything but shares, and that continues throughout all the documents down to the time when the draft is sent back by the counsel to Mr. Jevons. The instructions or directions to counsel to draw the will also only mention "shares," without any reference to number, but from some cause or other which is not explained the counsel who drew the will inserted into his draft the word "forty" before "shares" wherever it became necessary. G H

The first question I ask you is this: Was there a mistake at all in that? The evidence of Mr. Jevons is quite clear upon the subject, that whenever the matter was discussed the reference was to the whole number of the shares as being intended for the nephews. The wife, whose deposition has been read, is equally clear that her husband always spoke of the whole of his shares as intended for his nephews; and a friend has been called who speaks to the same effect. I should I

A imagine, therefore, that you would come to the conclusion that there is a mistake in the manner in which that clause is drawn.

But then that leads to the second question, viz., whether the mistake was in putting in the word "forty" at all and in not leaving it, as it was in the instructions "my shares in the company," or does the mistake consist in not having put in the proper number "four hundred" instead of "forty?" It is true that, if "four hundred" had been put in, it would, we know, have correctly carried out the intention as Mr. Jevons and the wife believe it to have been; but it is not because it would in fact have carried out his intention that therefore that is the way in which it should have been expressed in his will; and I should say that the more correct way of drawing a will from such instructions as these is not to insert a number, which may lead to a mistake, as you see it has done in this unfortunate case, but to use the general words which prevent the possibility of a mistake, viz., by saying "all my shares," or "the shares," which equally implies it. Did then the mistake consist in inserting any number or in not inserting the proper number?

The third question, which I leave to you is: Did he know of the inserting of the word "forty?" In considering this question bear this particularly in your minds. Did he know of the fact that the word "forty" was there? That depends upon Mr. Jevons' evidence, and I am sorry we should be left in some uncertainty as to what really took place. Mr. Jevons went on July 10 with the draft, which had been prepared by counsel, and so fully did it to his mind embody the wishes of the testator that he, as a matter of prudence, had it then and there executed, and the question is, did he read over that document to the testator? I am sorry to say Mr. Jevons is not able to say whether he did or not; but you will remember that he himself said that such would be the usual course; but at the present moment he says: "My recollection is indistinct upon the point as to the extent to which I went into the draft will with the testator." But he speaks with confidence as to the following: "I read the passages which made alterations in the draft which he had had in his possession.

I am sorry we have not more distinct recollection of what took place. I can only say it seems most unusual not to do one or other of these two things, viz., either to read over the whole of the documents which the party is about to sign, or to go through it passage by passage and say, "There is a clause to this effect and a clause to that effect," and so on. In some states of a testator's health or in some states of a testator's mind disturbed by pain, it might be expedient to shorten the process, but in some way or another, so far as my experience goes, I should say it is the practice of solicitors either to read over the whole instrument, or to read and explain clause by clause the effect which each clause would have. Unfortunately Mr. Jevons does not enable us to judge by his evidence what course he did pursue, and you have to draw your inference; but remembering that this was the document which he then got the testator to sign as a valid will, it will be for you to say whether you do not come to the conclusion that Mr. Jevons did, either by reading the whole or in some way or other, call the testator's attention to the several matters of his will. He does say he read the passages which made alterations in the draft which the testator had had in his possession, but then there comes a very important fact. He called his attention to the question of legacy duty, and that is repeated twice over in the will. He had the draft with him, and he says as to one of these alterations in which the word "forty" occurs, he made it himself from the draft. As to the other, he is rather under the impression that he made it at the office for the purpose of making the one part of the draft consistent with the other. But with regard to that alteration, which he made at the time, you will have to say whether you do or do not believe that he read that passage to him, in which the word "forty" undoubtedly occurs. Therefore, the two questions which you have to consider as to that are, did he read or bring to the testator's notice the one particular instance in which at any rate the word "forty" was inserted before "shares?"

Upon the fourth question, did he approve of the words used as the expression of his wish? I must explain more fully what I have already suggested. When you employ a lawyer either to draw a will or a deed which requires skill, you rely on his skill, and of course you rely on his integrity; and when he tells you, "I have drawn this will according to your instructions," and he puts it before you to sign, do you not adopt his words as expressing your wish? I do not wish, as far as this is a question of fact, to take it out of your hands; but, speaking for myself, it appears to me a man does approve of the words which a solicitor puts in for him. And this seems to divide itself again into two parts. Did he approve of the particular words being used as the expression of his will, that is, did he approve of such passages as his attention was particularly directed to, or, generally, did he approve the whole will as expressing his wishes? When a man leaves his solicitor to draw a will, does he not say in effect—I do not know how to do it; I rely upon you, and I accept your words as though I had the power to do it?

The next question is: Did he understand the effect of the words? He was a man in failing health and nervous, and business had become so distasteful to him that he did not open his letters. Mr. Jevons himself also in two instances wrote the word "forty" in with his own hand, and did not understand or notice what the effect was. You probably, therefore, would come to the conclusion that the testator was equally as wanting in observation as Mr. Jevons, and did not understand the meaning of the words.

Lastly, did the testator intend his nephews to have all or only the forty shares? That is a question upon which probably you will have no difference of opinion; but I have put the question in order that we may have, as far as counsel and myself can foresee, everything that may be necessary for determining the law of the case after you have decided the facts.

The jury, after deliberating for a short time, found as follows: (i) That the words were inserted by mistake; (ii) that the particular mistake was in inserting the word "forty;" (iii) that the testator did not know of the insertion of the word—that it was not read over to him; (iv) that he did not approve of the word being used, that is, that he instructed his solicitor as to the whole of the shares, and only approved of the draft upon the supposition that the solicitor had carried out his wishes; (v) that he did not understand the effect of the words used; (vi) that he intended the nephews to have all the shares.

Cur. adv. vult.

Mar. 14, 1882. **SIR JAMES HANNEN, P.**—The findings of the jury have disposed of the whole matter. It appears that the testator intended to leave all his shares in a particular company to his nephews, and gave instructions to that effect to his solicitor, who embodied them in writing and sent them to a conveyancing counsel in London to draw the will. In those instructions the solicitor spoke, as he had been directed by the testator to speak, of "all" the testator's shares; but by some accident not accounted for, counsel introduced into the draft will the word "forty" before "shares." Though the solicitor saw this, it never attracted his attention, and he never realised the effect the word "forty" would have on the disposition of the shares made by the testator. The jury have arrived at the conclusion that what the solicitor said on this subject was correct—that he never informed the testator in any way that the word "forty" had been introduced; and it was proved, by other evidence than that of the solicitor himself, that the actual will as executed was not read over to the testator. The jury found that the testator never authorised the introduction of the word "forty" into the will, and never heard that it had been introduced, and that he executed the will in the belief that it carried out his instructions. In *Harter v. Harter* (1), I held that the language of a will could not be changed where the testator had seen the words and adopted them; but in *Fulton v. Andrew* (2), where a residuary bequest was introduced into a will, it was held that the clause containing that bequest might be rejected. If so, the same principle may be applied to a single word. Therefore,

A on the ruling of the House of Lords in *Fulton v. Andrew* (2), I hold that the words may be struck out which had been introduced without the authority of the testator.

The court directed that the word "forty" be struck out of the four places in which it occurred in the will, and by consent that the costs be paid to the plaintiffs.

Solicitors: *Field, Roscoe & Co.*; *Sharpe, Parkers & Co.*, and *Walker, Son & Field*.

B [Reported by J. RICHARDS KELLY, Esq., Barrister-at-Law.]

C

Re VISCOUNT EXMOUTH. VISCOUNT EXMOUTH v. PRAED

[CHANCERY DIVISION (Fry, J.), February 19, 21, March 3, 1883]

[Reported 23 Ch.D. 158; 52 L.J.Ch. 420; 48 L.T. 422;
31 W.R. 545]

D

Will—Contingent limitation in nature of defeasance—Need for certainty in creation and operation.

E

A testator bequeathed chattels in the nature of heirlooms upon trust to go with his family title so far as the rules of law and equity would permit, so that no person in existence at the time of his decease, or born in due time afterwards and afterwards coming into the title, should have any other than a life interest in the same, and so that no person should acquire an absolute interest in the same till the expiration of twenty-one years after the decease of all such persons as should be in existence at the time of the testator's decease, and afterwards attaining the said title.

F

Held: a contingent limitation in the nature of a defeasance was subject to all the rules applicable to a condition subsequent, and must in order to be valid, be clear and certain, not only in its creation, but also in its point of operation, and must be such that at any given point of time it was ascertainable whether the limitation had or had not taken effect; the latter part of the limitation was void for uncertainty in its operation; and, accordingly, the first holder of the title who came into existence after the decease of the testator took an absolute interest in the chattels.

G

Notes. Applied: *Jeffreys v. Jeffreys* (1901), 84 L.T. 417. Considered: *Sifton v. Sifton*, [1938] 3 All E.R. 435. Referred to: *Re Johnson, Cockerell v. Essex* (1884), 26 Ch.D. 538; *Re Moore, Prior v. Moore*, [1901] 1 Ch. 936; *Re Hill, Hill v. Hill*, [1902] 1 Ch. 807; *Re Sandbrook, Noel v. Sandbrook*, [1911–13] All E.R.Rep. 559; *Re Fowler, Fowler v. Fowler*, [1917] 2 Ch. 307; *Re Lanyon, Lanyon v. Lanyon*, [1927] All E.R.Rep. 61; *Re Blaiberg, Blaiberg v. Marquise De Andia Yraarzaval*, [1940] 1 All E.R. 632; *Re Evans, Hewitt v. Edwards*, [1940] Ch. 629; *Hopper v. Liverpool Corpn.* (1944), 88 Sol. Jo. 213; *Re Moss's Trusts, Moss v. Allen*, [1945] 1 All E.R. 207; *Re Wilson's Will Trusts, Tryon v. Bromley-Wilson*, [1950] 2 All E.R. 955; *Re Gape's Will Trusts, Verey v. Gape*, [1952] 2 All E.R. 579; *Re Brace, Gurton v. Clements*, [1954] 2 All E.R. 354.

H

I As to conditions attached to gifts, see 39 HALSBURY'S LAWS (3rd Edn.) 914 et seq.; and for cases see 44 DIGEST 440–444.

Cases referred to:

- (1) *Tollemache v. Earl of Coventry* (1834), 8 Bli.N.S. 547; 2 Cl. & Fin. 611; 5 E.R. 1045, H.L.; 44 Digest 947, 8020.
- (2) *Egerton v. Earl Brownlow* (1853), 4 H.L.Cas. 1; 8 State Tr.N.S. 193; 23 L.J.Ch. 348; 21 L.T.O.S. 306; 18 Jur. 71; 10 E.R. 359, H.L.; 44 Digest 460, 2806.

- (3) *Clavering v. Ellison* (1856), 3 Drew. 451; affirmed (1857), 8 De G.M. & G. 662, L.J.J.; affirmed (1859), 7 H.L.Cas. 707; 29 L.J.Ch. 761; 11 E.R. 282, H.L.; 44 Digest 440, 2667. A

Also referred to in argument:

East v. Twyford (1853), 4 H.L.Cas. 517; 22 L.T.O.S. 173; 10 E.R. 564, H.L.; 37 Digest 125, 570.

Pinbury v. Elkin (1719), 1 P.Wms. 563; 2 Vern. 758, 766; Prec. Ch. 483; 24 E.R. 518, L.C.; 44 Digest 1143, 9885. B

Shelley v. Shelley (1868), L.R. 6 Eq. 540; 37 L.J.Ch. 357; 16 W.R. 1036; 44 Digest 950, 8034.

Re Catt's Trusts (1864), 2 Hem. & M. 46; 4 New Rep. 88; 33 L.J.Ch. 495; 10 L.T. 409; 10 Jur.N.S. 536; 12 W.R. 739; 71 E.R. 377; 44 Digest 461, 2810. C

Action instituted by the fourth Viscount Exmouth against the trustees of the will of the second Viscount Exmouth, and the infant heir presumptive to the title, for the purpose of obtaining a declaration that certain chattels which the second Viscount Exmouth had by his will purported to bequeath as heirlooms were the absolute property of the plaintiff.

The title and honours of Exmouth were conferred upon Sir Edward Pellew, and the heirs male of his body, in the year 1814. The testator, who succeeded to the title and died in December, 1833, by his will dated April 26, 1833, gave to trustees certain plate and other chattels upon trust to permit and suffer the same to go and be held and enjoyed with the title and honours of Exmouth, so far as the rules of law and equity would admit, by the person who for the time being should be actually possessed of the said title, in the nature of heirlooms, and so that no person in existence at the time of his, the testator's, decease, or born in due time afterwards, and afterwards coming to the said title, should have any other than a life interest in the same, and so that no person should acquire an absolute interest in the same till the expiration of twenty-one years after the decease of all such persons as should be in existence at the time of the testator's decease, and afterwards attaining the said title. D

The third Viscount Exmouth was the son of the testator, and he died in February, 1876, without issue, being succeeded in the title by his nephew the present plaintiff. The plaintiff was born in 1861, and, as he was still unmarried, the infant heir presumptive was his younger brother. At the date of the death of the second viscount, there existed descendants of the first viscount, who were still living, and were capable in certain events of succeeding to the title. E

Everitt, Q.C., and *Vaughan Hawkins* for the plaintiff. F

Præd for the trustees.

Cookson, Q.C., and *Coltman* for the infant defendant. G

Cur. adv. vult.

FRY, J., stated the facts and the bequest in question, and continued: The passage I have just read divides itself into three clauses, which require separate attention. H

The first is the trust to permit and suffer the property to go and be held by and enjoyed with the title and honours of Exmouth, so far as the rules of law and equity will admit, by the person for the time being actually possessed of the said title, in the nature of heirlooms. There is, in my judgment, no doubt that the effect of that clause, standing alone, would be to give an absolute interest in the chattel property to the first person who succeeded to the honours, and that, therefore, if it had stood alone, the third viscount would have become absolutely possessed of this chattel property. That I think follows from *Tollemache v. Earl of Coventry* (1) to which counsel for the plaintiff referred me. I

The second clause is in these terms:

"So that no person in existence at the time of my decease, or born in due time afterwards, and afterwards coming into the title, shall have any other than a life interest in the same."

A That clearly reduces the absolute interest that would have been taken by a person in existence at the time of the testator's decease to a life interest, and accordingly the third viscount took not an absolute but a life interest in the chattels in question.

The third clause says that,

B "No person shall acquire an absolute interest in the same till the expiration of twenty-one years after the decease of all such persons as should be in existence at the time of my decease, and afterwards attaining the said title;"

which may, I think, be paraphrased in this way, "that no person shall acquire an absolute interest till the expiration of twenty-one years from the decease of all such persons as shall be in existence at the time of my decease, and shall at any time after my decease attain the said title." It appears to me that the last words of the clause are indefinite as to time. If that clause be good, it appears to me to be plain that the present viscount has not obtained an absolute interest, and cannot demand the delivery of the chattels from the trustees, because it is plain that the twenty-one years from the death of the third viscount, who died in 1876, have not expired, and consequently there is at least one person living at the death of the second viscount who has not died twenty-one years ago.

D But the question arises whether that clause is or is not good, and in my judgment the clause is invalid and inoperative. I must, in the first place, inquire what is the nature of that clause. It appears to me to be a contingent limitation by way of trust, in the nature of clauses for postponement and defeasance. It postpones the vesting of an absolute interest in the person who may afterwards take the absolute interest, supposing he survives the twenty-one years, and who, but for the clause, would have taken the absolute interest at the moment of his coming into possession. So that, to apply it to the circumstances which happened, the present viscount, supposing the clause is good, would but for that clause have taken an absolute interest on his coming into the title, but would not take an absolute interest till the expiration of the twenty-one years at any rate from the death of his predecessor. In the next place, it is a clause of defeasance, because, supposing the person who would have taken absolutely on acquiring the title does not survive the period of twenty-one years, the absolute interest will never vest in him, and therefore, to take the instance of the present actual possessor of the title, if the present viscount should not survive the twenty-one years from the death of the late viscount, it is plain his absolute interest would be defeated.

G Such contingent limitations in the nature of defeasances are, in my view, subject to all the rules applicable to conditions subsequent. One of those rules I take to be, that the condition must be clear and certain. That requisite certainty I hold to include not only certainty of expression in the creation of the limitation, but also certainty in point of operation. It must be such a limitation that at any given moment of time it is ascertainable whether the limitation has or has not taken effect. But of this contingent limitation it cannot always be ascertained whether it has or has not taken effect.

H Let me go back upon those propositions which, if they are correct, determine the case, to illustrate them a little more clearly. In the first place, is such a limitation as this subject to the rules applicable to conditions subsequent? I will, in the first place, refer to one passage in the judgment of LORD ST. LEONARDS in the well-known case of *Egerton v. Earl Brownlow* (2). In addressing the House of Lords his Lordship said (4 H.L.Cas. at p. 208):

I "I know by the authorities which have been referred to, that conditions which were intended to defeat an estate, have defeated an estate in contingency just as much as a vested estate, that they are odious as it is said in law, and as it is also said by equally high authorities, the INSTITUTES and SHEPPARD'S TOUCHSTONE, that they must be submitted to a strict construction; that is, you are not to give a favourable construction to a proviso, the object of which is to defeat an estate already created, but that, if that estate is to be defeated,

it must be so by clear and express terms within the limits of the instrument creating it." A

In *Clavering v. Ellison* (3), originally before KINDERSLEY, V.-C., the question arose upon limitations no doubt somewhat different to the present. The nature of those limitations he expressed in these words:

"The estates and interest are by the previous part of the will clearly and distinctly given to the children as they came into esse by way of vested remainder, and the proviso is intended to defeat those estates and to accelerate the subsequent limitations." B

And then, having referred to the expression used in the old cases, that such conditions are odious to the law, he said that it appeared to him to be a clear rule that the contingency on which such a limitation is to take effect should be something definite and certain, and that the contingency should be so expressed as not to leave it in any degree doubtful or uncertain what the contingency is which is intended to defeat the prior estate. No doubt there the want of certainty was rather in the expression than in the ascertainment of its operations. It is quite plain that certainty in the one is as essential as certainty in the other. That case went before the Court of Appeal, and the decision of the Vice-Chancellor was affirmed by the lords justices. It went to the House of Lords, and the decision of the lords justices was affirmed by the House of Lords; and in addressing the House of Lords in that case, LORD CRANWORTH used this language (7 H.L.Cas. at p. 725): C

"I consider that from the earliest times one of the cardinal rules on the subject has been this, that where a vested estate is to be defeated by a condition or a contingency that is to happen afterwards, that condition must be such that the court can see from the beginning precisely and distinctly upon the happening of what event it was that the preceding vested estate was to determine." E

In the next place let me inquire whether in the present instance it is ascertainable at any given time whether the contingency has or not happened. Nothing can illustrate better the difficulty in the way of this proviso than the actual circumstances of the case. When the third viscount died there were living persons one of whom at least, Henry Edward Pellew, is still living, who were in the entail some of them before and some of them after the present viscount; that is to say, their estates would take effect, if at all, some before and some after the present year. It follows, therefore, that you cannot tell whether all the persons named from the death of the last of whom the twenty-one years is to commence, have or have not expired at a given time. Suppose, for instance, the present viscount lives to the year 1897, which will be twenty-one years from 1876, when the third viscount died, and supposing Henry Edward Pellew be then living, to whom will the chattels belong? No human being could answer the question. Whether Henry Edward Pellew would be one of the persons who was living at the death of the testator, and afterwards attained the title, nobody can tell. It was known that he was living at the death of the testator, but whether he will live to attain the title, is not within human knowledge. F

In 1897, therefore, it is possible that the period of twenty-one years has expired; it is equally possible that it has never begun to run. Now supposing the present viscount, having lived to 1897, died immediately afterwards, to whom would the chattels belong? Would they belong to his legal personal representative? They would if the period had expired. Would they belong to his successor in the title? They would if the period had not expired. Therefore, from the expiration of the twenty-one years, and the death of the first of the class of persons indicated by the will, down to the expiration of the twenty-one years and the death of the last of the possible persons who may attain the title, the whole question of the possession of these chattels would be an uncertainty. In my judgment that is such an uncertainty in this condition of defeasance as prevents it being clear and certain, and renders it inoperative. I hold, therefore, that the third clause in the G

A passage I have read from the second viscount's will being inoperative, the present plaintiff is now absolutely entitled to the chattels.

There is one observation which I ought to make, which is this: An argument was addressed to me upon this third clause, with a view to show me that on some ground of construction the present viscount is entitled to the chattels. I have not dealt with that in my judgment because, on account of some intellectual defect on my part, I never from first to last understood what the point was, and I only advert to it now for the purpose of observing that I should have given a more elaborate judgment on it, if I had been able to understand it.

Solicitors: *Farrer & Co.*

[Reported by J. F. WAGGETT, ESQ., Barrister-at-Law.]

SCARF v. JARDINE

[HOUSE OF LORDS (Lord Selborne, L.C., Lord Blackburn, Lord Watson and Lord Bramwell), June 9, 12, 13, 1882]

[Reported 7 App. Cas. 345; 51 L.J.Q.B. 612; 47 L.T. 258;
30 W.R. 893]

Partnership—Dissolution—Debt incurred after dissolution—No notice of dissolution given to creditor—Liability of retired partner—Liability of new partner. Election—Partnership—Dissolution—Debt incurred after dissolution—No notice of dissolution given to creditor—Liability of retired partner—Liability of new partner—Duty of creditor to elect.

The appellant and R. carried on business in partnership under the style of "R. & Co." The partnership was dissolved by consent, and B. became partner with R., the style of the firm being unchanged. After the appellant had retired from the firm, but before notice of his retirement had been given to the respondent (with whom the firm had had previous dealings), "R. & Co." ordered goods from the respondent, which he supplied to them. After he had notice of the change in the partnership he made no alteration in his books, but kept a continuous account against "R. & Co.," and took a cheque from the new firm in payment of his whole account. The cheque was dishonoured, and he then commenced proceedings against R. and B., and upon their going into liquidation brought in a proof against them for his whole debt. He afterwards commenced an action against the appellant in respect of the goods supplied before he had notice of the change in the firm.

Held: (i) since R. and B. gave the order and received the goods, and were alone interested in the profit and loss of the firm which ordered the goods, the respondent could hold them liable; (ii) when an ostensible partner retires, or when a partnership between several known partners is dissolved, those who dealt with the firm before a change took place are entitled to assume, until they have notice to the contrary, that no change has occurred, and, therefore, the respondent could hold the appellant and R. liable; (iii) these two courses being inconsistent, the respondent was required to elect between them, and he could not hold R. and B. and the appellant jointly liable; (iv) where a person is put to his election, and has not merely determined to follow one of his remedies, but has also communicated it to the other side in such a way as to lead the opposite party to believe that he has made that choice, the election is completed, and once made cannot be altered; (v) the issue of the writ by

the respondent against R. and B. was an election to sue them, and, accordingly, the action against the appellant failed.

Notes. Followed: *Fell v. Parkin* (1882), 52 L.J.Q.B. 99. Considered: *Griffith v. Pound* (1890), 45 Ch.D. 553; *Longman v. Hill* (1891), 7 T.L.R. 639; *Burgess v. Morton* (1894), 10 T.L.R. 339. Applied: *Morel Bros. & Co., Ltd. v. Earl of Westmorland*, [1900-3] All E.R.Rep. 397. Considered: *French v. Howie* (1905), 93 L.T. 202; *Harrisons and Crossfield, Ltd. v. London and North-Western Rail. Co.*, [1916-17] All E.R.Rep. 540; *Bradford Old Bank v. Sutcliffe*, [1918] 2 K.B. 833; *Bennett v. Whitehead*, [1926] 2 K.B. 380. Distinguished: *Re Shepherd, Harris v. Shepherd*, [1942] 2 All E.R. 584. Referred to: *Jones v. Ashwin and Ivory* (1883), Cab. & El. 159; *Re Davison, Ex parte Chandler* (1884), 13 Q.B.D. 60; *Re Crook, Ex parte Collins* (1891), 66 L.T. 29; *Re Snyder Dynamite Projectile Co., Skelton's Case* (1893), 68 L.T. 210; *British Homes Assurance Corp'n. v. Paterson*, [1902] 2 Ch. 404; *Law v. Law*, [1904-7] All E.R.Rep. 526; *Re West Coast Gold Fields, Ex parte Salaman* (1905), 75 L.J.Ch. 23; *Willis, Faber & Co. v. Joyce* (1911), 104 L.T. 576; *Codling v. Mowlem* (1913), 83 L.J.K.B. 445; *Re A. Gunsbourg & Co., Ltd., Ex parte Cook*, [1920] All E.R.Rep. 492; *Moore v. Flanagan*, [1920] All E.R.Rep. 254; *Anderson v. Equitable Assurance Society of United States*, [1926] All E.R.Rep. 93; *De Bearn (Prince) v. La Compagnie D'Assurances La Federale De Zurich* (1937), 42 Com. Cas. 189; *United Australia, Ltd. v. Barclays Bank, Ltd.*, [1940] 4 All E.R. 20; *Kaprow & Co. v. Maclelland & Co.*, [1948] 1 All E.R. 264; *Ross v. Ross*, [1950] 1 All E.R. 654; *Heskell v. Continental Express, Ltd.*, [1950] 1 All E.R. 1033; *Rosenfeld v. Neuman*, [1953] 2 All E.R. 885.

As to liability of retired partners, see 28 HALSBURY'S LAWS (3rd Edn.) 493-494; 515-516; as to election between inconsistent claims, see 15 HALSBURY'S LAWS (3rd Edn.) 171-174. For cases see 36 DIGEST (Repl.) 488-490; 21 DIGEST (Repl.) 299.

Cases referred to:

- (1) *Curtis v. Williamson* (1874), L.R. 10 Q.B. 57; 44 L.J.Q.B. 27; 31 L.T. 678; 23 W.R. 236; 1 Digest (Repl.) 673, 2372.
- (2) *Bilborough v. Holmes* (1876), 5 Ch.D. 255; 46 L.J.Ch. 446; 25 W.R. 297; sub nom. *Billborough v. Holmes*, 35 L.T. 759; 36 Digest (Repl.) 496, 638.
- (3) *Bottomley v. Nuttall* (1858), 5 C.B.N.S. 122; 28 L.J.C.P. 110; 32 L.T.O.S. 222; 5 Jur.N.S. 315; 141 E.R. 48; 36 Digest (Repl.) 470, 400.
- (4) *Freeman v. Cooke* (1848), 2 Exch. 654; 6 Dow. & L. 187; 18 L.J.Ex. 114; 12 L.T.O.S. 66; 12 Jur. 777; 154 E.R. 652; 12 Digest (Repl.) 74, 414.
- (5) *Dumpor's Case* (1603), 4 Co. Rep. 119b; 76 E.R. 1110; sub nom. *Dumpor v. Syms*, Cro. Eliz. 815; 31 Digest (Repl.) 436, 5639.
- (6) *Clough v. London and North Western Rail. Co.* (1871), L.R. 7 Exch. 26; 41 L.J.Ex. 17; 25 L.T. 708; 20 W.R. 189, Ex. Ch.; 21 Digest (Repl.) 440, 1479.
- (7) *Jones v. Carter* (1846), 15 M. & W. 718; 153 E.R. 1040; 31 Digest (Repl.) 290, 4252.

Also referred to in argument:

- Re Conner, Ex parte Rivolta*, [1882] W.N. 76.
- Rolfe and Bank of Australia v. Flower* (1865), L.R. 1 P.C. 27; 35 L.J.P.C. 13; 14 L.T. 144; 14 W.R. 467; 12 Jur.N.S. 345, P.C.; 4 Digest (Repl.) 470, *1802.
- Priestly v. Fernie* (1865), 3 H. & C. 977; 34 L.J.Ex. 172; 13 L.T. 208; 11 Jur.N.S. 813; 13 W.R. 1089; 2 Mar.L.C. 281; 159 E.R. 820; 21 Digest (Repl.) 299, 628.
- Kendall v. Hamilton* (1879), 4 App. Cas. 504; 48 L.J.Q.B. 705; 41 L.T. 418; 28 W.R. 97, H.L.; 36 Digest (Repl.) 491, 599.
- Calder v. Dobell* (1871), L.R. 6 C.P. 486; 40 L.J.C.P. 224; 25 L.T. 129; 19 W.R. 978, Ex. Ch.; 39 Digest 390, 261.
- Re Smith, Knight & Co., Ex parte Gibson* (1869), 4 Ch. App. 662; 38 L.J.Ch. 673; 20 L.T. 835; 17 W.R. 833, L.J.J.; 36 Digest (Repl.) 500, 668.

A *Re Liversidge, Ex parte Appleby* (1837), 2 Deac. 482, Ct. of R.; 4 Digest (Repl.) 473, 4149.

Keay v. Fenwick (1876), 1 C.P.D. 745, C.A.; 1 Digest (Repl.) 445, 979.

Harris v. Farwell (1851), 15 Beav. 31; 51 E.R. 447; 36 Digest (Repl.) 491, 597.

B **Appeal** by the defendant, Scarf, from a decision of the Court of Appeal (LORD COLERIDGE, C.J.; BAGGALLAY and BRETT, L.JJ.), reversing a decision of DENMAN, J., dismissing an action brought by the respondent, Jardine, for the price of goods supplied by him to a firm, "W. H. Rogers & Co.," after the appellant had ceased to be a partner, but before notice had been given to the respondent.

C A firm carried on business under the name of "W. H. Rogers & Co.," in Manchester, with which the respondent, Mr. Jardine, had dealings. It consisted at the time in question of two partners, the appellant Mr. Scarf, and Mr. W. H. Rogers. On July 27, 1877, those two persons dissolved the partnership between them, and another person named Beech joined Mr. Rogers, and they carried on the same business under the same firm and at the same place from that time forward. Of this Mr. Jardine, the respondent, knew nothing until Feb. 25, 1878. In the meantime, in January and February, 1878, goods were ordered from him on behalf of the firm carrying on business under the name of "W. H. Rogers & Co.," according to the ordinary course of business, which, it was to be presumed, was the same as had prevailed before the dissolution of partnership in the previous month of July. Goods were ordered of the respondent and were delivered by him at the place of business of the firm. At the time when they were ordered, and at the time when they were delivered, he was ignorant of the dissolution of partnership which had in fact taken place, and of the fact that the business was then being carried on not by Scarf and Rogers, but by Rogers and Beech. He became aware of those facts on Feb. 25, 1878, on receiving a circular dated Feb. 21, by which notice was given to him, and in which the date of the dissolution of partnership was mentioned as having taken place on July 27 then last, and it was at the same time stated that all debts owing to or by the old firm would be received and paid by Mr. Rogers alone, who would continue to carry on the business as theretofore in partnership with Mr. Beech under the same style and firm.

G The respondent afterwards supplied other goods to the new firm. He made no break in the accounts in his books; he rendered an account consisting of the old and the new debts; he rendered that account to the new firm. He had some correspondence with them, looking to them as the persons from whom he might expect payment of the whole of that demand, and they on the other hand replied in the correspondence as being prepared to liquidate the debt, they made some payment on account, and they gave a cheque for the balance on July 22, 1878, which was post-dated a week. That cheque when presented was dishonoured, and on Aug. 7, 1878, the respondent commenced an action against Rogers and Beech for the balance, which included the present demand; that is to say, included the goods which had been supplied in January and February before notice of the dissolution of partnership. The action was stopped, not by any discontinuance on the respondent's part, but by the failure of the new firm, which went into liquidation on Aug. 16, 1878. Under this liquidation the respondent proved as a creditor of the new firm by an affidavit in which he swore that Rogers and Beech were justly and truly indebted to him in the sum of £125 19s. 1d. for goods sold and delivered by him to Rogers and Beech, that sum including the goods in question. No objection was made to that proof, it was never retracted, it was admitted; and although it did not appear upon the proceedings that a dividend has been paid under it, yet at all events, for anything that their Lordships knew to the contrary, that might be the case, or might be the case thereafter.

I After the liquidation, and after the proof, the present action was brought by the respondent against Mr. Scarf, who in point of fact had ceased to be a partner in July, 1877, and had given no authority to order the goods in question upon

his credit, and, as between himself and the persons who did order the goods, was at the time when they were supplied a stranger to the business. A

Forbes, Q.C., and *G. E. S. Fryer* for the appellant.

Finlay, Q.C., and *C. A. Russell* for the respondent.

LORD SELBORNE, L.C.—The facts in this case are few and simple, but they raise a question which may be of some general importance, and one which seems to be as yet undetermined by authority. [His Lordship stated the facts and continued:] At the time when these goods were supplied the persons who actually ordered them were Rogers and Beech; they were the persons alone interested in the business, and they were undoubtedly, upon ordinary principles, liable for what they so ordered. The appellant also might be held liable, about that there can be no doubt, because the principle of law which is stated in *LINDLEY ON PARTNERSHIP* (3rd Edn.), vol. 1, p. 429, is incontrovertible, namely, that B C

“when an ostensible partner retires, or when a partnership between several known partners is dissolved, those who dealt with the firm before a change took place are entitled to assume, until they have notice to the contrary, that no change has occurred”;

and the principle on which they are entitled to assume it is that of the estoppel of a person who has accredited another as his known agent from denying that agency at a subsequent time, as against the persons to whom he has accredited him, by reason of any secret revocation. Of course, in partnership there is agency; one partner is agent for another; and in the case of those who, under the direction of the partners for the time being, carry on business according to the ordinary course, where a man has established such an agency and has held it out to others, they have a right to assume that it continues until notice to the contrary. There was, therefore, in this case undoubtedly a state of circumstances which would have entitled the respondent, if he had thought fit, to hold Mr. Scarf liable, the credit being given to him and to Rogers, there being no knowledge on the part of the respondent of the dissolution of partnership, no knowledge of any revocation of the agency at the time when these goods were delivered. On the other hand, if you look not to the estoppel but to the fact, the respondent was entitled to hold the persons who actually gave the order and received the goods, and were interested in the profit and loss of the firm which ordered them, liable to him, those persons being Rogers and Beech alone. D E F

It seems to me that the real question which your Lordships have to determine is not the question of what is called “novation,” but it is this: whether in that state of circumstances there was a concurrent joint liability of the three persons, Scarf, Rogers, and Beech, upon the principles which I have stated, or whether the respondent had a right to make his choice whether he would sue those who were liable on the facts or those who were liable by estoppel. I am unable to understand how there could have been a joint liability of the three. The two principles are not capable of being brought into play together; you cannot at once rely upon estoppel and set up the facts; and if the estoppel makes A. and B. liable, and the facts make B. and C. liable, neither the estoppel, nor the facts, nor any combination of the two, can possibly make A., B., and C. all liable jointly. Therefore, it appears to me that, if the respondent chose to go upon the facts, and to make the persons who actually ordered and got the benefit of the goods his debtors, which he had a plain and certain right to do, he entirely disavowed the estoppel, and could no longer set it up. If, on the other hand, he chose to go upon the estoppel, then Beech being a stranger to the liability upon that footing, he would only sue Scarf and Rogers. One way of testing it would be by inquiring what was the rule under the old system of pleading. If at that time Scarf and Rogers had been sued, could they have pleaded in abatement that Beech ought also to be joined as being also liable? I think most clearly they could not; and, upon the other hand, if Rogers and Beech had been sued, still more impossible would it have G H I

A been for them to plead in abatement that Scarf ought also to be joined, as he neither was a partner when the goods were ordered, nor, as between him and them, could any liability have attached. It seems to me, therefore, that the respondent was necessarily put to his election. He might hold either Rogers and Scarf or Rogers and Beech liable; he could not hold all three liable together.

B That makes it unnecessary for me to say much upon the question of novation, except that, if your Lordships should differ from the Court of Appeal in this case, you will have the satisfaction of feeling that you do so upon grounds which do not seem to have been clearly or fully presented to that court. In the court of first instance the case was treated really as one of what is called "novation," which, as I understand it, means this (the term being derived from the civil law), that, there being a contract in existence, some new contract is substituted for it, either C between the same parties or between different parties, the consideration mutually being the discharge of the old contract. A common instance of it in partnership cases is where upon the dissolution of a partnership the persons who are going to continue in business agree and undertake, as between themselves and the retiring partner, that they will assume and discharge the whole liabilities of the business, usually taking over the assets; and if in that case they give notice of that arrangement to a creditor, and ask for his accession to it, there becomes a contract between D the creditor who accedes and the new firm, to the effect that he will accept their liability instead of the old liability, and, on the other hand, that they promise to pay him for that consideration.

E If this case had rested upon that ground, on which it appears to have been put in the court of first instance, I could not myself have agreed in the decision at which the court arrived, because there is really only one act done upon which a serious argument, as it seems to me, could be founded in favour of novation, if the circumstances had required that the case should be put upon that ground. I mean the giving of the cheque which I have already mentioned, on July 22, 1878, F by the new firm. Down to that time it was, as it seems to me, merely in the natural and ordinary course of things that, when the notice of dissolution referred to Mr. Rogers, who was continuing to carry on the business of that firm with Beech, as the person who would receive and pay all debts owing to or by the old firm, either Mr. Rogers, or his firm, should act in the liquidation of the affairs and debts of the old concern; and the mere corresponding with them, the mere sending in the matter to them would not, as it seems to me, make Beech liable, unless he G did something to make himself liable beyond carrying on that kind of correspondence.

On the other hand, is there sufficient evidence of the intention which would be necessary on the part of the plaintiff to relinquish these original debtors? The fact of the cheque being given, which, as I have said, is the only thing which can be relied upon as showing that Beech was willing to make himself liable, is H perfectly consistent with the plaintiff's not relinquishing the original debtors. If it results in payment he is perfectly entitled to take it; if it does not result it will not fulfil its original object. It did not result in payment, and the action followed. The proof in bankruptcy afterwards being in invitoe, though it might be some evidence of the intention of the respondent to get what he could out of Rogers and Beech, yet certainly would be no evidence of any accession on the part of I Beech to the liability, which was not upon him at all. I, therefore, should not have differed from the opinion of the Court of Appeal if I had thought, as the Court of Appeal seem to have treated it, that the case depended upon what is called the doctrine of novation. I am inclined to say that the facts which have taken place were susceptible of an interpretation consistent with the retention of the intention on the part of the respondent to retain his original debtors, at all events at the time of action brought, and that on the other hand there was nothing to make Mr. Beech a debtor if he had not been so before. But, as Beech was really a debtor, the whole doctrine of novation disappears from the case.

The question resolves itself into that which I originally stated, namely, whether there was an intention on the part of the respondent to hold the three persons liable, or only two, and if two, whether it is possible, after choosing to hold those who actually gave the order and received the goods liable, and proceeding against them as debtors in such a way as to amount to a distinct election to take their liability, to retract that, and fall back upon the liability which on a different principle might have been asserted against the other two, that is to say, against Scarf and Rogers, to the exclusion of Beech. I think that the respondent was bound by his election, and that, after approbating the liability according to the facts, and taking as his debtors those who had actually given the order, he could not, when it suited his convenience, retract it, reprobate it, and go back upon the liability by estoppel of the man who never gave the order at all.

Then did the respondent do that which was and ought to be held as an election of liability? I think that he did with full knowledge of all the facts from Feb. 25. He not only carried on the correspondence to which I have referred, which might have been entirely consistent with his reserving his right to elect; he not only received the cheque, upon which I am disposed to make the observation that receiving it would not have been a conclusive election, but he brought his action against Rogers and Beech, who could not be liable except upon the footing of his holding them to that liability to which they were undoubtedly subject at his election, according to the facts; and not only did he make his election, but when the action was stopped by the liquidation he carried in his proof, swearing that they were justly and truly indebted to him for the goods as sold and delivered by him to them. Rogers and Beech were in fact the debtors, and he had the benefit of that which really (without going into any technical distinctions) for this purpose appears to me to be a sufficient ground of judgment.

I do not think it necessary in this case to go into any of the cases which have been mentioned, because I think that the principle is perfectly distinct. The case which was relied upon by the respondent, of *Curtis v. Williamson* (1), simply held that the mere act of making an affidavit of the kind which was made in this case in bankruptcy was not one as to which the party would have no locus pœnitentiæ under any circumstances where he had been desirous, when he had fully considered the matter, of withdrawing it before it was put upon the file, and nothing was done, so far as appears, after it was put upon the file. There was nothing to bind him to his election except that inadvertent, and at the time when it was done unintentional, act of his agent; and the court, who probably knew the facts of that case, were quite right in holding that that ought not to be regarded as an election by him. In *Bilborough v. Holmes* (2) I need not refer particularly to the circumstances; but it appears to me that a proof, under circumstances similar to the present, was held upon the principle of election not to bind the party who made it; and in the other cases which have been mentioned it is sufficient to say that they were quite right. In *Bottomley v. Nuttall* (3) an acceptance had been given which was evidence of a successful obligation, and proof of it would by no means destroy or extinguish any right which the party might have upon the original debt and the original consideration.

There is, therefore, as was admitted at the Bar, no direct authority upon this point. Your Lordships are obliged to determine it upon principle; and on principle I think your Lordships ought to hold that the respondent was put to his election, that he made it when he brought the action and proved in liquidation, and that he cannot now, consistently with the election which he has made, hold Mr. Scarf liable. I, therefore, move your Lordships that the order under appeal be reversed, and that the appellant have his costs in the Court of Appeal and in this House.

LORD BLACKBURN.—I am of the same opinion. [His LORDSHIP stated the facts, and continued:] Though the amount now in dispute is very small the question is an important one. I do not think there can be any doubt that, where a person has given authority to another, the authority being such as would ap-

- A parently continue, he is bound to those who act upon the faith of that authority, though he has revoked it, unless he has given the proper notice of the revocation. In this case I think there can be no doubt that Rogers, having been partner with Scarf had authority, and apparently continuing authority, to bind Scarf as to all matters concerning the partnership, and that Mr. Jardine, being an old customer, had a right to believe that that authority continued until he was told that it was
- B revoked. But then I do not think that the liability is upon the ground that the authority actually continues. I think it is upon the ground, as has been very well put and explained in *Freeman v. Cooke* (4), that there is a duty upon the person who has given that authority, if he revoke it, to take care that notice of that revocation is given to those who might otherwise act upon the supposition that it continued; and the failure to give that notice precludes him from denying that
- C he gave the authority against those who acted upon the faith that that authority continued. I put rather an emphasis upon these last words, for I think that no man has a right to say, "I know now that the authority was in fact revoked, but I will continue to go on, and will do things subsequently, and act upon the supposition that I hold this person liable, though I am not actually acting upon the faith that he has given authority, but I am acting upon the ground that I
- D find another is really liable, and I will only come on him if that other does not pay." I do not think he can do that.

The question, therefore, is: Was Mr. Jardine acting upon the faith that he was so? Mr. Jardine, upon Jan. 30, as far as appears upon the evidence, had never so much as heard of Mr. Beech. When he received the order from W. H. Rogers & Co. he had every reason to think that he was contracting to supply these goods

E to Rogers and Scarf; and he did supply the substantial part of them before he had any notice that he was not supplying them to Rogers and Scarf. Therefore, at that time he was clearly in the position of a person who had acted upon the faith that W. H. Rogers' authority, when he gave the order, still continued when the goods were supplied, and he, therefore, certainly had a right to hold Scarf liable on that ground. But it is quite clear that on Feb. 25 he became aware that in

F point of fact Scarf was not really a principal, and had not given real authority; that in point of fact Rogers was not acting by Scarf's authority, but by Beech's authority, and that Rogers and Beech were the real persons who had ordered the goods and had received them, and were the persons who were therefore liable; because in fact Rogers had authority from Beech, and had not in fact authority from Scarf.

- G The first question, therefore, which arises in this case is, could a person who knew that he held both Beech and Rogers liable, and had very rightly the power to say, "I will treat this as being the joint liability of Rogers and Beech," say, "I will treat this not only as the joint liability of Rogers and Beech, but as the joint liability of Rogers, Beech, and Scarf," treating them all three as jointly liable? And certainly, although counsel could not produce any precise authority upon the
- H point, I should myself never have entertained the slightest doubt that he could not, and that in old times a plea in abatement in an action against Rogers and Beech for not joining Scarf would have been bad; nor could I have doubted that in old times, if an action had been brought against Rogers, Scarf, and Beech jointly, there would have been a nonsuit entered upon the ground that there was a variance in the proof—that there was no proof that the three were liable.
- I I should not have doubted that at all if I had not found that that was not the view of the Court of Appeal. There seems not only to be no distinct authority on the subject, but there really seems to have been a doubt in the minds of those able judges whether or not the respondent could consider all three persons jointly liable. I think it important to say distinctly that, in my opinion, he could not, and to say that the right which the plaintiff had when he got the notice on Feb. 25 was to sue either at his option. He was not bound to sue Scarf. He might very reasonably and properly say, "I think that I have a legal right to hold Mr. Scarf liable because he did not give notice to me in time; but I am not going

to do so. I find now that I have a right to hold Rogers and Beech liable, and I will do so." If he had communicated that to the parties there could be no doubt at all that when he had elected thus to charge Rogers and Beech, and Rogers and Beech only, there would have been no question that it was a final and conclusive election, and that he could in no way after that charge Scarf. But he also had a right, if he pleased, to say, "I will proceed upon the ground that Scarf has made himself liable to me; I will hold Scarf liable." But in that case I think he could not hold Beech also liable. It seems to me that he had his choice between the two, but he could not hold both sets of persons liable.

Then comes the question which ought to have been decided, not whether there was a novation, but whether the respondent had before Sept. 30, the date at which for the first time he made a claim against Scarf, made a final determination of the election by which he had to choose which of the two sets of parties he would hold liable. On that question there are a great many cases; they are collected in the notes to *Dumpor's Case* (5) (1 SMITH'S LEADING CASES (8th Edn.), 47, 54), and they are uniform in this respect, that where a man has an option to choose one or other of two inconsistent things, when once he has made his election it cannot be retracted; it is final and cannot be altered. "Quod semel placuit in electionibus, amplius displicere non potest" (COKE UPON LITTLETON, 146 a), and I do not doubt that there are many older authorities to the same effect; but that rule has been uniformly acted upon from that time at least down to the present. When once there has been an election to do one of the two things you cannot retract it and do the other thing; the election once made is finally made. But upon that comes the question which now arises, whether there was evidence here on which your Lordships should find as a fact that there was an election. Upon that I may state that, in *Clough v. London and North-Western Rail. Co.* (6) the Exchequer Chamber had to consider that question a good deal in a case of some importance in which the judgment was carefully considered, and it will be found that the result of what is there said is that, where there is a right to elect, the party is not bound to elect at once; he may wait and think which way he will exercise his election, as long as he can do so without injuring other persons; and accordingly in that particular case it was held that he had not lost his right to elect by a reasonable waiting under rather peculiar circumstances; but when he has once fully elected it is final. I may also refer to *Jones v. Carter* (7) as most neatly stating the point.

The principle, I take it, running through all the cases as to what is an election is this, that where a party in his own mind has thought that he would choose one of two remedies, even though he has written it down on a memorandum or indicated it in some other way, that alone will not bind him; but as soon as he has not only determined to follow one of his remedies, but has communicated it to the other side in such a way as to lead the opposite party to believe that he has made that choice, he has completed his election, and can go no further; and, whether he intended it or not, if he has done an unequivocal act—I mean an act which would be justifiable if he had elected one way, and would not be justifiable if he had elected the other way—the fact of his having done that unequivocal act to the knowledge of the person concerned is an election. In *Jones v. Carter* (7) the question was whether a person who had a right to avoid a forfeiture had avoided it or not. He had at first brought a writ of ejectment for the purpose of avoiding it, by which in modern times you do not actually enter, but it had proceeded so far that the defendant had entered into a consent rule by which he had admitted the entry, and having done so the court held that it must be taken as if the plaintiff had entered, and that, inasmuch as the entry to avoid a forfeiture was unequivocal in its nature, he could not afterwards say the lease was not void. It would have been exactly the same the other way if he had done an unequivocal act showing that the lease was not void, such as receiving rent; he could never afterwards have said that it was void.

That is the question which I think the court below ought to have decided, and which, I think, your Lordships now, having power to find all the facts, have to

A decide. Was there before Sept. 30, which was the date when the respondent first came upon Scarf, an unequivocal election to take Beech as his debtor? I do not think that the mere fact of his having continued to enter in his books these goods along with others which he had undoubtedly contracted to supply after Feb. 25, when he had full notice, entering them in one account, would exclude him, because I think, as I said before, that it was merely an expression of his own private intention and opinion, which did not bind the matter until it was communicated to the other side, which it never was. I do not think that his having demanded money from Rogers after he knew that he was carrying on the new firm of Rogers and Beech will do, because the notice of dissolution distinctly said, "whatever Rogers and Scarf owe, go to Rogers and Rogers will pay it."

But the evidence goes further: I am not sure that taking a cheque from Rogers and Beech as payment was so far enough to make an election, because I think that, in acting on the authority given by Scarf to pay the debts for him and Scarf, Rogers might pay money by the new firm's cheque or otherwise as he pleased. But then the respondent goes on and issues a writ against Rogers and Beech; he sues Beech. I am unable to conceive a more unequivocal act. He has thereby adopted Beech as his debtor at that time. I do not think that its going to judgment or not going to judgment is material. How he could possibly do a more unequivocal act than issuing a writ against Rogers and Beech I cannot imagine. The result of his issuing the writ was that Rogers and Beech, not being able to get time to obtain terms, went into liquidation, and then the respondent sent in his affidavit claiming to prove against them for this sum which is now in dispute, and also for the subsequent debts, treating them all as one. I think that also is an unequivocal act, and taking the whole together I can bring myself in no way to doubt that upon the facts we ought to find that Mr. Jardine, having the right of election between holding Beech liable and holding Scarf liable, had, before he ever came upon Scarf, finally determined his election and taken Beech as liable, and that he could not hold both Scarf and Beech liable. I am consequently of opinion that the judgment should be for the appellant, though not upon the ground upon which it was originally put, namely, that there was a novation, but upon the ground that Scarf never was liable, for this reason, that before any step was taken to make him liable a final and conclusive election had been made to hold Beech liable, which involved impliedly that Scarf was not.

LORD WATSON and **LORD BRAMWELL** concurred.

G *Appeal allowed.*
Solicitors: *Flower & Nussey*, for *Killick, Hutton & Vint*, Bradford, Yorkshire;
Buchanan & Rogers.

[Reported by C. E. MALDEN, Esq., Barrister-at-Law.]

BLIGHT v. HARTNOLL

[COURT OF APPEAL (Sir George Jessel, M.R., Lindley and Bowen, L.JJ.), February 12, 13, 1883]

[Reported 23 Ch.D. 218; 52 L.J.Ch. 672; 48 L.T. 543; 31 W.R. 535]

Will—Residue—Bequest of all property except property bequeathed to other persons subject to limitations—Limitations held to be void—Bequeathed property part of residue.

A testatrix gave to H. all her property except a wharf which was left to other persons subject to limitations which were subsequently held to be void.

Held: the bequest to H. was a residuary bequest and the wharf fell into the residue.

Notes. Applied: *Re Bagot, Paton v. Ormerod*, [1893] 3 Ch. 348. Distinguished: *Re Fraser, Lowther v. Fraser*, [1904-7] All E.R. 177. Considered: *Re Tilden, Coubrough v. Royal Society of London* (1938), 82 Sol. Jo. 334. Applied: *Kirkby v. Phillips*, [1947] 2 All E.R. 777. Referred to: *Re Sazone Shoe Co., Ltd.'s Trust Deed, Re Abbott's Will Trusts, Abbott v. Pearson*, [1962] 2 All E.R. 904.

As to the effect of the failure of a gift in general, see 39 HALSBURY'S LAWS (3rd Edn.) 946 et seq.; and for cases see 44 DIGEST 416 et seq.

Cases referred to:

- (1) *Evans v. Jones* (1846), 2 Coll. 516; 63 E.R. 840; 44 Digest 418, 2492.
- (2) *Wainman v. Field* (1854), Kay, 507; 69 E.R. 215; 44 Digest 427, 2570.
- (3) *Davers v. Dewes* (1730), 3 P.Wms. 40; 24 E.R. 961, L.C.; 44 Digest 747, 6047.

Appeal from an order of FRY, J., in an action brought by the next-of-kin of a deceased testatrix, Elizabeth Blight, against the residuary legatees of her will and other interested parties, claiming that a certain wharf, which the testatrix had purported to give away to certain persons subject to certain limitations which had been held to be void, belonged to the next-of-kin.

Under the terms of her will dated Sept. 12, 1854, the testatrix bequeathed to her sister, Christiana, wife of John Hooper Hartnoll, subject to payment of debts, legacies, funeral and testamentary expenses, and other charges and deductions, all her property with the exception of a certain debt owing to her, and also with the exception of her wharf at Lower Charlton, near Woolwich. The testatrix then devised to her said sister Christiana during her life an annuity of £50 to be charged on and issuing and payable out of the rental of the wharf, but should she have died in the lifetime of the testatrix, or should she survive her, then, after her decease, the testatrix directed that the said annuity should be paid by her executors thereafter named to the persons therein named.

The testatrix also bequeathed unto her grandson Thomas Richard Crouch, son of her daughter Emma, wife of Charles Richard Crouch, an annuity of £15 a year, to be applied by her executors thereafter named towards the maintenance and education of her said grandson until he should have arrived at the full age of twenty-one years, and in like manner, and for a like purpose, the testatrix bequeathed unto her granddaughter Frances Christiana Crouch, daughter of her said daughter Emma, an annuity of £15 a year, both the said annuities to be paid out of the rental of her aforesaid wharf, the annuity to her grandson to terminate on his attaining twenty-one, and then to be added to the annuity bequeathed to Frances Christiana Crouch, the full annuity of £30 to be thereafter paid for the term of her natural life to her said granddaughter, with further directions in the event of the death of the said granddaughter during the lifetime of her mother, the testatrix's daughter Emma, which did not happen. After

A certain other provisions, the testatrix then directed that, after payment of the aforesaid annuities, the quarterly balances arising out of the rental of the aforesaid wharf should be accumulated in the hands of the said John Hooper Hartnoll in manner specified in the will for the purpose of paying off two mortgages which she had effected on the said wharf. She further directed her executors thereafter named that, after payment of the aforesaid annuities, and the payment and discharge of the aforesaid two mortgages, they were to sell by public auction the wharf at New Charlton which had been previously charged with payment of the aforesaid annuities, and divide the proceeds among such of her grandchildren as might then be surviving, and in such proportions as her sister Christiana Hartnoll might by her will appoint. The testatrix then appointed John Hooper Hartnoll and Thomas Arthur Boate the executors of her will.

C On Sept. 15, 1854, the testatrix died, entitled in fee to the wharf mentioned in her will. Of the two leases of the wharf granted by her, the one was to expire in 1892 and the other in 1893. Christiana Hartnoll died in 1877, having by her will purported to exercise the power of appointment given to her by the will of Elizabeth Blight.

D FRY, J., in an administration action held that the power of appointment was badly created and badly exercised. The plaintiffs then argued that the wharf belonged to the next-of-kin of the testatrix, and did not fall into the residue. FRY, J., however, held that the testatrix had treated the wharf as part of her own personal property, and had shown no intention inconsistent with its falling into residue, and that, after satisfaction of the annuities and mortgages, it passed to Christiana Hartnoll under the residuary gift.

E *Cookson, Q.C.*, and *Grosvenor Woods* for the next-of-kin.
Everitt, Q.C., *Methold* and *Oswald* for the residuary legatees.
Mitchell and *T. J. Edwards* for other parties.

SIR GEORGE JESSEL, M.R.—It will be as well to see what the law is upon this subject before construing this will. I take it that the law as to personal estate is substantially the same, so far as regards gifts of residue, as the law relating to real estate; that is to say, unless a contrary intention appears by the will, lapsed and void bequests fall into the residue.

That being so, the first question here is: Is this bequest a residuary bequest? If it is, the void gift will, *prima facie*, fall into it. You may have a residuary gift in various forms; but however it is expressed, it must in effect be a gift of all the testator's estate which is not disposed of by the will. It is not a true residue if there is any part of the testator's estate which is not disposed of by the will to anybody at all. There is a difference between the case where part of the estate is undisposed of, and the case where the will purports to, but does not, dispose of a part. By a residue is meant that which the will does not purport otherwise to dispose of; but if there is some part of the estate which the will does not purport to dispose of at all, there is no true residuary gift. The wording is not material. A gift of "all my property to A except my gold watch"—there being a gift of the gold watch to B—or a gift of "all my property except my leasehold house, which I give to B," is a true residuary gift. The common form is to give to A, B, and C certain legacies, and to give all the rest to D, but it only means the same thing. *Evans v. Jones* (1) is an authority for that, if you want one.

I But that is very different from a gift of "all my property to A except my gold watch," the gold watch not being given to anyone. In that case there is not a lapsed or void gift of the watch; it is not the subject of a legacy at all, but is allowed to go by course of law to the next-of-kin, and there is therefore no true residuary gift. But the moment we get a case of a true residue, the law is, that that residue is increased by the lapse of a legacy or the fact of its not having been effectively given away in accordance with the expression of the testator's intention.

Here there is a very simple residuary gift. The testatrix gave to Christiana Hartnoll all her personal property except a certain wharf, which was expressed

to be given away to other persons, but which was not validly given away, some of the limitations of the will in relation thereto being void. Why should not this wharf fall into the residue? It is said that there is a contrary intention shown, because the will makes it subject to certain debts. But it is only made so in case the legacy takes effect. It is impossible to suppose that the testator would give a legacy knowing it to be void, and, with the exception of the case of a testator expressing a doubt whether a legacy given by his will was void or not, it would be impossible to hold that he even contemplated what should occur in case the legacy was invalid. We certainly should not presume such an intention on the part of a testator. A testator generally expects his legatees to survive him, though there is a possibility that they may not; but we cannot suppose him to have been such an idiot as wilfully to make a void bequest. The only case which suggests itself at the present moment as one in which a testator might make a bequest having a doubt as to its validity, is when he does not know which of several certain charities is capable of taking a devise of real estate. In such a case he may put into his will a whole string of illegal bequests, but you cannot assume that he thought they were illegal. It is almost impossible to suppose that a testator intended that a legacy should not, because it is invalid, fall into the residue. There is nothing in the present case to lead one to suppose that the testatrix thought that the gift of the wharf was void, or intended that in that case it should not fall into the residue.

In my opinion, the decision of *FRY, J.*, was correct. As regards *Wainman v. Field* (2), *WOOD, V.-C.*, thought that in that case there was no true residuary gift, and therefore that the property in question did not fall into it. That decision is merely one of construction, and I should not myself be inclined to construe the will in the same way as the Vice-Chancellor. But no principle is laid down, and I cannot extract any principle from the decision. Therefore, whether I concurred in the decision or not, I could not apply it to this case.

LINDLEY, L.J.—I also think that the decision of *FRY, J.*, is correct. The first question we have to consider is, what does the testatrix mean when she gives all her property except a certain wharf to one person? Is that a true residuary gift, and is there any difference between such a gift and a residuary gift in the common form, namely, a gift of the wharf to A, and of all the rest of the testatrix's property to B? In my opinion there is no difference whatever. The second question is: Is there any expression of an intention on the part of the testatrix to exclude from the residue property which would naturally fall into it? Our choice is between testacy and intestacy, and the testatrix can hardly be assumed to have intended to die intestate as to any portion of her property. I can find nothing in the will which justifies us in saying that there was such an intention. I have looked at both the cases cited by counsel for the next-of-kin. In *Davers v. Dewes* (3) the ratio decidendi of the Lord Chancellor was that the goods and furniture were undisposed of by the will, and, therefore, he held that they must go to the next-of-kin. He thought it was plain the testator did not intend they should pass by the will, but reserved them to be disposed of by a subsequent codicil, and, therefore, they could not pass by the devise of the residue by the will. In *Wainman v. Field* (2), *WOOD, V.-C.* thought that, on the particular words used by the testator, the property did not fall into the residue; but that was merely on the construction of that will.

BOWEN, L.J.—I am of the same opinion.

Solicitors: *E. W. Owles; Sidney; W. Bristow; Shaft.*

[Reported by *FRANK EVANS, Esq., Barrister-at-Law.*]

ANDERSON, TRITTON & CO. v. OCEAN STEAMSHIP CO.

[HOUSE OF LORDS (The Earl of Selborne, L.C., Lord Blackburn and Lord Watson), November 14, 17, 18, December 5, 1884]

[Reported 10 App. Cas. 107; 54 L.J.Q.B. 192; 52 L.T. 441;
33 W.R. 433; 5 Asp.M.L.C. 401]

Shipping—General average—Liability of cargo owners for contribution—Sum paid to owners of assisting ship under agreement to pay specified amount when assistance requested irrespective of whether the services beneficial or not.

Under an agreement between the owners of steamships trading to the Hankow river, if any ship was in danger and signalled for assistance, she should pay the assisting ship the sum of £2,500 whether the services rendered were beneficial or not and no services should be rendered for more than twenty-four hours. Ship A. ran aground while trading in the Hankow river, signalled ship S. for assistance, and with her assistance was refloated without injury. An agreement was drawn up between the owners of ship A. and the owners of ship S. which embodied the terms of the general arrangement, and in pursuance thereof the owners of ship A. paid to the owners of ship S. the sum of £2,691 19s. 6d. for services and expenses. The owners of ship A. claimed that the defendants, as owners of cargo on board that ship, were liable for a general average contribution in respect of the sum paid to the owners of ship S.

Held: the fact that the owners of ship A. had by contract become bound to pay the sum mentioned, and had in fact paid it was not conclusive that the whole of it was chargeable to general average; part of it might be, the exact amount chargeable being a matter to be decided by the jury.

Per LORD BLACKBURN: I think that the disbursement, in so far as it is a disbursement for the salvation of the whole adventure from a common imminent peril, may properly be charged to general average.

Notes. Considered: *Morrison Steamship Co., Ltd. v. S.S. Greystoke Castle* (Cargo Owners), [1946] 2 All E.R. 696; *The Troilus*, [1951] 2 All E.R. 40. Referred to: *The Raisby* (1885), 10 P.D. 114; *The Prinz Heinrich* (1888), 13 P.D. 31; *The Leon Blum*, [1915] P. 90; *Tate and Lyle, Ltd. v. Hain Steamship Co.* (1934), 151 L.T. 249.

As to general average see 35 HALSBURY'S LAWS (3rd Edn.) 502 et seq.; and for cases see 41 DIGEST 592 et seq.

Cases referred to:

- (1) *Kemp v. Halliday* (1865), 6 B. & S. 723; 34 L.J.Q.B. 233; 13 L.T. 256; 11 Jur.N.S. 852; 13 W.R. 1035; 2 Mar.L.C. 271; 122 E.R. 1361; on appeal (1866), L.R. 1 Q.B. 520, Ex. Ch.; 41 Digest 593, 4173.
- (2) *Beldon v. Campbell* (1851), 6 Exch. 886; 20 L.J.Ex. 342; 17 L.T.O.S. 257; 155 E.R. 805; 41 Digest 267, 1117.

Also referred to in argument:

Aitchison v. Lohre (1879), 4 App. Cas. 755; 49 L.J.Q.B. 123; 41 L.T. 323; 28 W.R. 1; 4 Asp.M.L.C. 168, H.L.; 41 Digest 866, 7367.

The Hector (1833), 3 Hag. Adm. 90; 166 E.R. 339; 41 Digest 883, 7661.

The Clifton (1834), 3 Hag. Adm. 117; 166 E.R. 349; on appeal sub. nom. *Kelly v. Bushby*, *The Clifton* (1835), 3 Knapp, 375, P.C.; 41 Digest 846, 7087.

The Princess Alice (1849), 3 Wm. Rob. 138; 6 Notes of Cases, 584; 166 E.R. 914; 41 Digest 836, 6972.

Arnold v. Cowie, *The Glenduror* (1871), L.R. 3 P.C. 589; 8 Moo.P.C.C.N.S. 22; 24 L.T. 499; 1 Asp.M.L.C. 31; 17 E.R. 221, P.C.; 41 Digest 887, 7723.

The Medina (1876), 2 P.D. 5; 35 L.T. 779; 25 W.R. 156; 3 Asp.M.L.C. 305, C.A.; 41 Digest 860, 7272.

The Waverley (1871), L.R. 3 A. & E. 369; 40 L.J.Adm. 42; 24 L.T. 713; 1 A Asp.M.L.C. 47; 41 Digest 859, 7249.

Nicholson v. Chapman (1793), 2 Hy. Bl. 254; 126 E.R. 536; 41 Digest 851, 7141.

Newman v. Walters (1804), 3 Bos. & P. 612; 127 E.R. 330; 41 Digest 839, 7006.

Arthur v. Barton (1840), 6 M. & W. 138; 9 L.J.Ex. 187; 7 L.T. 224; 151 E.R. 355; 41 Digest 267, 1119.

Birkley v. Presgrave (1801), 1 East, 220; 102 E.R. 86; 41 Digest 594, 4177.

Moran v. Jones (1857), 7 E. & B. 523; 26 L.J.Q.B. 187; 29 L.T.O.S. 86; 3 Jur.N.S. 663; 4 W.R. 503; 119 E.R. 1840; 41 Digest 603, 4305.

The Minnehaha (1861), 1 Lush. 335; 167 E.R. 149; sub nom. *Ward v. McCorkill, The Minnehaha*, 15 Moo.P.C.C. 133; 4 L.T. 810; 7 Jur.N.S. 1257; 9 W.R. 925; 1 Mar.L.C. 111; sub nom. *The Storm King and The United Kingdom (Owners) v. The Minnehaha (Owners)*, 30 L.J.P.M. & A. 211, P.C.; 41 Digest 676, 5056.

The Undaunted (1860), Lush. 90; 29 L.J.P.M. & A. 176; 2 L.T. 520; 167 E.R. 47; 41 Digest 832, 6921.

The Melpomene (1873), L.R. 4 A. & E. 129; 29 L.T. 405; 21 W.R. 956; 2 Asp.M.L.C. 122; 41 Digest (Repl.) 832, 6915.

The E.U. (1853), 1 Ecc. & Ad. 63; 8 L.T. 582; 164 E.R. 37; 41 Digest 892; 7818.

The Helen and George (1858), Sw. 368; 166 E.R. 1170; sub nom. *The Argo v. The Helen and George*, 8 L.T. 335; 41 Digest 858, 7241.

The Phantom (1866), L.R. 1 A. & E. 58; 15 L.T. 596; 12 Jur.N.S. 529; 14 W.R. 774; 2 Mar.L.C. 442; 41 Digest 828, 6374.

The City of Chester (1884), 9 P.D. 182; 53 L.J.P.90; 51 L.T. 485; 33 W.R. 104; 5 Asp.M.L.C. 311, C.A.; 41 Digest 829, 6900.

Bird v. Gibb, The De Bay (1883), 8 App. Cas. 559; 52 L.J.P.C. 57; 49 L.T. 414; 5 Asp.M.L.C. 156, P.C.; 41 Digest 879, 7587.

Appeal from a decision of the Court of Appeal (SIR BALIOL BRETT, M.R., BAGGALLAY and BOWEN, L.JJ.), reported 13 Q.B.D. 651, reversing a decision of the Divisional Court (GROVE, LOPES and MATHEW, JJ.), in an action brought by the respondents as the owners of the steamship *Achilles* to recover a sum of £162 11s. 7d. alleged to be due from the appellants as owners of a portion of the cargo as a general average contribution. At the trial of the action before CAVE, J., and a jury judgment had been entered for the respondents.

Sir Farrer Herschell, Q.C., Cohen, Q.C., and Gorell Barnes for the appellants.

H. Matthews, Q.C., G. Bruce, Q.C., and H. D. Greene for the respondents.

Their Lordships took time for consideration.

Dec. 5, 1884. **LORD BLACKBURN** read the following opinion in which the **EARL OF SELBORNE, L.C.**, and **LORD WATSON** concurred.—The first paragraph of the statement of claim is as follows:

"In consideration that the plaintiffs, at the request of the defendants, had taken on board a ship of the plaintiffs', called the *Achilles*, certain goods of the defendants, to be carried on board the said ship from Hankow to London, the defendants promised that they would contribute and pay their just share and proportion, in respect of the said goods, of any general average loss that might arise or happen to the ship during the said voyage."

The statement then proceeds to aver that the ship with the goods on board took the ground, and that the ship and crew were in danger of perishing, and that her master and crew, being unable to rescue the said ship or the said cargo from the said danger, help and assistance were obtained, and were necessary and proper for that purpose, for which the plaintiffs were obliged to pay, and did pay, £2,691 19s. 6d., and the ship and cargo were by means of the said help and assistance preserved.

A If there was a general average loss to which the defendants were to contribute it is not now in controversy that the defendants' proportion of £2,691 19s. 6d. would be £162 11s. 7d., and for that sum the action was brought. There can, however, I think, be no doubt that the plaintiffs, are not tied down to recover that exact amount or nothing. If it was proved that there was a claim for general average, but that the amount for which the claim was made out was less than £2,961 19s. 6d.,

B the plaintiffs might still recover the proper percentage of that amount actually made out. The defendants by their statement of defence put the plaintiffs on proof of everything, and contended, and I rather think still contend, that the plaintiffs are not entitled to recover anything. But they seem to have had doubts upon that subject, and, therefore, bring £75 into court. What the effect of this mode of pleading might be on the costs I do not stop to inquire. It certainly shows, to my

C mind, that, besides the issue whether there was a general average at all, there was a serious issue as to what the amount was to which the cargo had to contribute as a general average.

I may as well clear away a matter of prejudice. If anyone is insured in the ordinary form his insurers would have to indemnify him for general average. It is, therefore, usual enough for a merchant who is insured to hand over the defence to

D his insurers; if they can make out that the merchant is not liable at all, there is no claim on the insurers; if they can make out that the amount payable is less than is demanded, the claim on the insurers is less. I think it very likely that in this case insurers are defending the action in the name of the defendants, though I do not know that it is so, but that makes no difference in the law, and should make none as to the findings of fact. No more contribution is exigible from the owner of a parcel

E of goods that are insured than from the owner of a parcel that is not insured.

On the trial evidence was produced on the part of the plaintiffs only, the defendants calling none. At the close of the case it was submitted that there was no case, and various objections were taken. One of these I may now notice: There was evidence—I do not now say more—that not only the ship, but also the cargo, were exposed to a peril from which the master and crew were unable to

F rescue them; that the assistance of the *Shanghai* was requested and was granted; and there was evidence that by the assistance of the *Shanghai* the ship and cargo were saved from that peril. The objection of counsel for the appellants, if I understood him rightly, was that, assuming all to be true which this could prove, it would show a claim for salvage for which the owners of the *Shanghai* might have brought a suit in the Court of Admiralty against the ship and cargo, and that, in

G that court the amount of the fair reward would have been decided by the Admiralty, taking everything into consideration; the peril to the *Shanghai*, which does not seem to have been great, being one element, and the sum which the owners of the *Shanghai* in all cases demanded being another, but not a conclusive one. But I think this was not a tenable point. The owners of the *Achilles* paid the amount demanded by the *Shanghai* as a disbursement; after they had been paid the owners

H of the *Shanghai* could not have brought any suit. I think it would be a very unjust rule of law that the cargo owners should go free from a payment which they might have been forced to make to the owners of the *Shanghai* because the owners of the *Achilles* did not put the *Shanghai* to a suit in the Court of Admiralty, but, rightly or wrongly, paid as a disbursement the whole amount demanded. I do not think that the owners of the *Achilles* could, by paying the claim of the

I *Shanghai*, entitle themselves to recover more from the goods owners than the *Shanghai* could have recovered in a salvage suit against the goods owners, but I do not see why they might not recover whatever it was fair and just should be paid as a contribution.

General average, as is explained in ABBOTT ON SHIPPING, is founded on the Rhodian law, which, however, in terms did not extend further than to cases of jettison; but its principle applies, and it has been applied, to other cases of voluntary sacrifice for the benefit of all, that is if properly made. Those things which are actually saved in the sense explained in ABBOTT ON SHIPPING (5th Edn.), pt. 3,

ch. 8, s. 13, p. 355, must contribute. In *Kemp v. Halliday* (1), I said (6 B. & S. A at p. 746):

"In order to give rise to a charge as regards general average, it is essential that there should be a voluntary sacrifice to preserve more subjects than one exposed to a common jeopardy, but an extraordinary expenditure incurred for that purpose is as much a sacrifice as if instead of money being expended money's worth were thrown away. It is immaterial whether the shipowner sacrifices a cable or an anchor to get the ship off a shoal, or pays the worth of it to hire those extra services which get her off. It is quite true that so long as the expenditure by the shipowner is merely such as he would incur in the fulfilment of his ordinary duty as shipowner, it cannot be general average."

I may observe that in the specimen of an adjustment given in ABBOTT ON SHIPPING (5th Edn.), pt. 3, ch. 8, s. 16, p. 359, and sanctioned by LORD TENTERDEN's high authority, one of the items allowed is "expense of bringing the ship off the sands £50." That item must have been a disbursement to pay for services hired. I think that the promise stated in the first paragraph of the statement of claim is one that would be implied by law in every contract for the carriage of goods. The shipowners have, I think, a lien till the contributions are paid or secured. The goods owner may raise the question whether any, and if any what, contribution is due, by offering to pay what, if anything, he admits to be due, demanding the goods, and if refused bringing trover, and so raising the question whether he has been ready and willing to pay enough. But I see no reason why the same question should not be raised in this form of action. Questions of this sort are generally more conveniently settled by average adjusters as arbitrators, or by stating a case on any question of law on which the opinions of average adjusters differ; but the action having been brought must be disposed of.

I have come to the conclusion that, on the evidence given at the trial, it was not a simple issue whether the whole sum actually paid by the shipowners to the owners of the *Shanghai* was chargeable to general average, and, if that was not made out, that nothing was to be recovered. I do not think that it would follow merely from the shipowner having become liable to pay and having paid that sum, that the whole of it was chargeable to general average. I think it might well be that on this evidence the proper conclusion was that something differing from that sum might be chargeable, and I think that, till it is ascertained whether any sum was chargeable, and what the sum was, the case is not ripe for decision. I do not think that the answers by the jury to the questions asked by the learned judge at the trial suffice to enable this House to solve that question. I have, therefore, come to the conclusion that neither the judgment given by CAVE, J., in favour of the plaintiffs for the whole amount, nor the order of the Divisional Court entering judgment for the defendants, nor the order now appealed against restoring the judgment below, can be supported, and that the only course that can be adopted by this House is to order a new trial.

The principles on which I come to this conclusion have not often been discussed in a court of law; they probably often come before average adjusters, and are of great importance. The contract of the shipowner is to carry on the goods to their destination. In *Beldon v. Campbell* (2) it is said by PARKE, B., with, I think, perfect accuracy (6 Exch. at p. 889):

"There is no doubt of the power of the master by law (but some as to what extent it goes) to bind the owner. The master is appointed for the purpose of conducting the navigation of the ship to a favourable termination, and he has as incident to that employment a right to bind his owner for all that is necessary, that is upon the legal maxim, Quando aliquid mandatur, mandatur et omne per quod pervenitur ad illud."

I think that if the question here raised had been whether the owners of the *Achilles* were bound by a contract made by their master to pay the owners of the *Shanghai* the sum in question, the first questions asked by CAVE, J., would have

A been perfectly right. I do not, however, think that on the evidence any question of the authority of the master to bind his owners really was raised. The two sets of shipowners had a common agent, Drysdale, Ringer & Co., and I should rather conclude that Drysdale, Ringer & Co. were the persons who, on behalf of the owners of the *Shanghai*, agreed to send out the *Shanghai* to help the *Achilles* as soon as the master of the *Achilles* signalled that he wanted help, and that the amount of remuneration to be paid by the owners of the *Achilles* to the owners of the *Shanghai* was not discussed or settled between the captains at all, but was settled in the first instance by Drysdale, Ringer & Co., and afterwards the two sets of shipowners ratified and agreed on what they settled.

I think, therefore, that it was quite clear that there was a contract binding on the owners of the *Achilles* to pay this sum of £2,691 19s. 6d. to the owners of the *Shanghai*, whether it was made by themselves or by their master for them is as far as regards the binding of the owners of the *Achilles*, unimportant. But neither the owners of the ship nor their master have authority to bind the goods, or the owners of the goods, by any contract. The master has, I think, authority to make for his owners all disbursements which are proper for the general purposes of the voyage, and when once those disbursements are paid for, either by the master out of funds belonging to the owner which the master has, or by funds which the owners themselves apply to discharge a contract which they either could not dispute because the master had bound them to make it, or did not choose to dispute, I think that the disbursement, in so far as it is a disbursement for the salvation of the whole adventure from a common imminent peril, may properly be charged to general average. But I think there is neither reason nor authority for saying that the whole amount which the owners of the ship choose to pay is, as a matter of law, to be charged to general average; and though I quite agree that there is some evidence here that the *Achilles* and her cargo were both in danger, and were both saved by the services of the *Shanghai*, and though I also agree that it is not a question of law whether the amount of the sum charged as a disbursement was exorbitant or not, still I cannot find that any question as to the amount was submitted to the jury.

It seems to me that if such a question had been submitted to a jury there is much in the evidence that might make it very doubtful whether the jury would think this sum properly chargeable against the owners of the goods if uninsured. If they thought the charge was against underwriters, there is a common enough impression, not confined to jurymen, that the underwriters' trade is such as to make it right to be liberal in deciding any doubtful question against them. I do not think this ought to influence, but it might do so. I cannot, however, find that the opinion of the jury was taken at all as to the amount. On a new trial that question may be raised, and it may be a subject of great difficulty to say what evidence bears on it, and what the proper directions to the jury should be. I think it better not to prejudice the question further than by saying that the fact that the owners of the *Achilles* had by contract, made either by their master or by themselves, become bound to pay this sum, and had paid it, is not, I think, conclusive that the whole of it was chargeable to general average, though part of it may be.

I think that the order of this House should be for a new trial, and that all the costs of the trial, and in the Divisional Court, and in the Court of Appeal, are thrown away; and that as neither party can be said to have succeeded in this House, each party should bear his own costs in this House. I, therefore, move accordingly.

Order appealed from reversed, except so far as it rescinded the order of the Queen's Bench Division that judgment be entered for the defendants. Cause remitted with directions for a new trial.

Solicitors: Waltons, Bubb & Walton; Flux, Son & Co.

[Reported by C. E. MALDEN, ESQ., Barrister-at-Law.]

A

INGLIS v. STOCK

[HOUSE OF LORDS (The Earl of Selborne, L.C., Lord Blackburn, Lord Watson and Lord FitzGerald), March 26, 27, 30, 1885]

[Reported 10 App. Cas. 263; 54 L.J.Q.B. 582; 52 L.T. 821;
33 W.R. 877; 5 Asp. M.L.C. 422]

B

*Insurance—Marine insurance—Insurable interest—Goods at purchaser's risk—
Sale of goods f.o.b.*

By agreements in writing D. agreed to sell to B. 200 tons of sugar of a certain quality at an agreed price f.o.b. Hamburg, payment by cash in London in exchange for bill of lading. B. re-sold to the respondent the same quantity at an increased price, but otherwise on the same terms. D. also sold 200 tons of sugar to the respondent on the same terms. D.'s agent shipped 390 tons of sugar in one ship to satisfy these two contracts. The usual course of business was not to appropriate specific bags of sugar to particular contracts until after the shipment, and after D. had received the bills of lading. The ship and cargo were lost before any appropriation was made, but D., on hearing of the loss, appropriated 200 tons to B.'s contract, and 190 tons to that of the respondent who paid the contract price and obtained the bills of lading. He had a floating policy of insurance on goods, and declared under it in respect of the sugar so lost. In an action on the policy by the respondent against the underwriters,

C

D

E

Held: the sales being "f.o.b. Hamburg" the sugar was at the respondent's risk after shipment, he had an insurable interest in it, and the underwriter was liable.

Notes. Considered: *Wimble, Sons & Co. v. Rosenberg & Sons*, [1913] 3 K.B. 743. Explained and Distinguished: *Healy v. Howlett*, [1917] 1 K.B. 337. Referred to: *Colley v. Overseas Exporters* (1919), Ltd., [1921] All E.R.Rep. 596; *London County Commercial Reinsurance Office*, [1922] 2 Ch. 67; *Wilson v. Wright*, [1937] 4 All E.R. 371; *Comptoir d'Achat et de Vente du Boerenbond Belge S.A. v. Luis de Ridder, Limitada*, [1949] 1 All E.R. 269; *Demby Hamilton & Co. v. Barden*, [1949] 1 All E.R. 435.

F

As to insurable interests, see 22 HALSBURY'S LAWS (3rd Edn.) 96-100, as to risk of unascertained goods, see 34 HALSBURY'S LAWS (3rd Edn.) 77, as to when payment is ordinarily due, see *ibid.* 115, as to when property passes and shipment, see *ibid.* 176-177. For cases see 29 DIGEST (Repl.) 51 et seq., 125 et seq.; 39 DIGEST 530, 558-9.

G

Cases referred to:

- (1) *Browne v. Hare* (1859), 4 H. & N. 822; 29 L.J.Ex. 6; 7 W.R. 619; 157 E.R. 1067; sub nom. *Hare v. Browne*, 33 L.T.O.S. 334; 5 Jur.N.S. 711, Ex. Ch.; 39 Digest 513, 1306.
- (2) *Anderson v. Morice* (1875), L.R. 10 C.P. 609; 44 L.J.C.P. 341; 33 L.T. 355; 24 W.R. 30; 3 Asp.M.L.C. 31, Ex. Ch.; affirmed (1876), 1 App. Cas. 713; 46 L.J.Q.B. 11; 35 L.T. 566; 25 W.R. 14; 3 Asp.M.L.C. 290, H.L.; 29 I Digest (Repl.) 132, 745.
- (3) *Sparkes v. Marshall* (1836), 2 Bing.N.C. 761; 2 Hodg. 44; 3 Scott, 172; 5 L.J.C.P. 286; 132 E.R. 293; 29 Digest (Repl.) 128, 712.

H

I

Also referred to in argument:

Seagrave v. Union Marine Insurance Co. (1866), L.R. 1 C.P. 305; Har. & Ruth. 302; 35 L.J.C.P. 172; 14 L.T. 479; 12 Jur.N.S. 358; 14 W.R. 690; 2 Mar.L.C. 331; 29 Digest (Repl.) 132, 749.

A **Appeal** by the defendant from a decision of the Court of Appeal (SIR BALIOL BRETT, M.R., BAGGALLAY and LINDLEY, L.JJ.), reported 12 Q.B.D. 564, reversing a decision of FIELD, J., reported 9 Q.B.D. 708, upon further consideration.

The facts appear in the speech of the EARL OF SELBORNE, L.C.

Sir Farrer Herschell, Q.C., Cohen, Q.C., and Gorell Barnes for the appellant.

B *Charles Russell, Q.C., Reid, Q.C., and Danckwerts* for the respondent.

THE EARL OF SELBORNE, L.C.—The question in this case is, whether the respondent had at the time of the loss of the steamer *City of Dublin* in the river Elbe, on Feb. 4, 1881, an insurable interest in 3,900 bags of sugar, part of that vessel's cargo. The Court of Appeal, reversing a judgment of FIELD, J., decided in the respondent's favour.

C By two contracts, dated respectively Jan. 7 and 12, 1881, which were, except as to dates and parties, identical in their terms, Messrs. Drake & Co., merchants of London, agreed to sell to one Beloe and to the respondent respectively, 200 tons each of German beetroot sugar, to be shipped from Hamburg. The material terms of the contract between Drake and Beloe are these :

D "London, Jan. 7, 1881, Messrs. W. Beloe & Co. We have this day sold to you for your account 200 tons German beet sugar of the crops 1880–1881, at 21s. 9d. per cwt. of 50½ kilos. net f.o.b. Hamburg for 88 degrees net saccharine contents. . . . The sugar shall analyse between 85/92 net both inclusive; sixpence per cwt. to be paid or allowed for each degree above or below 88, fractions in proportion; but anything above 92 not to be paid for. The analysis is to be effected by a public German chemist . . . for January delivery at Hamburg payment by cash in London in exchange for bill of lading; less two months' interest at 5 per cent per annum. Any dispute arising out of this contract to be settled by arbitration of two London brokers in the usual way."

E By another contract dated Jan. 7, the respondent bought from Beloe the sugar which Beloe had contracted to buy from Drake & Co., upon substantially the same terms, except that the price to be paid for it to Beloe was to be 21s. 10½d. per cwt., subject to like variations between the same limits; and that the average analysis of the whole contract was "not to exceed 90." The price, therefore, in each case was to be variable, according to the percentage of saccharine matter in the sugar; the goods were in each case to be delivered at Hamburg free on board, and consequently were, after shipment, to be at the purchaser's risk; and the bills of lading were to be retained by the vendors till the purchase moneys were paid.

F The respondent and Beloe at Bristol, and the agents of Drake & Co. at Hamburg, engaged space for these sugars in a general ship, the *City of Dublin*, one of a line of steamers trading between Bristol and Hamburg. The shipping agents at Hamburg, being informed by the respondent of his two purchases from Beloe and Drake & Co., and learning from Beloe that Drake & Co. were his vendors, advised their correspondents at Hamburg that 400 tons of sugar would be coming for that ship's cargo from Drake & Co. I do not think it material, but it is proper to notice that the respondent did not know from whom Beloe had bought, and Drake & Co. did not know that Beloe had sold to the respondent till after the loss. The quantity actually put on board the *City of Dublin* at Hamburg was only 3,900 bags or 390 tons. As to this, I think it enough to say that if the respondent would have had an insurable interest in 4,000 bags, under the circumstances of the case he had, in my opinion, such an interest though the quantity was short by ten tons. No other sugar belonging to Drake & Co. was put on board this ship. The 3,900 bags were, therefore, specially separated from the bulk of the vendor's own sugar; and they were shipped under Drake & Co.'s contracts with Beloe and the respondent, with a view to, and in fulfilment of, the agreement of Drake & Co., as vendors, to put the purchased sugars "free on board."

The present controversy arises out of the manner in which this was done. Each bag was distinguished by a mark denoting its percentage, according to certified analysis, of saccharine matter; and ten bills of lading, for parcels bearing marks corresponding to those on the bags, were made out in an impersonal form and sent, according to the contracts, to Drake & Co., to be retained by them till the time of payment should arrive. The aggregate consignment, except as to the deficiency of 100 bags, was proper and suitable to fulfil the two contracts, without exceeding as to either of them, the average of 90 per cent. of saccharine matter; and, according to the evidence of Mr. Hales, a partner in the firm of Drake & Co., it was made up and "ordered forward" as being "so divisible." But no particular bags were then set apart or marked as applicable to the one contract more than the other; it was thought sufficient by Drake & Co., or their agents, to leave this to be done when the bills of lading came forward. There would be no practical difficulty in doing it in a proper and reasonable way, even if the plaintiff had not produced Beloe's contract, inasmuch as neither purchaser could claim, and Drake & Co. were not to be paid for any excess beyond 90 per cent. of the average analysis of the whole contract, though it was conceivably possible that it might have been done perversely and unreasonably. The decision was, in fact, made by Drake & Co., who forwarded invoices of the parcels attributed to each purchaser on the evening of Feb. 4, after they had received notice of the loss. In the division so made the deficiency of ten tons was ascribed to the respondent's contract, being the later in date. No question was raised by the respondent or by Beloe; and the purchase moneys were paid by the respondent according to the contracts and invoices. But by this, which was done after the loss, the underwriters were, of course, not bound.

It is contended, on the part of the appellant, that under these circumstances, and for want of a proper division before the loss, the shipment had not the effect of divesting the prior title of Drake & Co., the vendors, or of passing any interest in these sugars to the respondent. This argument appears to me to confound two very different things—the appropriation necessary as between vendor and purchaser, and the division, as between purchaser and purchaser, of specific goods actually appropriated to the aggregate of the two contracts. I do not think it follows that there could be no appropriation by the vendor of which the purchasers might take the benefit, merely because the parcels of goods appropriated were mixed in the act of appropriation so as to require some subsequent division or apportionment. Whether this may have happened by previous agreement or course of dealing between all the parties, in which case there could be no serious doubt, or by accident, error, or want of proper care on the vendor's part, appears to me to make no difference in principle. The purchasers might possibly be entitled to reject, but the vendors could not, in my opinion, without their consent, retract the appropriation.

In the present case I see no reason to doubt that the difficulty arising from the confusion of parcels—material only to the settlement of the amount payable by the respondent to his two vendors—if not solved by consent or arbitration, for which each contract provided, would have been soluble by principles of law applied to the facts and the terms of the contracts. The necessity for doing this, and the fact that it had not been done at the time of the loss, do not in my opinion sufficiently distinguish this case from *Browne v. Harc* (1), and earlier authorities to the same effect. The goods were, by the act of the vendors, separated from all other goods belonging to them; they were shipped "free on board" in what was for that purpose the purchaser's ship, under two contracts so to deliver them, in both which contracts, subject to the payments to be made by him to Drake & Co. and Beloe, the respondent was then, though Drake & Co. did not know it, solely interested. I cannot infer from any part of the evidence that in so shipping them indiscriminately the vendors intended to break, instead of fulfilling, their contracts, and to take upon themselves, contrary to those contracts, the subsequent risk of loss, and the liability to freight. Yet this, as it seems to

A me, would be the necessary result of the appellant's argument. I think that the order appealed from is right, and I move your Lordships to affirm it, and to dismiss the appeal with costs.

B **LORD BLACKBURN.**—I also agree that there is no occasion to hear the counsel for the respondent. The respondent had insured himself by floating policies to the extent of £5,000. One of the policies is set out as a sample policy. It is a policy for £4,000, part of £5,000, and is marked in the margin No. 4247. By it the respondent caused himself to be insured in respect of goods conveyed in a steamer

C “from the continent of Europe between Havre and Hamburg, both ports included, and or Rouen, and or Nantes, to Bristol upon any kind of goods and merchandises, beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship at as above, upon the said ship, etc., including all risks of craft, and so shall continue and endure during her abode there upon the said ship, etc., and, further, until the said ship, with all her ordnance, tackle, apparel, etc., and goods and merchandises whatsoever, shall be arrived at as above upon the said ship, etc., until she hath moored at anchor twenty-four hours in good safety and upon the goods and merchandises until the same be there discharged and safely landed. . . . The said ship, etc., goods and merchandises, etc., for so much as concerns the assured by agreement between the assured and assurers in this policy are and shall be valued at £4,000, part of £5,000, on sugar to be hereafter valued and declared. To follow policy for £4,000, No. 3/4246 dated Dec. 6, 1880.”

E The meaning of “to be hereafter valued and declared,” is that if the insured has several adventures out, all within the description in the policy, he may select at his pleasure which is to be protected by the policy; and, on his giving notice of such a selection to the insurers, the policy is as if it had named that adventure from the beginning. Of course, if adventures have been previously named, these come first, and, whether those prior subjects of insurance are lost or not, the policy is equally pro tanto functus officio. And I believe the practice is, if there is nothing to show that the first adventure which came in safe was selected not to be under the policy, it is taken to be so, though there is no declaration. The meaning of “To follow policy for £4,000, No. 3/4246” is, that, there being consecutive policies, any loss declared is to be borne first by the earlier policies, and that it is not until after the policy No. 3/4246 is exhausted, either by losses or declared adventures which have come in safe, that the underwriters on the policy which follows are to bear the balance of the loss, if any. There is not, as far as I remember, any other difference between a policy in the present form, with a declaration that it is on sugar valued at £3,800, and sailed in the *City of Dublin* steamer, which sailed from Hamburg to Bristol on Feb. 3, 1881, and an ordinary policy for the same sugar, valued at the same sum, on the same steamer, on the same voyage.

H The appellant is an underwriter for £150 on each of these consecutive floating policies. There is no dispute, at least now, that the *City of Dublin* is such a steamer, and the voyage such a voyage as was within the terms of the policies, nor that the values and declarations were properly given, nor that there was enough left unexhausted on the policies to enable the underwriters to pay a total loss. I But it was said that the situation of the respondent with regard to the sugars was not such as to give him an insurable interest. And I have no doubt that, in order to recover against an underwriter, the assured must show that he suffers loss in respect of the thing insured. In case of an insurance on goods, if he shows that he had at the time of the loss the whole legal property in the goods which were lost, he undoubtedly does show it. But I do not agree that this is the only way in which he can show an insurable interest in goods, or that any relation to goods such that if the goods perish on the voyage the person will lose the whole,

and if they arrive safe will have all or part of the goods, will not give an interest which may be aptly described as "goods." A

In the present case there has been a good deal of extraneous matter brought into the discussion. I think if it had been remembered that the three contracts—viz., that of Jan. 7, between Drake and Beloe, that of the same date between Beloe and the respondent, and the contract of Jan. 12, between Drake and the respondent—were all in writing, and it had been seen that they are so expressed that, in my opinion, there is no doubt as to their construction, the objection would have been much more clearly raised, not, I think, for its benefit. Drake & Co., of London, who were large importers of beet sugar manufactured in Germany, made a contract with Beloe, of Bristol, who bought to sell again. There are, I gather, trading lines of steamers running from Hamburg to Liverpool, Leith, and Bristol, and, it may be, other places; but to London, if a steamer is wanted from Hamburg, it must be chartered, but of course it may be chartered. By the contract Drake & Co. bound themselves to Beloe to supply 200 tons of German beet sugar of the crop of 1880-81. It was not only to be German beet sugar, but it was to analyse between 85 and 92, "but anything above 92 not to be paid for." No portion of the sugar now in dispute was either below 85 or above 92, so that this term does not come into operation. The sugar was to be "net free on board at Hamburg," and it was for January delivery at Hamburg. The price was to depend upon the "average analysis of the whole contract. Should the average analysis of the whole contract exceed 90, such excess is not to be paid for." Counsel for the appellant raised an argument on this clause which I shall notice by and by. The price was to be paid in London in exchange for bill of lading. B C

Under this contract the first thing to be done was by Beloe, the buyer. He must let Drake, the seller, know in good time on what ship the goods were to be shipped free on board, for, till he knew that, Drake could not put the goods on board. As soon as he had secured room in the steamer he selected, and let Drake & Co. know in good time on what steamer they were to ship them, Drake & Co.'s part of the contract begins; they are bound to have there at Hamburg, and to ship free on board that ship, 200 tons of sugar answering in all respects to the description in the contract. Provided that sugar of the proper quantity and description was put on board that ship, it was no concern of Beloe's where or how Drake & Co. got it. So soon as they had done that they had fulfilled their part of the contract so far. But the price was to be paid in London in exchange for bill of lading; and no doubt from that it is to be implied that Drake & Co. were to take a bill or bills of lading for the sugar they put on board, and were in due time to be ready and willing to give the bills of lading in London in exchange for the price. If Drake & Co. did this Beloe was bound to pay the price. Beloe had on the same day, but whether before or after he had made the contract with Drake & Co. does not appear, made a contract with the respondent to supply him with 200 tons of sugar at 1½d. a cwt. higher price than that at which Drake had agreed to supply Beloe. As the respondent knew where he wanted the sugar, this was to be shipped "free on board A 1 steamer to Bristol." The description of the sugar was the same as that in the contract between Drake and Beloe, except that it was said "average analysis not to exceed 90." Counsel for the appellant said that if the average analysis exceeded 90 Beloe was bound to take it from Drake, but not to pay the excess in price; but the respondent was not bound to take this more valuable lot at all, but would be in his right if he rejected it. What would have been the case if that point had been raised by the facts we need not inquire, though I have a strong suspicion that a jury would not much favour it. D E F G H I

Looking at the documents, it appears that not only were the averages under 90, but that by no possible shuffling of the 3,900 bags actually put on board the *City of Dublin* could 2,000 bags have been selected the average of which would exceed 90. The respondent did not know, and had no reason to inquire, where Beloe was to get the sugar with which he was to supply him. He saw Edward Stock, the agent for the Bristol line of steamers, and, according to the evidence his

A directions were to secure room for the 200 tons in the steamer which would leave at the end of the month; and on Jan. 11, E. Stock & Son, the Bristol agents for the steamers, wrote to Nisistle and Günther the following letter :

B "There are 200 tons of sugar sold for shipment the second half of this month, but we have not yet ascertained the names of the shippers. There are also further parcels in treaty,"

C and so forth. This, it must be noticed, was before the contract between Drake and the respondent on Jan. 12, and how there can be any doubt raised that the respondent did his best as far as regards securing room on that steamer to take on board the sugar which Beloe was to ship or cause to be shipped, I am unable to conceive. He had to advise Beloe of this, and it is sworn that he did so, and I see no possible reason for doubting that he did.

E The position of things, then, as between Beloe and the respondent was this: The respondent had done his part, and unless Beloe by himself, or Drake, or anyone else, put the proper quantity of sugar of the proper description on board the steamer, the respondent had a right of action against Beloe. If Beloe did put the proper quantity on board he was entitled to recover the price in exchange for bills of lading, and it was no answer that the goods had perished at sea before the bill of lading was offered. He did send an invoice specifying the marks and numbers of 2,000 bags undoubtedly put on board, which he alleged had been shipped on the respondent's account. If these were proper bills of lading for the sugar shipped, it is difficult to imagine a clearer case of the loss of sugar. It is said that the bills of lading, which he offered to give in exchange for the cash, were not the bills of lading of goods shipped for the respondent in the *City of Dublin*, and, therefore, the respondent was not bound to pay in exchange for such bills of lading; instead of being liable to pay Beloe the price he had an action against him for breach of contract in not shipping as he ought to have done.

F This requires us to notice some more of the evidence. When the respondent had made his contract with Drake on Jan. 12, he at once proceeded to Edward Stock & Sons, who, on that very day advised Nisistle & Co. that the 200 tons were coming; so that he had done his part in securing room for that 200 tons, and if Drake & Co. have not shipped them he has a cause of action against them. They did not ship the whole 200 tons, but only 190 tons, 10 tons or 100 bags meant to be shipped having been delayed. For that Drake & Co. sent an invoice and received payment; and, as I said about Beloe, if Drake & Co. have offered the respondent bills of lading for goods which were not shipped for him, he has a cause of action against them, and was not bound to pay. But if Drake & Co. have fulfilled their contract, and the bills of lading are those referring to the 1,900 bags, then the subsequent loss by perils of the sea is no answer. The respondent must pay the price, and has lost it, and that is as clear a loss as can well be. When Drake & Co., or rather their agents at Hamburg, were shipping the sugar and held the mate's notes, it was no doubt their business to see that a proper bill of lading for each separate shipment was signed; and if at any time before the bills of lading left Hamburg they had been allocated to each shipment, no objection, not even an idle one, could have been raised. But instead of doing so the whole of the bills were sent in a lump to London that they might be allocated there. This was perfectly bona fide. Drake & Co. had no interest in favouring one more than the other, and were to be paid exactly the same price per bag, whether they allocated it to the one or to the other. And if they had done this before the loss, I do not see what damage either Beloe or the respondent could have sustained by the allocation being made in London instead of in Hamburg.

I have been quite unable to see, even if the respondent had sustained some damage, that it could have been damage going to the whole root of the matter, so as to form a defence against an action by either Drake & Co. or Beloe, for not paying for the goods in exchange for the bills of lading; that is, supposing the respondent, because prices had greatly fallen, or from any other motive, had

wished to get off. And if it were so, I think the case would fall entirely within what LORD HATHERLEY in *Anderson v. Morice* (2), says is the principle of *Sparkes v. Marshall* (3). The insurers have no right to call upon the insured to exercise a possible option to be released from his contract. But the loss having happened before the actual allocation, the respondent's loss, when it happened, was a loss not of 200 tons, but of 200 tons parcel of 390 tons; so that the loss, though exactly the same, is said not to be the same in description, because it is a loss of an undivided portion of the goods instead of being a loss of the goods themselves, I am quite unable myself to perceive why that should make the slightest difference. In the merits certainly it does not. I am quite unable to perceive why an undivided interest in a parcel of goods on board a ship may not be described as an interest in goods just as much as if it were an interest in every portion of the goods. No authority was cited in order to show that it was not so, and I can see no reason for it. Then, that being so, of course it follows that there is no defence at all, and this is my opinion. This, however, is not the ground on which the Court of Appeal decided. They thought that there was shown to be a custom, or course of dealing, which rendered Drake & Co.'s conduct a literal fulfilment of the contract. I am not satisfied that, on the evidence, such a custom or course of trade was shown. I do not say that it is not, but I should at least wish to hear the respondent's counsel before deciding on that ground. On the other, as I have already intimated, I have no doubt at all.

LORD WATSON and **LORD FITZGERALD** concurred.

Appeal dismissed.

Solicitors: *Waltons, Bubb & Walton; Hollams, Son & Coward.*

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

GLYN, MILLS & CO. v. EAST AND WEST INDIA DOCK CO.

[HOUSE OF LORDS (Lord Selborne, L.C., Earl Cairns, Lord O'Hagan, Lord Blackburr, Lord Watson and Lord FitzGerald), July 3, 4, 6, August 1, 1882]

[Reported 7 App. Cas. 591; 52 L.J.Q.B. 146; 47 L.T. 309;
31 W.R. 201; 4 Asp.M.L.C. 580]

Shipping—Carriage of goods by sea—Delivery—Bill of lading made in several parts—Presentment to shipowner or warehouseman of one part—No knowledge or notice of prior endorsement of other part.

If one of a set of bills of lading made in parts is produced to the master of a ship by the consignee or an endorsee, and the master has no notice or knowledge of any prior endorsement of one of the other parts, although he has, from the form of the bill, notice that there are other parts of the bill of lading in existence, he is justified in delivering the goods upon the part presented to him. If, however, he has notice or knowledge of two conflicting claims, he must deliver to the rightful holder at his peril, or interplead.

Fearon v. Bowers (1) (1753), 1 Hy. Bl. 364n, disapproved.

A warehouseman taking the custody of goods under the provisions of the Merchant Shipping Acts is under an obligation to deliver the goods to the same person to whom the shipowner was by his contract bound to deliver them, and is justified or excused by the same things as would justify or excuse the master.

C. & Co. were consignees of goods shipped under a bill of lading made out in three parts, each of which parts bore the words "the master of the ship

A hath affirmed three bills of lading all of this tenor and date, the one of which bills being accomplished the others to stand void." The consignees endorsed the first part to the appellants for valuable consideration. On the arrival of the ship the goods were warehoused with the respondents under the provisions of the Merchant Shipping Amendment Act, 1862, ss. 66-78, and entered at the Customs by C. & Co. as owners. The respondents had no notice or knowledge of the title of the appellants. C. & Co. later produced to the respondents the second part of the bill of lading, and obtained delivery of the goods upon orders signed by them as consignees.

B **Held:** the appellants could not maintain an action against the respondents for conversion of the goods.

C **Notes.** Considered: *Sanders v. Maclean* (1883), 11 Q.B.D. 327; *Sewell v. Burdick* (1884), ante p. 223; *Leduc & Co. v. Ward*, [1886-90] All E.R.Rep. 266.

As to the delivery and warehousing of cargo, see 35 HALSBURY'S LAWS (3rd Edn.) 449 et seq.; and for cases see 41 DIGEST 529-531. For the Merchant Shipping Act, 1894, see 23 HALSBURY'S STATUTES (2nd Edn.) 395.

Cases referred to:

- D (1) *Fearon v. Bowers* (1753), 1 Hy. Bl. 364, n.; 126 E.R. 214, N.P.; 41 Digest 529, 3573.
- (2) *Shaw v. Foster* (1872), L.R. 5 H.L. 321; 42 L.J.Ch. 49; 27 L.T. 281; 20 W.R. 907, H.L.; 35 Digest (Repl.) 295, 152.
- (3) *London and County Banking Co. v. Ratcliffe* (1881), ante p. 486; 6 App. Cas. 722; 51 L.J.Ch. 28; 45 L.T. 322; 30 W.R. 109, H.L.; 35 Digest (Repl.) 499, 1864.
- E (4) *Mason v. Lickbarrow* (1790), 1 Hy. Bl. 357, Ex. Ch.; on appeal sub nom. *Lickbarrow v. Mason* (1793), 4 Bro. Parl. Cas. 57; 6 East, 22, n.; 2 E.R. 39, H.L.; 41 Digest 385, 2295.
- (5) *The Tigress* (1863), Brown. & Lush. 38; 32 L.J.P.M. & A. 97; 8 L.T. 117; 9 Jur.N.S. 361; 11 W.R. 538; 1 Mar.L.C. 323; 167 E.R. 286; 41 Digest 394, 2368.
- F (6) *Barber v. Meyerstein* (1870), L.R. 4 H.L. 317; 39 L.J.C.P. 187; 22 L.T. 808; 18 W.R. 1041; 3 Mar.L.C. 449, H.L.; 41 Digest 394, 2371.
- (7) *Watts v. Ognell* (1607), Cro. Jac. 192; 79 E.R. 167; 31 Digest (Repl.) 258, 3933.
- (8) *De Nicholls v. Saunders* (1870), L.R. 5 C.P. 589; 39 L.J.C.P. 297; 22 L.T. 661; 18 W.R. 1106; 31 Digest (Repl.) 256, 3921.
- G (9) *Townsend v. Inglis* (1816), Holt, N.P. 278; 1 Digest (Repl.) 423, 811.
- (10) *Knowles v. Horsfall* (1821), 5 B. & Ald. 134; 106 E.R. 1142; 5 Digest (Repl.) 809, 6843.
- (11) *Wright v. Campbell* (1767), 4 Burr. 2046; 1 Wm. Bl. 628; 98 E.R. 66; 41 Digest 386, 2305.

H Also referred to in argument:

Hollins v. Fowler (1875), L.R. 7 H.L. 757; 44 L.J.Q.B. 169; 33 L.T. 73; 40 J.P. 53, H.L.; 1 Digest (Repl.) 787, 3155.

Gurney v. Behrend (1854), 3 E. & B. 622; 23 L.J.Q.B. 265; 23 L.T.O.S. 89; 18 Jur. 856; 2 W.R. 425; 118 E.R. 1275; 41 Digest 385, 2297.

I *Re Westzinthus* (1833), 5 B. & Ad. 817; 2 Nev. & M.K.B. 644; 3 L.J.K.B. 56; 110 E.R. 992; 32 Digest 287, 651.

Mills v. Ball (1801), 2 Bos. & P. 457; 126 E.R. 1382; 39 Digest 628, 2253.

Jones v. Smith (1841), 1 Hare, 43; 11 L.J.Ch. 83; 6 Jur. 8; 66 E.R. 943; affirmed (1843), 1 Ph. 244; 12 L.J.Ch. 381; 7 Jur. 431, L.C.; 35 Digest (Repl.) 598, 2727.

Appeal from a decision of the Court of Appeal (BRAMWELL and BAGGALLAY, L.JJ., BRETT, L.J., dissenting), reported 6 Q.B.D. 475, reversing a decision of FIELD, J., in an action tried before him without a jury (5 Q.B.D. 129).

The appellants, who were bankers in London, had advanced money to Messrs. Cottam, Morton & Co. upon the security of a cargo of sugar, of which Cottam, Morton & Co. were the consignees. The bill of lading had been made in three parts, and Cottam, Morton & Co. endorsed the first part to the appellants. Upon the arrival of the ship the cargo was warehoused with the respondents under a stop-order for freight, in accordance with the provisions of the Merchant Shipping Amendment Act, 1862. Cottam, Morton & Co. were entered in the manifest as consignees of the cargo, and they handed to the respondents the second part of the bill of lading, and paid the freight. Later, they gave a delivery order to a firm of Williams & Co., to whom the respondents delivered the sugar. The respondents had no notice of the appellants' title. The bank then commenced this action against the dock company to recover damages as for a conversion of the goods.

Sir Farrer Herschell, Q.C., Benjamin, Q.C., and Gorell Barnes for the appellants.
Sir Hardinge Giffard, Q.C., Cohen, Q.C., and Pollard for the respondents.

Their Lordships took time for consideration.

Aug. 1, 1882. The following opinions were read.

LORD SELBORNE, L.C.—Having had the advantage of seeing in print the opinion of my noble and learned friend, LORD BLACKBURN, on this case, with which I agree, I shall content myself with making a very few observations. Every one claiming as assignee under a bill of lading must be bound by its terms, and by the contract between the shipper of the goods and the shipowner, therein expressed. The primary office and purpose of a bill of lading, although by mercantile law and usage it is a symbol of the right of property in the goods, is to express the terms of the contract between the shipper and the shipowner. It is for the benefit of the shipper that the right to take delivery of the goods is made assignable, and it is for the benefit and security of the shipowner that when several bills of lading, all of the same tenor and date, are given as to the same goods, it is provided that "the one of those bills being accomplished, the others are to stand void." It would be neither reasonable nor equitable, nor in accordance with the terms of such a contract, that an assignment, of which the shipowner has no notice, should prevent a bona fide delivery under one of the bills of lading, produced to him by the person named on the face of it as entitled to delivery (in the absence of assignment), from being a discharge to the shipowner. Assignment, being a change of title since the contract, is not to be presumed by the shipowner in the absence of notice, any more than a change of title is to be presumed in any other case, when the original party to a contract comes forward and claims its performance, the other party having no notice of anything to displace his right. He has notice, indeed, that an assignment is possible, but he has no notice that it has taken place. There is no proof of any mercantile usage putting the shipowner, in such a case, under an obligation to inquire whether there has in fact been an assignment or not; and, in the absence of such usage, I am of opinion that it is for the assignee to give notice of his title to the shipowner, if he desires to make it secure, and not for the shipowner to make any such inquiry.

This conclusion is in accordance with the authorities which will be referred to by my noble and learned friend, and also with the principle of such decisions as those of your Lordships' House in *Shaw v. Foster* (2) and *London and County Banking Co. v. Ratcliffe* (3). It was admitted in the argument at the Bar that the right of the shipowner to deliver to the first person who claimed it by virtue of an endorsed bill of lading (the shipowner having no notice of any better title) could not be denied, although such person might not, in fact (if there had been a prior endorsement of another part of the bill of lading to another person for valuable consideration), have the legal title to the goods. It is clear, therefore, that the shipowner may be discharged by a bona fide delivery, under the terms of his contract with the shipper, to a person who is not the true owner; and I think there is no sufficient reason for refusing him the benefit of that contract, when the part

A of the bill of lading on which he makes a like bona fide delivery is not endorsed. I have spoken of the "shipowner" throughout, because, in my opinion, the position of the dock company, for the purposes of the present question, is not in any respect different from that of the shipowner. The appeal, therefore, ought, in my opinion, to be dismissed, with costs.

B **EARL CAIRNS.**—I also am of opinion that this appeal must fail. There is no necessity for going at length into any of the facts of the case, for on the facts there has really been no dispute; but I think it is desirable to state at the outset that the opinion which I have formed is that the respondents are under no higher liability in this case than the shipowner himself would have been, and, on the other hand, that they are not under any lower or less liability, and that the case may be
C looked upon, in a general point of view, as if the delivery had here been, not by the dock company, but by the shipowner himself. I think that that is satisfactory, because the opinion which your Lordships will express will be an opinion applicable generally to the case of shipowners, and will not be founded upon any special circumstances connected with the present case. So also, it appears to me that neither the appellants nor the respondents in this case can be said to be guilty of
D any laches whatever, much less of any want of good faith. There was no laches in law on either side, nor was there any bad faith. It is quite clear that Cottam, Morton & Co. produced to the dock company, whom I will suppose to be the shipowner, one part of the bill of lading, and on the production of that part of the bill of lading the delivery of the goods took place.

That leads me to consider what is the position, with regard to a bill of lading of
E this kind, of a shipowner at an out-port? A shipowner or his agent at a distant port undertakes to carry certain goods; he receives the goods upon a contract of affreightment; he, or the captain, his servant, the master of the ship, gives a bill of lading. I will suppose, in the first place, that he gives a bill of lading consisting of only one part. The contract in a bill of lading of that kind is that the shipowner will deliver to the consignee, or to his order, or to his assigns, the goods
F which are undertaken to be carried. Of course, in a contract of that kind, it is obvious that questions of some difficulty and some embarrassment may arise. The assumption is that the person who ships the goods, or the consignee, will not necessarily be the person to whom the delivery is to be made. The delivery is to be made to him or, in the alternative, to his order or to his assigns. Questions, it is obvious, therefore, may arise: Has the consignee ordered the delivery to be
G made to any person else? Has he assigned the contract or the property in the goods? If he has, to whom has he assigned it? Are there more assigns than one, and, if so, in what order of assignment do they stand?

If there were only one part of the bill of lading, the process, as it appears to me, would be an extremely simple one. The bill of lading would be the title deed, and whoever came to the shipowner, or to the master of the ship, and demanded
H delivery of the goods, in whatever right he claimed, whether he claimed as the original consignee, or whether he claimed as a person coming by order of the consignee, or whether he claimed as the assign of the contract or of the property, in any of those cases all that the master of the ship (who is not a lawyer, and has not, perhaps, a lawyer at his side) would have to say is: "Where is your title deed? Produce your title deed." If he had not a title deed, the master would be entitled
I to say: "I will not deliver these goods to you." If, on the other hand, he had the bill of lading, and if there was no fraud and no notice of any different title brought home to the master, all that the master would have to do would be to deliver to the person having that title deed, and then he would be free from any responsibility.

The confusion, the difficulty, and embarrassment have arisen from there not being what I have supposed, one title deed, but there being more than one, in this case three parts of the title deed, that is to say, of the bill of lading. I ask the question: For whose benefit is it that there are those three parts? Certainly not for the benefit of the shipowner or for the benefit of the master. To them the

presence of three parts of the bill of lading is simply an embarrassment. It is for the benefit of the shipper or of the consignee. I do not stop to inquire whether to them it is a benefit, or whether at this time of day (many of the reasons, if not all the reasons, for having bills of lading in parts being very much modified) it would not be better for every one that there should be only one part; that is a question for the mercantile world to consider. It is quite sufficient for me to say that it is certainly not for the benefit or for the convenience of the shipowner or of the master that there are three parts of the bill of lading. A

Then what has the shipowner to do? The shipowner has to protect himself from that which is liable to cause difficulty or embarrassment to him, and the way in which, as it appears to me, he does protect himself is by stating that, although "the master or purser" "hath affirmed to three bills of lading," that is to say, has signed three bills of lading, "all of the same tenor and date," yet, notwithstanding that fact, "one of those bills of lading being accomplished, the others shall stand void," which I understand to mean, that if upon one of them the shipowner acts in good faith, he will have "accomplished" his contract, will have fulfilled it, and will not be liable or answerable upon any of the others. If one is produced to him in good faith, he is to act upon that and not to embarrass himself by considering what has become of the other bills of lading. That appears to me to be the plain and natural interpretation of these words, having regard to the purpose for which they are introduced. I put it to the learned counsel who argued the case whether he could suggest any other explanation of these words which would give them a rational meaning, but I could not learn from the Bar that there was any other explanation that could be suggested. B C D

That being the case, there has occurred here exactly one of those instances in which the shipowner requires protection. He has had one of these bills of lading produced to him. I use the term "shipowner" because for this purpose I assume that the dock company is in the position of the shipowner. He has had in good faith one of the parts of the bill of lading presented to him; he has had no notice of any title at variance with that; he has acted upon the bill of lading so produced; and it appears to me that if he, or those who stand in his place, is not to be protected, the final clause might as well be struck out of the bill of lading. It is said that this will cause inconvenience to those who advance money upon bills of lading. I do not think that it need do so in the least. There are, at all events, three courses open to them, either of which they may take. The mercantile world may, if they think right, alter the practice of giving bills of lading in more parts than one. That would be one course which might be taken. But even supposing that the bill of lading is in more parts than one, all that any person who advances money upon a bill of lading will have to do, if he sees, as he will see, on the face of the bill of lading that it has been signed in more parts than one, will be to require that all the parts are brought in; that is to say, that all the title deeds are brought in. I know that that is the practice with regard to other title deeds; and it strikes me with some surprise that anyone would advance money upon a bill of lading without taking that course of requiring the delivery up of all the parts. If the person advancing the money does not choose to do that, another course which he may take is, to be vigilant and on the alert, and to take care that he is on the spot at the first arrival of the ship in the dock. If those who advance money on bills of lading do not adopt one or other of those courses, it appears to me that, if they suffer, they suffer in consequence of their own act. Whether that be so or not, it seems to me that in this case the dock company, standing in the position of the shipowner, require to be protected; that they have done that which it was their positive duty to do; and that the judgment of the court below ought to be affirmed. E F G H I

LORD O'HAGAN.—I also have had the advantage of reading the opinion of my noble and learned friend, LORD BLACKBURN, and its exposition of the law presents the view which, after serious consideration, I have adopted in common, I believe.

A with all your Lordships. I cannot say that I have not had some hesitation in the adoption of it. The conflict of decision between able judges of equal authority and equally divided, the diversities of reasoning even between those who in the result have agreed, the want of any recent evidence as to the usages of commercial men in these countries with reference to bills of lading, and especially such dealings with them as are the subject of our consideration, made me doubtful for a time; but I am satisfied upon the whole that the ruling of the Court of Appeal was right, and ought to be upheld.

B The defendants got possession of the goods from the captain, not by virtue of any contract or bailment, as has been contended at the Bar, but under the provisions of the statute and subject to the liabilities created and the duties imposed by it; and among them was the obligation to deliver them to such person or persons, and on such conditions, as the statute should be held to have indicated and required to warrant delivery by the shipowner or the master. On the payment of the freight, and the removal of the stop-order, it seems to me that they were bound, as he would have been, to deliver them to the person making presentment of the bill of lading. I think, in the absence of express decision, the weight of authority having relation to it sustains the judgment of the court below; I think that usage, as far as we have any means of ascertaining it, is inconsistent with the plaintiffs' claim, and I think, finally, that principle and policy and the necessities of mercantile affairs are quite in favour of the action of the defendants.

C As to authority, there is none which deals with the precise state of facts before us. *Fearon v. Bowers* (1) was different from this, as there the person yielding up the goods was the captain of the vessel and not the warehouseman, and he had to choose between two claimants—the consignee and the endorsee—whereas there was only one claimant known to the defendants, and they had had no notice of any other. I concur in the view of LORD TENTERDEN that the law should not commit a discretion to the captain of a ship so unreasonably large and so capable of being put to evil uses. But that case could scarcely have been entertained at all, if the lesser power to hand goods to the holder of a bill of lading, bona fide and without knowledge of any adverse title, had not been assumed to be warranted by usage and by law. I do not think the approval of that case in *Lickbarrow v. Mason* (4) by LORD LOUGHBOROUGH and BULLER, J., can be held to have established it in all its dangerous extent. The circumstances they were considering do not necessitate the minute examination or the complete rejection or adoption of its doctrine. But this, at least, may be said, unless the holder of a bill of lading was then understood to be entitled to receive the goods of which it guaranteed the delivery, we can scarcely conceive that the larger proposition would not have been at once repudiated.

G In *The Tigress* (5) before DR. LUSHINGTON, when he refers to *Fearon v. Bowers* (1), he does not expressly adopt it, in its fulness, as he did not need to do for the purpose of his judgment, but confined himself to approval of it so far as it may be applied in the conditions of that before us. He says of *Fearon v. Bowers* (1) (Brown. & Lush. at p. 44):

H "This case is a stronger one than the present, for here it appears that there had been no presentment at all by the vendee of his bill of lading. It is clear, therefore, that the master would at least have been justified in delivering to the plaintiffs, as holders of the first bill of lading presented, and it must be remembered that the bills of lading contain a proviso that, the first being accomplished, the others shall stand void."

I Plainly, DR. LUSHINGTON considered the first presentment sufficient to entitle the holder to the delivery of the goods, and held that the delivery on such presentment was the "accomplishment" within the proper meaning of the instrument on which the others should "stand void." Accordingly the case is simply headed: "A master is justified in delivering the goods to the holder of the first bill of lading presented," which is the case of the defendants, who stand in the master's place.

It seems to me that, taking these cases together, they constitute a reasonable body of authority in support of the judgment of the court below. A

As to the practice in such matters, we have no parol testimony about it, nor any proof at the particular trial of this case; but we have the statement of LEE, C.J., a long time ago, that a usage existed then which would have fully warranted the course of the defendants; we have his direction of a verdict founded on the proof of it; we have LORD TENTERDEN suggesting the limitation of the rule so acted on by the Chief Justice, but not denying its existence or disapproving of it, save as to its excessive operation; and we have the uncontradicted assertion of a living judge of great experience in mercantile cases, that it is still the "undoubted practice" to deliver "without inquiry" to the holder of a bill of lading. Lastly, that principle and policy are in favour of such a practice appears to me reasonably plain, when we consider how impossible it would be for a master in a multitude of cases to institute satisfactory inquiry as to the transactions, dehors the part produced to him, which might qualify or destroy the right to the possession of the goods. The fact that so very few complaints of misdelivery are recorded during a century and more, either on the score of error or of fraud, demonstrates how little practical evil has come of the usage; while, if it had not prevailed, the prompt and unfettered action required by the needs of commerce might have been much restrained in very many instances. It is always painful to decide when the decision must necessarily injure one of two blameless parties; but in this case the plaintiffs, who had the property which secured the advance undoubtedly vested in them by the indorsement of the bill of lading, have never lost their title to that property or the right to recover it, if wrongfully taken from them. If they had acted as the bank did in *Barber v. Meyerstein* (6), there could have been no risk of loss. They might have taken other precautions (such as getting all the three parts of the bill of lading) with a like result, and they are not now precluded from seeking redress from anyone who may have illegally obtained possession of their goods. But the defendants who have done nothing mala fide, who have acted, as I conceive, according to usage and within their right, should not be made answerable for an error, for the consequences of which they are not, in my opinion, legally or morally responsible. I think that the appeal should be dismissed with costs. B C D E F

LORD BLACKBURN.—This is one of the cases in which difficulty arises from the mercantile usage of making out a bill of lading in parts. There is, since the decision of *Lickbarrow v. Mason* (4) now nearly 100 years ago, no doubt that, before there was any statute affecting the matter, the bill of lading was a transferable document of title, at least to the extent, as was said by LORD HATHERLEY, L.C., in *Barber v. Meyerstein* (6) (L.R. 4 H.L. at p. 326), that G

"when the vessel is at sea and the cargo has not yet arrived, the parting with the bill of lading is the parting with that which is the symbol of property, and which, for the purpose of conveying a right and interest in the property, is the property itself." H

The very object of making the bill of lading in parts would be baffled unless the delivery of one part of the bill of lading, duly assigned, had the same effect as the delivery of all the parts would have had; and the consequence of making a document of title in parts is that it is possible that one part may come into the hands of one person who bona fide gave value for it under the belief that he thereby acquired an interest in the goods, either as purchaser, mortgagee, or pawnee, and another part may come into the hands of another person who, with equal bona fides, gave value for it under the belief that he thereby acquired a similar interest. I

This cannot well happen unless there is a fraud on the part of those who pass the two parts to different persons, such as would bring them within the grasp of the criminal law, and, from the nature of the transaction, such a fraud must speedily be detected. The cases, therefore, in which it occurs are not very frequent. Nevertheless, it does at times occur, and there are cases in our courts

A where the rights of the two holders have had to be considered. The last of those was *Barber v. Meyerstein* (6), in this House; and, so far as that decision extends, the law must be taken to be settled. I have never been able to learn why merchants and shipowners continue the practice of making out a bill of lading in parts. I should have thought that, at least since the introduction of quick and regular communication by steamers, and still more since the establishment of the electric telegraph, every purpose would be answered by making one bill of lading only, which should be the sole document of title, and taking as many copies, certified by the master to be true copies, as might be thought convenient; those copies would suffice for every legitimate purpose for which the other parts of the bill can now be applied, but could not be used for the purpose of pretending to be holder of a bill of lading already parted with. However, whether because there is some practical benefit of which I am not aware, or because, as I suspect, merchants dislike to depart from an old custom for fear that the novelty may produce some unforeseen effect, bills of lading are still made out in parts, and probably will continue to be so made out. So long as this practice continues it is of vast importance not to unsettle the principles which have been already settled, and when a new case has to be decided it is desirable to be very cautious as to what principles are applied.

The facts in the present case bear in many respects a close resemblance to those in *Barber v. Meyerstein* (6), but they are not quite the same; and the question on the solution of which, in my opinion, the decision in the present case ought to depend, did not arise in *Barber v. Meyerstein* (6), though LORD WESTBURY did in that case mention it when he said (L.R. 4 H.L. at p. 336):

“There can be no doubt, therefore, that the first person who for value gets the transfer of a bill of lading, though it be only one of a set of three bills, acquires the property, and all subsequent dealings with the other two bills must in law be subordinate to that first one, and for this reason, because the property is in the person who first gets a transfer of the bill of lading. It might possibly happen that the shipowner, having no notice of the first dealing with the bill of lading, may, on the second bill being presented by another party, be justified in delivering the goods to that party. But, although that may be a discharge to the shipowner, it will in no respect affect the legal ownership of the goods.”

That point did not arise, and LORD WESTBURY did not express any opinion on it. He only mentions it, so as to show that it was not decided either way.

In the present case Cottam & Co., on May 15, 1878, applied in writing to Glyn & Co., bankers in London, for an advance on the security of certain bills of lading. From the terms of the application it is plain that the bankers were to have a property, with a power of sale, in the goods represented by the bills of lading so far as was necessary to secure their advance, and that, subject thereto, Cottam & Co. were to remain owners of all the rest of the interest in the goods, and might do, as owners, everything consistent with the property thus given to the bankers. I do not think it necessary to express any opinion on a question much discussed by BRETT, L.J.,—I mean, whether the property which the bankers were to have was the whole legal property in the goods, Cottam's interest being equitable only, or whether the bankers were only to have a special property as pawnees, Cottam & Co. having the legal general property. Either way the bankers had a legal property, and at law the right to the possession, subject to the shipowners' lien, and were entitled to maintain an action against anyone who without justification or legal excuse deprived them of that right. Cottam & Co. delivered to the bankers, as part of their security, a bill of lading for twenty hogsheads of sugar by the *Mary Jones*, shipped by Elliot, in Jamaica, deliverable to Cottam & Co., or to their assigns, endorsed in blank by Cottam & Co. This bill of lading bore on the face of it, distinctly printed, the word “first,” and at the end had the usual clause:

"In witness whereof the master of the ship hath affirmed three bills of lading all of this tenor and date, the one of which bills being accomplished the others to stand void."

There could be no doubt, therefore, that the bankers had distinct notice that there were two other parts of the bill of lading.

It appears in *Barber v. Meyerstein* (6), that in a similar transaction the Chartered Mercantile Bank, before making a similar advance to Abraham, had insisted upon having all three parts of the bill of lading delivered to them, and so no doubt might Glyn & Co. have done here; but I infer that Abraham, who soon after was guilty of a very gross fraud, was not a person who could ask any reliance to be placed on his honesty, and that where the person depositing the bill of lading is of good repute, a banker would rather run the risk, in most such cases nominal, of the depositor having committed a fraud than the risk of offending a good customer by making inquiries which might be construed as implying that they thought him capable of committing a gross fraud. However this may be, it appears that Glyn & Co. made no inquiry, and were content to take the one part; and as, in fact, neither of the other parts had been transferred, the security which Glyn & Co. had was not impeached by such a prior transfer, and as the *Mary Jones* was then at sea, the question mainly discussed in *Barber v. Meyerstein* (6) does not arise in this case.

The *Mary Jones* arrived on May 27, and next day the master reported her at the Customs, and the goods were there, for Customs purposes, entered by Cottam & Co. as owners. All this was quite right and did not require the production of any bill of lading; it could and ought to have been done as well as if the other parts of the bill of lading had been delivered to the appellants or had remained locked up in the desk of the shipper, Elliot, in Jamaica. The master appears to have been in a hurry to get his vessel empty, and to have resolved to avail himself of the provisions of the Merchant Shipping Amendment Act, 1862, ss. 66 to 78 [see now Merchant Shipping Act, 1894, ss. 493-501]. He had not, in strictness, any right to do so till default had been made in making entry, which never was the case at all, or till default had been made in taking delivery within seventy-two hours after the report of the ship, which would not in this case be till May 31. But the master, apparently being in a hurry, on May 28 prepared and signed a notice to the East and West India Docks to

"detain all the undermentioned goods which shall be landed in your docks now on board the ship *Mary Jones*, from Jamaica, whereof I am master, until the freight due thereon shall be duly paid or satisfied, in proof of which you will be pleased to receive the directions of James Shepherd & Co. The whole cargo as per bills of lading."

This stop was lodged with the dock company on May 29. The dock company, it appeared, were in the habit of requiring the master to sign an authority at the foot of a copy of the manifest, and in this case the copy manifest was signed and lodged on May 28. It is not necessary to inquire what would have happened if before the seventy-two hours had expired a duly authorised person had tendered the freight and demanded delivery, for no such thing occurred; and I think as soon as the seventy-two hours had elapsed the dock company held the goods under the provisions of the Act, just as much as if they had not been landed till then.

Counsel for the respondents wished your Lordships to draw the inference of fact that all this must have been done, not under the provisions of the Act, but by virtue of some agreement to which Cottam & Co. were a party. I do not see any evidence of this; and, looking at the manner in which the admissions were made, so as to apply not only to the *Mary Jones*, but to two other ships mentioned in the statement of defence, I should, if necessary, draw the inference that it was not the fact.

On May 31, on which day the seventy-two hours had expired, Cottam & Co. brought down and showed to the dock company a bill of lading, with the word

- A "second" distinctly printed on the face of it, and in every other respect precisely similar to the bill at that time in the hands of Glyn & Co. It was not endorsed. The clerk of the dock company entered in the books of the company that Cottam & Co. were the proprietors of the goods, and marked the bill of lading with his initials and the date, so as to show that he had seen it and returned it to Cottam & Co. It was proved, what I think would have been inferred without proof, that after this the dock company would, according to their ordinary practice, have delivered the goods when the stop for freight was removed to the order of Cottam & Co., unless, in the meantime, they had got notice that another bill of lading was, as the witness says, out. It appeared in *Barber v. Meyerstein* (6) that in the case of Abraham, whose honesty they seem to have distrusted, the Chartered Mercantile Bank had lodged a stop; and so might Glyn & Co. have done in the present case. They did not do so; and, the stop for freight having been removed, the dock company, though not till the month of July, delivered the goods to the order of Cottam & Co., not having then either notice or knowledge of the fact that one part of the bill of lading had been endorsed to Glyn & Co., but having from the form of the bill itself notice that there were two other bills of lading, either of which Cottam & Co., if dishonest enough, might have endorsed and delivered for value to some other party.

The real question, I think, is, whether the dock company were, under such circumstances, justified in or rather excused for delivering to Cottam & Co.'s order, though, if they had had notice or knowledge of the previous transfer of the bill of lading to Glyn & Co., it would have been a mis-delivery, for which they would have been responsible. I do not think the dock company held the goods by virtue of any contract. They held them under the statute subject to a duty imposed by the statute to deliver them to the person to whom the shipowner was bound to deliver them [see Bills of Lading Act, 1855, s. 3], and, as I think, they were justified, or rather excused, by anything which would have justified or excused the master in so delivering them. So that, I think, the very point which has to be decided is that raised by LORD WESTBURY—viz., what will excuse or justify the master in delivering.

Barber v. Meyerstein (6) settles that the mere fact there were parts of the bills in the hands of the mortgagor or pledgor does not form a justification or excuse for an innocent purchaser from the mortgagor or pledgor, whichever he was, taking the goods. If it could be proved that the other parts of the bills of lading were left in the hands of the mortgagor or pledgor in order that he might seem to be the owner, though he was not, a purchaser from the person in whose hands they were thus left might either at common law or under the Factors Acts have a good title; but there is not in this case, any more than there was in *Barber v. Meyerstein* (6), any evidence to raise such a question. But the master is not in the position of a purchaser from the holder, or person supposed to be the holder, of a bill of lading. He is a person who has entered into a contract with the shipper to carry the goods, and to deliver them to the persons named in the bill of lading, in this case Cottam & Co., or their assigns—that is, assigns of the bill of lading, not assigns of the goods—and I quite assent to what was said in the argument that this means to Cottam & Co. if they have not assigned the bill of lading, or to the assign if they have.

If there were only one part of the bill of lading, the obligation of the master under such a contract would be clear, he would fulfil the contract if he delivered to Cottam & Co. on their producing the bill of lading unendorsed, he would also fulfil his contract if he delivered the goods to any one producing the bill of lading with a genuine endorsement by Cottam & Co. He would not fulfil his contract if he delivered them to anyone else, though, if the person to whom he delivered was really entitled to the possession of the goods, no one might be entitled to recover damages from him for that breach of contract. But at the request of the shipper, and in conformity with ancient mercantile usage, the master has affirmed to three

bills of lading all of the same tenor and date, the one of which bills being accomplished, the others to stand void. A

In *Fearon v. Bowers* (1) (1 Hy. Bl. at p. 364, n.), decided in 1753, LEE, C.J., is reported to have ruled

"that it appeared by the evidence that according to the usage of trade the captain was not concerned to examine who had the best right on the different bills of lading. All he had to do was to deliver the goods upon one of the bills of lading, which was done. The jury were therefore directed by the Chief Justice to find a verdict for the defendant." B

LORD TENTERDEN says (I quote from ABBOTT ON SHIPPING (5th Edn.), the last published in his lifetime, pt. 3, ch. ix., s. 24):

"But perhaps this rule might, upon further consideration, be held to put too much power in the master's hands." C

It is singular enough that 129 years should have elapsed without its having been necessary for any court to say whether this rule was good law.

It was suggested in the argument with great plausibility that, especially after the caution given immediately after the passage I have read in ABBOTT ON SHIPPING (pt. 3, ch. ix., s. 25), masters have declined to incur the responsibility of deciding between two persons claiming under different parts of the bill of lading, so that the case has not arisen. If this rule were the law, it would follow a fortiori that if the master was entitled to choose between two conflicting claims, of both of which he had notice, and deliver to either holder, he must be justified in delivering to the only one of which he had notice. So that I think it is necessary to consider whether it is law, and I do not think it can be law, for the reason given by LORD TENTERDEN—it puts too much power in the master's hands. Where he has notice or probably even knowledge of the other endorsement, I think he must deliver, at his peril, to the rightful holder, or interplead. But where the person who produces a bill of lading is one who—either as being the person named in the bill of lading which is not endorsed or as actually holding an endorsed bill—would be entitled to demand delivery under the contract, unless one of the other parts had been previously endorsed for value to someone else, and the master has no notice or knowledge of anything except that there are other parts of the bill of lading, and that, therefore, it is possible that one of them may have been previously endorsed, I think the master cannot be bound, at his peril, to ask for the other parts. It is not merely that, as BRAMWELL, L.J., says: "It is the undoubted practice to deliver without inquiry to anyone who produces a bill of lading"—i.e., when no other is brought forward—and that the evidence given in *Fearon v. Bowers* (1) must have proved that much, though it seems also to have proved more, but that, as it seems to me, unless this was the practice, the business of a shipowner could not be carried on, unless bills of lading were made in only one part. I cannot say on this anything in addition to what BAGGALLAY, L.J., says (6 Q.B.D. at pp. 502, 503), and I quite assent to his reasoning. F

I think also that the only reasonable construction to be put upon the clause at the end of the bill of lading is that the shipowner stipulates that he shall not be liable on this contract if he bona fide, and without notice or knowledge of anything to make it wrong, delivers to a person producing one part of the bill of lading designating him—either as being the person named in the bill if it has not been endorsed, or if there be a genuine endorsement as being assign—as the person to whom the goods are to be delivered. In that case, as against the owner, the other bills are to stand void. H

Even without that clause I should say that the case falls within the principle laid down as long ago as the reign of James I in *Watts v. Ognell* (7). WILLES, J., in *De Nicholls v. Saunders* (8) said (L.R. 5 C.P. at p. 594): I

"That depends upon a rule of general jurisprudence, not confined to choses in action, though it seems to have been lost sight of in some recent cases, viz.,

A that if a person enters into a contract, and, without notice of any assignment, fulfils it to the person with whom he made the contract, he is discharged from the obligation."

The equity of this is obvious. It was acted upon in *Townsend v. Inglis* (9), where goods lodged in the docks by Reid & Co. were by them sold to Townsend, and a delivery order was given by Reid & Co. to Townsend. Townsend paid for the goods
 B to Reid & Co.'s brokers, who misappropriated the money. Then Reid & Co. countermanded the order and finally removed the goods from the docks before the dock company had any notice either of the sale to Townsend or of the delivery order given to him. Townsend brought trover against Reid & Co. and the dock company. GIBBS, C.J., a very great commercial lawyer left to the jury the question whether Townsend was, on the evidence as to previous dealings, justified in paying
 C the broker, which the jury found he was, and the plaintiff had a verdict against Reid & Co.; but the learned Chief Justice directed a verdict for the dock company, saying (Holt, N.P. at p. 281):

"Though the skins were the property of the plaintiff from the completion of the bargain, the company had made no transfer, and had no notice of their possessory title when they delivered the skins to Reid & Co."

D In *Knowles v. Horsfall* (10) ABBOTT, C.J., treats this as indisputable. Goods, parts of which were in a warehouse, had been sold by Dixon to the plaintiff. ABBOTT, C.J., says (5 B. & Ald. at p. 139) as to the parcel in the warehouse:

"If the plaintiff had given notice of the sale to the warehouse keeper, the latter would not have been justified in delivering them to any other order than that
 E of the plaintiff, but not having received any such notice, the warehouse keeper would have been justified in delivering them to the order of Dixon, who placed them there."

I know of no case in which this principle has been departed from intentionally, and though it is very likely that it may have been sometimes lost sight of, I do not know to what cases WILLES, J., alludes.

F The sum involved in the present case is not large, but the amounts advanced by those who lend money on the security of bills of lading, and the value of the goods for which warehouse keepers and wharfingers become responsible, are enormous. Which is the more important trade of the two I do not know, but the decision of this case must have an effect on both, and it is, therefore, of great importance, and requires careful consideration. That being so, I have felt some
 G diffidence in differing from the two learned judges who had below come to a different result. FIELD, J., seems to have taken a view of the facts as to the way in which the goods came into the hands of the dock company different from that which I have taken, and consequently to have thought that the very important question suggested by LORD WESTBURY did not arise. BRETT, L.J., thinks that the master cannot be excused as against the first assignee of one part of the bill, who
 H has the legal right to the property, for delivering under any circumstances to one who produces another bill of lading bearing a genuine endorsement, unless he would be excused in all circumstances—in other words, unless *Fearon v. Bowers* (1) is good law to its full extent. In this I cannot agree.

I think, as I have already said, that where the master has notice that there has been an assignment of another part of the bill of lading the master must interplead or deliver to the one who he thinks has the better right, at his peril if he is
 I wrong; and I think it probably would be the same if he had knowledge that there had been such an assignment, though no one had given notice of it or as yet claimed under it. At all events, he would not be safe in such a case in delivering without further inquiry. But I think that when the master has not notice or knowledge of anything but that there are other parts of the bill of lading one of which it is possible may have been assigned, he is justified or excused in delivering according to his contract to the person appearing to be the assign of the bill of lading which is produced to him.

I further think that a warehouseman taking the custody of the goods under the provisions of the Merchant Shipping Amendment Act, 1862, ss. 66-78, is under an obligation cast upon him by the statute to deliver the goods to the same person to whom the shipowner was by his contract bound to deliver them, and is justified or excused by the same things as would justify or excuse the master; and I find as a fact that this was the position of the respondents here. On this ratio decidendi I think that the appeal should be dismissed with costs.

LORD WATSON.—I am of the same opinion. It appears to me that the goods in question were placed in the custody of the respondents under the provisions of the Merchant Shipping Amendment Act, 1862, and I agree with your Lordships that, in the circumstances of this case, the duty of the dock company, in regard to their delivery, differed in no respect from that of the shipowner. The nature and extent of the obligation undertaken by the shipowner to deliver the goods at the end of the voyage must depend upon the terms of the bills of lading, which contain his contract with the shipper; and every assignee of a bill of lading has notice of, and must be bound by, those stipulations, which have been introduced into the contract, for his own protection, by the shipowner.

In the present case the master, for the convenience of the shipper, subscribed to three bills of lading of the same tenor and date, by which he undertook to deliver the goods at the port of London, to Cottam & Co. and their assigns, and each bill of lading bore the usual affirmation by the master that he had signed three in all, "the one of which bills being accomplished, the others to stand void." That is a stipulation between the shipper and the shipowner, and is plainly intended to give some measure of protection to the latter, after he has delivered the goods upon one of the bills of lading, against subsequent demands for delivery, at the instance of the holders of the other bills of the set. It is, in my opinion, inconsistent with any reasonable construction of the stipulation, that the shipowner should be held liable in all cases to deliver to the true owner of the goods, because in that case it would give him no protection. The stipulation can have no intelligible meaning or effect, if it does not under some circumstances enable the shipowner to resist a claim for second delivery, preferred by the holder of a bill of lading, who has, by virtue of it, the right of property in the goods. On the other hand, it is obvious that the stipulation is meant exclusively for the protection of the shipowner, and is not intended to confer upon him the right to select the person to whom he shall deliver, or to affect the rights inter se of the holders of the bills of lading.

That being so, I think that the natural and reasonable construction of the language of the contract is that the shipowner is to be exonerated by delivery upon one of the bills of lading, although it does not represent the property of the goods, with this qualification, that bona fides being an implied term in every mercantile contract, the delivery must be made in good faith, and without knowledge or notice of any right or claim preferable to that of the person to whom he so delivers.

LORD FITZGERALD.—I also have had the advantage of reading the judgment of LORD BLACKBURN. I had previously arrived at the same result, though not entirely on the same grounds. and I concur in the decision which has now been announced. I entirely concur in the condemnation of the law laid down in *Fearon v. Bowers* (1) (if it was so laid down there), that in case of presentation to the captain of two or more parts of the bill of lading by parties claiming to be holders, and adversely to each other, the captain was not bound to look into the merits of the particular claims, but had a right to deliver to which of the claimants he thought proper. Such a rule would go far to enable the captain to violate his contract and his duty, and to "accomplish" his obligation by delivery to one whom he may have had reason to believe was not the real owner of the goods.

Before the close of the argument, EARL CAIRNS suggested for your Lordships' consideration that the practice of having so many parts of the bill of lading all in

A the nature of originals was introduced for some purpose of convenience to the consignor or consignee, and that the concluding passage, "the one of which being accomplished, the others to stand void," was probably intended for the protection of the shipowner. He further suggested that, in carrying into effect that object, the true interpretation should be that if the master, acting in entire good faith, delivered the cargo on one part of the bill of lading either to the consignee named
 B in it as such, or to an endorsee of one part, he would have "accomplished" the bill of lading so far as it is a contract for carriage and delivery, and be protected, even though another part of the bill of lading should prove to be outstanding in the hands of a prior endorsee for value, but of which the master had no notice.

It is singular that on this point there seems to have been hitherto no direct decision, though the present form of bills of lading has been in use, and the practice
 C of having several parts of the bill of lading has been followed, for considerably more than a century. In *Fearon v. Bowers* (1), tried in 1753, there were three parts and the same form, and in *Wright v. Campbell* (11), in 1767, there were two parts, and the form the same. *Fearon v. Bowers* (1) may be considered to bear on the question of construction, for LEE, C.J., is there represented to have said (1 Hy. Bl. at p. 364, n.): "All the captain had to do was to deliver the goods on one of the bills
 D of lading." In the absence of any authority to the contrary, I have come to the conclusion that, so far as the bill of lading is a contract for carriage and delivery, the noble and learned Earl suggested the true interpretation of "one of which being accomplished, the others to stand void." I should have had some difficulty in assenting to the proposition, either generally or as applicable to this particular case, that a delivery which, if made by the master, would justify or excuse him,
 E would equally justify or excuse the warehouseman. The position of the warehouseman when the stop-order had been removed seems to me to be different, and possibly his liability more extensive. If we had to determine that question, it would be necessary to consider carefully the position of the warehouseman, and to have regard to the Merchant Shipping Amendment Act, 1862, ss. 67-75, and in this particular case to his obligation under the memorandum at foot of the manifest.

I refrain from pursuing this topic further, as I do not consider it to be a necessary part of your Lordships' decision, nor does it, in my opinion, affect the result. A loss has been sustained by the wrongful act of Cottam & Co., which must be ultimately borne by one of three parties. Williams & Co. are not before us, and I say nothing as to whether or not they may be ultimately subject to any liability;
 G but as between the plaintiffs and the defendants in this suit, it seems to me that the plaintiffs, who, by their omissions and want of proper caution, and by their misplaced confidence in Cottam & Co., have enabled Cottam & Co. to commit that wrong, ought, in reason and justice, to bear the loss. The plaintiffs omitted to get from Cottam & Co. the second and third parts of the bill of lading, or to make any inquiry about them. They were not bound to do so, nor did that omission affect
 H their legal title, but it left them open to a risk from which they are now to suffer loss. The insecurity created by that omission might have been rectified by notice of their title to the master, or by notice to the defendants at any time before the actual delivery to Williams & Co. The plaintiffs used no proper caution, and took no action of any kind in relation to the goods until after the misdelivery to Williams & Co., and the discovery of the insolvency of Cottam & Co. If we could put the question to them: "Why did you pursue so incautious a course?" their reply
 I probably would be: "We trusted to the integrity of Cottam & Co., and we left the entry and warehousing of the goods, the payment of freight, and all matters of detail to Cottam & Co." It cannot be truly said that, as between the plaintiffs and defendants, the plaintiffs are innocent sufferers by the act of a third party.

The result has been the misdelivery of the goods, which the plaintiffs charge as an act of wrong by the defendants, rendering them liable in this suit. Having regard to the plaintiffs' legal title, it was no doubt a misdelivery; but the defendants are excused by law from the consequences of an error into which they

have been led by the plaintiffs. In *Lickbarrow v. Mason* (4) BULLER, J., in A delivering his opinion in this House, observes (6 East, at p. 30, n.):

"In all mercantile transactions one great point to be kept uniformly in view is to make the circulation and negotiation of property as quick, as easy, and as certain as possible."

I may amplify his language by interpolating after "property" the words "and the B advance and security of capital." It will be observed that, in this present decision of your Lordships, nothing has been expressed adverse to that proposition. We give full effect to the bill of lading as a symbol of title to the property comprised in it, and to its indorsement as a transfer of that title as full and effectual as if accompanied by a delivery of actual possession. We do no more than lay down a rule of construction, and apply a well-established principle of law, to this particular case, and we hope it may serve as a landmark for the future. C

Appeal dismissed.

Solicitors: *Murray, Hutchins & Stirling; Freshfields & Williams.*

[Reported by C. E. MALDEN, Esq., Barrister-at-Law.]

BALLARD v. TOMLINSON AND ANOTHER

[COURT OF APPEAL (Sir Balliol Brett, M.R., Cotton and Lindley, L.JJ.), February 3, 4, 17, 1885]

[Reported 29 Ch.D. 115; 54 L.J.Ch. 454; 52 L.T. 942;

49 J.P. 692; 33 W.R. 533; 1 T.L.R. 270]

Water—Pollution—Underground water—Right of landowner to uncontaminated water—Sewage discharged into well by landowner—Polluted water, flowing underground, pumped by neighbouring landowner from his well. F

While no one has, at any time, any property in water percolating below the surface of the earth even when it is under his land, yet every landowner has a right to appropriate that water while it is under his land, even by artificial means such as pumping, and has a right to appropriate it uncontaminated by any act of any other person. When a landowner, therefore, uses his land in such a way as to be a nuisance to his neighbour, as by contaminating his own well, he must take care not to injure his neighbour and not to poison water which other persons have a right to use as much as himself. G

The plaintiff and defendant were adjoining landowners and each had a well on his own land, that of the plaintiff being the deeper of the two. The water in the plaintiff's well rose naturally to within twenty-seven feet of the surface of the land, and he used a pump to raise it to that height. The defendant began to discharge sewage from premises on his land into his well, and that sewage percolated through the soil, and polluted the water which the plaintiff pumped up from his well. H

Held: although the plaintiff had no property in the water at the time it was polluted, the defendant was not justified in injuring his right to appropriate it in its natural, uncontaminated state, and, therefore, the plaintiff was entitled to an injunction restraining the defendant from using his well in such a way as to pollute the water in the plaintiff's well, and also to damages for any injury he had sustained in consequence of the pollution. I

Notes. Considered: *Jordeson v. Sutton, Southcoates and Drypool Gas Co.* [1899] 2 Ch. 517. Applied: *Foster v. Warblington U.D.C.* [1904-7] All E.R. Rep.

A 366. Considered: *English v. Metropolitan Water Board*, [1907] 1 K.B. 588. Referred to: *Paine & Co. v. St. Neots Gas and Coke Co.*, [1939] 3 All E.R. 812.

As to property and ownership of inland waters, see 39 HALSBURY'S LAWS (3rd Edn.) 506 et seq.; and for cases see 44 DIGEST 5 et seq. As to pollution, see 39 HALSBURY'S LAWS (3rd Edn.) 721 et seq.; and for cases see 36 DIGEST (Repl.) 287 et seq.

B Cases referred to:

(1) *Womersley v. Church* (1867), 17 L.T. 190; 44 Digest 39, 277.

(2) *Whaley v. Laing* (1857), 2 H. & N. 476; 26 L.J.Ex. 327; 5 W.R. 834; 157 E.R. 196; on appeal sub nom. *Laing v. Whaley* (1858), 3 H. & N. 675; 27 L.J.Ex. 422, Ex. Ch.; 44 Digest 49, 349.

C (3) *Chasemore v. Richards* (1859), 7 H.L.Cas. 349; 29 L.J.Ex. 81; 33 L.T.O.S. 350; 5 Jur.N.S. 873; 23 J.P. 596; 7 W.R. 685; 11 E.R. 140, H.L.; 44 Digest 84, 252.

(4) *Acton v. Blundell* (1843), 12 M. & W. 324; 13 L.J.Ex. 289; 1 L.T.O.S. 207; 152 E.R. 1223, Ex. Ch.; 44 Digest 34, 249.

(5) *Tenant v. Goldwin (or Golding)* (1704), 1 Salk. 21, 360; Holt.K.B. 500; 2 Ld. Raym. 1089; 6 Mod. Rep. 311; 91 E.R. 20, 314; 36 Digest (Repl.) 287, 356.

D (6) *Hodgkinson v. Ennor* (1863), 4 B. & S. 229; 2 New Rep. 272; 32 L.J.Q.B. 231; 8 L.T. 451; 27 J.P. 469; 9 Jur.N.S. 1152; 11 W.R. 775; 122 E.R. 446; 44 Digest 83, 276.

Also referred to in argument:

E *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70, H.L.; 36 Digest (Repl.) 282, 334.

Baird v. Williamson (1863), 15 C.B.N.S. 376; 3 New Rep. 86; 33 L.J.C.P. 101; 9 L.T. 412; 12 W.R. 150; 143 E.R. 831; sub nom. *Williamson v. Baird*, 10 Jur.N.S. 152; 33 Digest (Repl.) 866, 1146.

F *Webb v. Bird* (1862), 13 C.B.N.S. 841; 31 L.J.C.P. 335; 8 Jur.N.S. 621; 143 E.R. 332, Ex. Ch.; 19 Digest (Repl.) 69, 334.

Humphries v. Cousins (1877), 2 C.P.D. 239; 46 L.J.Q.B. 438; 36 L.T. 180; 41 J.P. 280; 25 W.R. 371; on appeal, 46 L.J.Q.B. at p. 442, C.A.; 36 Digest (Repl.) 288, 361.

Hurdman v. North Eastern Rail. Co. (1878), 3 C.P.D. 168; 47 L.J.Q.B. 368; 38 L.T. 339; 26 W.R. 489, C.A.; 36 Digest (Repl.) 289, 365.

G *Aldred's Case* (1610), 9 Co. Rep. 57b; 77 E.R. 816; 36 Digest (Repl.) 267, 183.

Broder v. Saillard (1876), 2 Ch.D. 692; 45 L.J.Ch. 414; 40 J.P. 644; 24 W.R. 1011; 36 Digest (Repl.) 288, 360.

Smith v. Kenrick (1849), 7 C.B. 515; 18 L.J.C.P. 172; 12 L.T.O.S. 556; 13 Jur. 362; 137 E.R. 205; 36 Digest (Repl.) 249, 8.

H *West Cumberland Iron and Steel Co. v. Kenyon* (1879), 11 Ch.D. 782; 48 L.J.Ch. 793; 40 L.T. 703; 43 J.P. 731; 28 W.R. 23, C.A.; 36 Digest (Repl.) 289, 363.

Snow v. Whitehead (1884), 27 Ch.D. 588; 53 L.J.Ch. 885; 51 L.T. 253; 33 W.R. 128; 36 Digest (Repl.) 290, 367.

I **Appeal** from a decision of PEARSON, J., reported 26 Ch. D. 194, that the plaintiff had no cause of action against the defendant for the pollution of an underground stream running under his land.

The plaintiff was a brewer at Brentford, where he had for many years carried on business, the water supply having since 1849 been drawn by him and his predecessors exclusively from a certain well, which penetrated the London clay and greensand down to the chalk, which it pierced for a short distance. In 1874 the defendant Tomlinson became possessed of certain property adjoining the plaintiff's brewery, upon which property there was a second well, ninety-nine yards from the plaintiff's well. This well was also driven down to the chalk, the only

differences between it and the plaintiff's well being that the surface of the land at the mouth of the latter was about ten feet below that at the mouth of the defendant's well, and that the plaintiff's well was sunk somewhat deeper than the defendant's, viz., to about 227 feet. The construction of both wells was alike in this, that the lower portion consisted in each case of a tube of less diameter than the upper portion, passing from the level of the lower strata of the London clay to the commencement of the chalk. Both wells were carried down beyond the tubing by open boring. It appeared from the evidence that in the absence of disturbing causes the water stood in each well at the same level, i.e., at about twenty-seven feet from the surface in the plaintiff's well, and about thirty-seven feet from the surface in the defendant's well; and it was further established that, owing to their proximity, and the nature of the ground through which they passed, there was a connection between the two more or less perfect, so that pumping in one well lowered the level of the water in the other.

A few years before this action was commenced the defendant Tomlinson, the owner of the land, erected a printing house on that land and let it to the defendant Jackson for his business of printing. The defendant Tomlinson constructed a drain from a water-closet on the premises into the well, by means of which the sewage from the closet was discharged into it. The plaintiff alleged that this sewage so polluted the water supply of the well that it became unfit for use in brewing, and claimed an injunction to restrain the defendants from permitting the well to be so used, and from using the same, as to pollute the water coming into the plaintiff's well, and from allowing the well to remain in such a condition as to pollute the water in or coming into the plaintiff's well, and he claimed damages. The case was heard by PEARSON, J., in February, 1884, who held that the plaintiff had no property in the underground water, and had no cause of action against the defendants for polluting it. He, therefore, dismissed the action. The plaintiff appealed.

Cookson, Q.C., Webster, Q.C., and De Castro for the plaintiff.

Sir Farrer Herschell, Q.C., Warmington, Q.C., and Vaughan Hawkins for the defendants.

SIR BALIOL BRETT, M.R.—As the proposition of law which is raised by this case seems to all of us clear, we think it right to give judgment at once.

The defendants were possessed of a well upon their own property which at one time they used merely as a well, but afterwards in a manner inconsistent with its being merely a well, as they allowed the sewage arising from the use of their buildings to go into the shaft of such well. It seems to me, that the shaft of that well is an artificial thing, and that the defendants therefore collected a quantity of sewage into an artificial reservoir. The plaintiff, at a considerable distance from this well (the distance to my mind is wholly immaterial), has a well on his own property of considerable depth which is lower than the bottom of this artificial shaft or well of the defendants. The collected sewage in the artificial shaft on the defendants' property has gone through the sides or bottom of this well into what is called the percolating water below the defendants' lands. It is said on behalf of the defendants that, but for the mode in which the plaintiff uses his well by pumping, the sewage in the artificial shaft on the defendants' property would not have gone into the percolating water beneath his land, or if it had it would have remained on his land, or, at all events, it never would have gone into the plaintiff's well. In the result, when the plaintiff used his own well by means of the mechanical pump, it is clear that the water which then came into his well from the percolating water beneath his own land came there adulterated by the sewage which had been in the artificial shaft in the defendants' well.

Then arises the question whether the plaintiff, under the circumstances, can maintain an action against the defendants. What are the rights of the parties? It seems to my mind to be clear from the decisions that no one has, at any time, any property in water percolating below the surface of the earth even when it is under his own land, but it is equally clear that everybody has a right to appropriate

A that percolating water, at least while it is under his own land, to the extent that he may take it all so as to prevent any of it going on the land of his neighbour. But his neighbour below him, according to the flow of water, has an equal right before the person above has appropriated it to take it all. He has a right to take the water from the percolating stream under his own land to this extent, that he may thereby cause the water which is under the land above him to come on his own land when it otherwise would not, and then to take that, and so on, until he has absolutely dried the land above him. This percolating water below the surface of the earth is therefore a common reservoir or source, in which nobody has any property, but of which everybody has, as far as he can, the right of appropriating the whole.

C Then arises the question, has one of those who have an unlimited right of appropriation a right to contaminate that common reservoir or source as against those who have an equal right with him to appropriate when he does not, or is he bound not to do anything which will prevent anybody to whom that unlimited right of appropriation shall come having such water unaltered in quality? It has been said by counsel for the defendants in his clear argument that when the defendants pollute this common source under their own land they do not pollute any water in which the plaintiff has any property. That is quite true. The plaintiff has no property in that water whilst it is under the defendants' land, nor, indeed, whilst it is under his own land; and if all that could be said was that the common source was contaminated before the plaintiff had appropriated any part of it, the plaintiff could not, to my mind, maintain any action in respect of that contamination. Suppose a man had tapped this common source some distance off his own land for the purpose of experiment, and found it was contaminated before it would come under his own land. I think, under those circumstances, he could not maintain an action because he had not appropriated the water, and therefore no injury was done to him at that time. But it does not seem to me to follow from that that he cannot maintain an action when water which he has appropriated has been contaminated by something which another person has done to that common source. In other words, it seems to me that, although nobody has any property in the common source, yet everybody has a right to appropriate it, and to appropriate it in its natural state, and no one of those who have a right to appropriate it has a right to contaminate that source so as to prevent his neighbour from having the full value of his right of appropriation.

G The next point taken by counsel for the defendants was this. Assuming it to be true that there is such right to appropriate, yet, if the person who has such right only appropriates by artificial means, and does so to such an extent that if he did not use those artificial means the water he would take would not be contaminated, then the polluted water must be said to be appropriated by him in that state by his own act, and therefore he cannot maintain the action. I cannot think that is a true proposition. The principle of natural user does not apply at all. The plaintiff, if he has the right to use anything in nature, has a right to exercise that user by all the skill and invention of which man is capable, and it seems to me that so long as the plaintiff uses only lawful means as against his neighbour, however ingenious or however artificial those means may be, his right to appropriate the common source is not diminished because he uses the most artificial or the most ingenious methods. Therefore, however he may appropriate the water from the common source by the use of such artificial means, he has a right to have the common source uncontaminated by any act of any other person. Neither does it matter whether the parties are or are not contiguous neighbours. If it can be shown in fact that the defendants have adulterated or fouled the common source it signifies not how far the plaintiff's land is from their land.

I The nearest case to the present I take to be *Womersley v. Church* (1). I think that case does show that the first proposition of counsel for the defendants is wrong, but I do not think that it governs the second point taken by him. I think that

the second point is partly noticed in *Whaley v. Laing* (2), but it does not, in my opinion, want any authority. A

I disagree with the decision of PEARSON, J., on this ground, that although nobody has any property in the percolating water, yet such water is a common source which everybody has a right to appropriate, and that therefore no one is justified in injuring the right of appropriation which everybody else has.

COTTON, L.J.—I also am of opinion that the decision appealed from is erroneous. As I understand the judgment of PEARSON, J., on the first point, namely, that this was underground water in an indefinite channel, he thought that his decision was a necessary consequence of *Chasemore v. Richards* (3). *Chasemore v. Richards* (3) simply decided, as I understand it, that every man has a right to take all the underground water (by which I mean water going in no definite channel) which he can find in his own land, notwithstanding that the effect of his doing so may be that his neighbour will have no underground water in his land, or that the stream which he owns will be diminished in consequence of the underground water which has been so appropriated not coming into that stream. That in no way decides the present case. B

Let us consider what the underground water is. Such water, whether in the chalk or other strata, is a natural incident of the land which the man has who owns the surface, unless he has parted with the minerals below. According to the decision in *Chasemore v. Richards* (3), the owner of the land has as a natural incident to his ownership a right to avail himself of that incident to whatever extent he chooses, even though the consequence may be that he takes not only the water which at first was under his property but all the adjoining water which by natural force comes under the land when he has taken that which was there in the first instance. But here what is it the defendants are doing? They are not using the natural right; they are not taking the water, but they are putting upon their land filth which gets down into the underground water in the water-bearing stratum, which is partly under their land and partly under that of their neighbour. They are therefore in no way exercising that right which a person who draws the water under his own land is exercising. All that the House of Lords decided was, that a plaintiff could not complain of a defendant exercising that natural right in taking the water which for the time being was under his own soil. But here the defendants are not doing that, but are simply putting filth on their own land in such a way as that it gets into the underground water in the stratum common to themselves and other persons. In my opinion, therefore, it is no necessary consequence of *Chasemore v. Richards* (3) to say that here the plaintiff cannot complain of the act of the defendants. C

Then why has not the plaintiff a right of action? The defendants, not by exercising a natural right incident to the ownership of land, but by putting filth on their land, interfere with the exercise by the plaintiff of a natural right incident to the ownership of his own land, and although while dirty water is in the stratum under the defendants' land, or even perhaps while it is under the plaintiff's land, so long as he is not desiring to appropriate and use it, the plaintiff has no right of action, yet as soon as the act of the defendants interferes with the beneficial use by the plaintiff of that right incident to the ownership of the land, in my opinion he has a right of action. Of course, if what the defendants were doing was a natural use of their land—that is to say, an exercise of a natural right incident to ownership—the plaintiff could not complain. But the defendants are not doing that. No one can say that putting filth on your own land in such a position, and with such little care, that it gets down to the stratum where the water is common to you and to your neighbour, or to any other owner of land, is a natural use of the land. D

In my opinion, therefore, subject to the other point on which PEARSON, J., relied, if the defendants have, as on the evidence they must be taken to have done, by their filth interfered with the plaintiff's natural right of taking this water, they are E

A liable to an action; and in fact counsel for the defendants practically admitted that, because he said if the water had gone by natural force of gravity from the defendants' land to the plaintiff's he could hardly contend that the defendants would be liable.

But then it is said that it is in consequence of the plaintiff's own act that he gets the water polluted. In one sense, that is true; that is to say, if the plaintiff did not draw water from this stratum there would be no polluted water going down to the water which was under his land; but the plaintiff is not seeking to get water from the defendants' land. He is seeking merely to exercise his natural right of getting the water from his stratum. The water comes not simply from the defendants' well, it comes from that cone or section of the circle which the water is drawn from, and as he is exercising his own right to take the water which is under his soil, in my opinion he can maintain a right of action against the defendants where the natural consequence of his exercising his own right is that there comes water which has been polluted by the act of the defendants. The plaintiff has a right to take all the water under his soil as far down as human skill can get it, and pumping machinery being an appropriate means of getting the water which is in the underground stratum, the defendants cannot, in my opinion, be held not liable because from the plaintiff's using powerful means of getting the water, water comes to his well which would not otherwise have done so. In my opinion the plaintiff is entitled to judgment against the defendants.

LINDLEY, L.J.—The question decided in *Acton v. Blundell* (4) and *Chasemore v. Richards* (3) was the right of a landowner to remove underground water from his own land when that water did not flow in any visible defined channel. The court decided that every owner of land has a right to sink a well in his own land, and to take from his well all the water he can get, and that, as every owner has this right, no owner can maintain an action against another for exercising that right, even although by exercising it he drains underground water from the plaintiff's land, and so deprives him of water which would otherwise come to his well. The alternative was to hold that no one could take water from his own well to such an extent as materially to affect the supply to those whose wells were fed from the same source as his own. This alternative was considered too inconvenient to be laid down as law, and the court was consequently driven to reconcile the conflicting rights of neighbouring landowners in the way it did, and to draw a distinction, as regards the right to get naturally supplied water, between water in defined and visible channels and water percolating through the soil and not yet in any defined visible channel.

How far the distinction was sound it is useless now to inquire; it is settled in law by the highest judicial authority. But the reasons for the distinction must be borne in mind, or the decisions establishing it may be misunderstood, and be made the basis of reasoning leading to results which are as startling as they were unforeseen. The right to foul water is not the same as the right to get it, and in my opinion does not depend on the same principles. *Prima facie* every man has a right to get from his own land water which is naturally found there; but it frequently happens that he cannot do this without diminishing his neighbour's supply. In such a case the neighbour must submit to the inconvenience. But *prima facie* no man has a right to use his own land in such a way as to be a nuisance to his neighbour, and whether the nuisance is effected by sending filth on to his neighbour's land, or by putting poisonous matter on his land and allowing it to escape on his neighbour's land, or whether the nuisance is effected by poisoning the air which his neighbour breathes, or the water which he drinks, appears to me wholly immaterial.

If a man chooses to put filth on his own land, he must take care not to let it escape on to his neighbour's land: *Tenant v. Goldwin* (5), and not let it poison the air which reaches it: (COMYN'S DIGEST, Action on the Case for Nuisance, A.) So if a man chooses to poison his own well, he must take care not to poison waters

which other persons have a right to use as much as himself. To hold the contrary A
on the ground that water is not their property until they get it, and that it is
poisoned before they get it, is to take an inadequate view of the subject and to
overlook the fact that the law of nuisance is not based exclusively on rights of
property. Light is not property, and yet if a man has a right to have it come
to his windows he can maintain an action against those who prevent it from
so coming. So air is not property, but a man who poisons the air which another B
has a right to breathe commits an actionable wrong. Upon precisely the same
principle underground water which supplies a well may not be the property of the
owner of the well, but he has a right to take and use such water, and upon principle
he appears to me to have a right of action against those who poison what he has a
right to get. If, indeed, the well owner had no right to get unpolluted water he
would have no right of action, but it lies upon those who deny this right to main- C
tain their position. Prima facie, at all events, the right of a man to get water
from his well is to get the water as nature supplies it, and if anyone contends that
he has a right to pollute the natural supply he must establish such right. A right
to foul a stream may be acquired by prescription, and possibly a right to foul an
underground basin of water might be similarly acquired, but no such question
arises in this case. Upon principle, therefore, and independently of authority, the D
judgment below cannot be supported.

On turning to the authorities, there is not one which warrants the judgment,
whilst there are at least three which are difficult to reconcile with it: *Womersley v.*
Church (1), *Hodgkinson v. Ennor* (6), and *Whaley v. Laing* (2). These decisions
show that, prima facie, one man has no right to foul water which another has a
right to get; and, if he has a right to get it, the fact that by pumping he draws it E
partly from the defendant's land is immaterial. The moment any water is taken
out of the well, by whatever means, its place is supplied by natural causes operating
on all the surrounding water which supplies the well, and if the well is used at all,
and any of such surrounding water is poisoned by soluble matter, it will inevitably
find its way into the well. Probably the same thing would take place, though
more slowly, by simple diffusion without pumping; but however this may be, the F
fact that the plaintiff has used a pump to get water out of his well, and has thereby
drawn poisoned water from the defendants' land, does not deprive the plaintiff
of his right to maintain an action against the defendants for poisoning water which
supplies the plaintiff's well.

In my opinion the decision appealed from ought to be reversed. The plaintiff is
entitled to an inquiry as to the damages he has sustained, and to an injunction G
and to the costs of the action and of the appeal.

Solicitors: *G. H. K. & G. A. Fisher; Wright & Pilley, for Ruston, Clark & Ruston, Brentford.*

[Reported by W. C. Biss, Esq., Barrister-at-Law.]

HARDY v. ATHERTON

[QUEEN'S BENCH DIVISION (Huddleston, B., and Hawkins, J.), May 23, 27, 1881]

[Reported 7 Q.B.D. 264; 50 L.J.M.C. 105; 44 L.T. 776;
45 J.P. 683; 29 W.R. 788]

Bastardy—Affiliation order—Enforcement—Marriage of mother to another man after making of order—Ability of husband to maintain child—Bastardy Laws Amendment Act, 1872 (35 & 36 Vict., c. 65), s. 5.

An affiliation order obtained by a single woman for the maintenance of a bastard child can be enforced against the putative father even though the mother has married another man since the making of the order and her husband is able to maintain the child.

Dictum of FIELD, J., in *Sotheron v. Scott* (1) (1881), 6 Q.B.D. at p. 520, explained.

Notes. The Bastardy Laws Amendment Act, 1872, s. 5, has been replaced by s. 6 of the Affiliation Proceedings Act, 1957 (37 HALSBURY'S STATUTES (2nd Edn.) 43).

The law does not now attach to a husband any liability to maintain his wife's illegitimate child: see the National Assistance Act, 1948, s. 42 (16 HALSBURY'S STATUTES (2nd Edn.) 968).

Followed: *Davies v. Evans* (1882), 9 Q.B.D. 238. Referred to: *Plymouth Guardians v. Gibbs*, [1903] 1 K.B. 177.

As to bastardy orders, see 3 HALSBURY'S LAWS (3rd Edn.) 122 et seq.; and for cases see 3 DIGEST (Repl.) 461 et seq.

Cases referred to:

- (1) *Sotheron v. Scott* (1881), 6 Q.B.D. 518; 44 L.T. 522; 45 J.P. 423; 29 W.R. 666; sub nom. *Southeran v. Scott*, 50 L.J.M.C. 56; 3 Digest (Repl.) 466, 488.
- (2) *Lang v. Spicer* (1836), 1 M. & W. 129; 1 Gale, 426; 3 Nev. & M.M.C. 556; 5 L.J.M.C. 60; 150 E.R. 374; sub nom. *Laing v. Spicer*, Tyr. & G. 358; 37 Digest 236, 295.
- (3) *Stacey v. Lintell* (1879), 4 Q.B.D. 291; 48 L.J.M.C. 108; 40 L.T. 553; 43 J.P. 510; 27 W.R. 551, D.C.; 3 Digest (Repl.) 442, 342.

Case Stated by justices of Lancashire under the Summary Jurisdiction Acts, 1857 and 1879.

At the petty sessions held at Newton in the county of Lancaster, on Aug. 25, 1877, an order in bastardy was made on the application of the appellant, Hannah Vernon, at that time a single woman, on the respondent William Atherton, the putative father of an illegitimate child of Hannah Vernon, born on July 8, 1877. The order, so far as material, was as follows:

"We do hereby adjudge the said William Atherton to be the putative father of the said bastard child, and we order that the said William Atherton do pay unto the said Hannah Vernon, the mother of the said child, so long as she shall live and be of sound mind and shall not be in any gaol or prison or under sentence of transportation, or to the person who may be appointed to have the custody of such child under the provisions of [the Poor Law Amendment Act] the sum of 5s. per week, for the maintenance and education of the said child, from the birth of the said child until the said child shall attain the age of sixteen years or shall die."

On Nov. 27, 1880, the appellant preferred an information and complaint calling on the respondent to show cause why he should not pay to the appellant £4 5s., being arrears then due from him under the above-mentioned order. It was proved that the appellant, since the making of the order, viz., on Mar. 22, 1880, had become the wife of James Hardy, and was still living with him as his wife, and that he was able to maintain the child. The justices were of opinion that, as the appellant had married and the husband was responsible for and capable of maintaining the

child, the order could not be enforced. They, therefore, declined to make an order for the committal of the respondent to prison, and dismissed the information and complaint and the appellant appealed. A

McClymont for the appellant.

Croome for the respondent.

Cur. adv. vult. B

May 27, 1881. **HUDDLESTON, B.**—This is a Case stated by justices for our determination, which raises the question whether a bastardy order can be enforced against the putative father of an illegitimate child when the mother has married a husband who is able to support the child.

The point turns on the construction of the Bastardy Laws Amendment Act, 1872. I may premise by stating that, under the old law, bastardy orders were made in relief of the parish in the event of the child becoming chargeable to the parish. C Subsequent legislation enabled the order to be made in favour of the mother (the Poor Law Amendment Act, 1844), and it is quite clear that the policy of that Act and the subsequent Acts was to throw on the father a portion of the burden of maintaining the child. In the present case, the order has been obtained by the appellant under s. 4 of the Bastardy Laws Amendment Act, 1872, and it is to be D observed that the only occasions on which the order is to cease are to be found in s. 5, namely, the death of the child, or that the child has attained the age of thirteen or sixteen years.

There was a proviso in a previous Act (the Poor Law Amendment Act, 1844, s. 5) to the effect that no order for the support of a bastard child should be of any force after the marriage of the mother. Had, therefore, that proviso remained E in existence, the order would have ceased on the marriage of the mother; but that portion of the section is repealed by the Act of 1872, and, consequently, it is clear that the attention of the legislature had been called to the proviso, and that it was no longer intended that the order should cease on the marriage of the mother. This F is the more remarkable, because that portion of the section which enacts that all money due under the order shall be payable to the mother, so long as she lives and is of sound mind, and is not in any gaol or prison, or under sentence of transportation, and that in such case the justices may appoint some person to have charge of the child, remains unrepealed. These provisions are introduced into the bastardy order, and appear in the order before us in the present case.

Under these circumstances, I entertain no doubt that the order on the putative father continues, although the mother marries, and the husband she marries is G competent to maintain the child. On the other view great difficulties would arise. The mother might have to make frequent applications to the justices to order the putative father to continue payment, and they would have, on each occasion, to decide whether the husband was competent to maintain the child or not. One week he might be able, and another week he might not be able. Whatever the means of the mother, she may apply for the order, because the policy of the law is H to compel the father to contribute to the support of his own offspring.

Our view of the law is supported by *Sotheron v. Scott* (1), where this very point I was practically decided by FIELD and MANISTY, JJ. It is true that the case did not contain the element that the husband was able to maintain the bastard child, and it was suggested that, had that element appeared, FIELD, J., would have been of a contrary opinion. But I have taken the opportunity to consult FIELD, J., and he has told me that he and MANISTY, J., were of opinion that the competency of the husband ought to have no effect; and he also added that the passage in the LAW REPORTS (6 Q.B.D. at p. 520), by which he is represented to have inclined to the other view, was rather an observation which fell from him in deference to what had been said by LUSH, J., in a previous case, and not because he agreed with him. The report in the LAW JOURNAL, though, in substance, it is the same, is somewhat different, and does not represent FIELD, J., as speaking so positively on the point.

- A Against this view of the law, counsel for the respondent quoted *Lang v. Spicer* (2), in answer to which it is only necessary to state that the question there was not between the mother and the putative father, but between the father and the parish. The child had become chargeable to the parish, and the parish had called on the putative father to maintain the child; but it was held that, as the Poor Law Amendment Act, 1834, s. 57, had enacted that a man who married a woman with
- B a bastard child should be liable to maintain such child, if the child became chargeable to the parish, the husband of the mother was liable for its support. In the other case which was cited (*Stacey v. Lintell* (3)), the question was whether the order could be obtained by a married woman, and it is therefore not an authority in point. It is true that, in giving judgment, LUSH, L.J., threw out a suggestion that, on the marriage of the mother, the justices would have a discretion whether
- C they would continue an order made on the putative father; but, with all respect to that learned judge, I do not see that the justices have any such discretion. They only have power to make the order, and the only occasion when they have power to discontinue the order is when the child attains the age of thirteen, or dies, and, by the previous statute, the Poor Law Amendment Act, 1844, s. 5, when the mother dies, or becomes of unsound mind, or is in prison, in which case the pay-
- D ments may be transferred to some other person appointed by the justices to have the custody of the child. Therefore, I am of opinion this order remains in force, and the question of the competency of the husband to maintain the child has no bearing on the case.

HAWKINS, J., read the following judgment.—Under the circumstances stated

E in this case, I am of opinion that the order can be legally enforced against the respondent. As between the parish and the husband, no doubt he is liable to maintain the child as a part of his family under s. 57 of the Poor Law Amendment Act, 1834, and so long as he is of ability so to maintain it, the child cannot legally become chargeable on the parish.

- On this ground, on the authority of *Lang v. Spicer* (2), it was contended on
- F behalf of the respondent that the order could not be enforced. Had the law remained at the present day the same as it was when that case was decided, it would have been an authority in point by which we should have been bound. Indeed, I, for one, should have come to the same conclusion, for, as the law then stood, the putative father was only liable so long as the child was chargeable to the parish, which it could not be if it formed part of the family of a person able to
- G maintain it without parish assistance. Orders at that period were only made in relief of the parish, and on the face of them it was so expressed. The Poor Law Amendment Act, 1844, however, repealed the Poor Law Amendment Act, 1834, and the earlier statutes, so far as related to the orders on putative fathers, and by s. 2, s. 3, and s. 5, justices were empowered, on the application of any single woman who had been delivered of a bastard child, to make an order on the
- H putative father for payment to her of a weekly sum, to be due and payable to her so long as she lives and is of sound mind, and not in gaol, etc.; provided always that the order should not remain of any force or validity after the child attained the age of thirteen years or after the marriage of the mother.

- By the Bastardy Laws Amendment Act, 1872, s. 3, these provisions and this proviso were expressly repealed, and by s. 4 power is given to justices to make
- I an order on the putative father for payment to the mother of a weekly sum for the maintenance and education of the child till it reaches the age of thirteen (or sixteen if specially ordered); and in s. 7 provision is made for making parish officers receivers under such order in the event of the child becoming chargeable. There is no re-enactment of the proviso that the order should become inoperative on the mother's marriage. The Bastardy Laws Amendment Act, 1873, does not affect the present question. Since the repeal of the portions of the statute relating to this question, the Poor Law Amendment Act, 1834, I find no ground for saying that the orders on putative fathers are only enforceable by way of relief to the parish,

and, since the repeal of the proviso to s. 5 of the Poor Law Amendment Act, 1844, A
no ground for saying they are suspended, or of no avail during the marriage of the
mother. They are made payable generally to the mother, and the only limits to
their power are those to which I have referred, namely, the child attaining thirteen
(or sixteen, if specially ordered) years of age, or its death.

Stacey v. Lintell (3) was cited in support of the respondent's view, but that B
case only decided that where a woman is married and living with her husband
she can no longer be deemed a single woman having power to apply for an affilia-
tion order under the Bastardy Laws Amendment Act, 1872. It is no authority for
saying that an order already made on the application of a woman when single cannot
be enforced after her marriage. The observations of LUSH, J., just before the
close of his judgment, though entitled to great respect, as everything which falls
from that learned judge is, were not necessary to the decision of that case, and C
do not purport to be the result of deliberate reflection.

It only remains for me to notice one other case, that of *Sotherton v. Scott* (1),
by which it was decided that an order of affiliation was not necessarily revoked or
suspended by the marriage of the mother; so far that case is strongly in favour
of the appellant. FIELD, J., is reported to have said (6 Q.B.D. at p. 520):

"It may or may not be the law that they [the justices] have a discretion, upon D
the hearing of a summons against the putative father to enforce payment, to
take into account the means of the woman's husband, when they are shown
to be sufficient to maintain the child."

I do not understand those remarks to be intended to intimate any hostile opinion
to that which I have arrived at.

In the result, I am of opinion that the order can be enforced, notwithstanding E
the marriage of the appellant and the ability of her husband to support the child,
which, by compulsion of law, he has taken as a member of his family; and I am
glad that it is so, for common sense and common humanity tell me that the
putative father ought not to be relieved from liability to contribute his share of
the maintenance of his own offspring at the expense of the man who has married F
the woman who had the misfortune to bear it, who possibly may have a hard
struggle to support the family of which he is legitimately the head, and to whom
the contribution towards the one foreign member of it may be of much importance.
I rejoice to think that, since the days of that chaste and humane sovereign, Queen G
Elizabeth, our laws have been so far humanised that a bastard child is no longer
a mere thing to be shunned by an overseer, whose existence is unrecognised until
it becomes a pauper, whose only legitimate home is the workhouse, that it is no
longer permissible to punish its unfortunate mother with hard labour for a year,
nor its true father with a whipping at the cart's tail (see 18 Eliz. 1, c. 3 and
WILSON'S JUSTICE OF THE PEACE, p. 86); but that even an illegitimate child may
now find itself a member of some honest family, and that the sole obligation now H
cast on its parents is that each may be compelled to bear her and his own fair
share of the maintenance and education of the unfortunate offspring of their
common failing.

Case remitted to the justices.

Solicitors: *Horne, Hunter & Birkett*, for *Moore & Son*, Warrington; *Allen*.

[Reported by W. E. GORDON, ESQ., Barrister-at-Law.] I

R. v. MARTIN

[COURT FOR THE CONSIDERATION OF CROWN CASES RESERVED (Lord Coleridge, C.J., Field, Hawkins, Stephens and Cave, JJ.), November 19, 1881]

[Reported 8 Q.B.D. 54; 51 L.J.M.C. 36; 45 L.T. 444; 46 J.P. 228; 30 W.R. 106; 14 Cox, C.C. 633]

Criminal Law—Grievous bodily harm—Malice—Harmless acts done deliberately—Offences Against the Person Act, 1861 (24 & 25 Vict., c. 100), s. 20.

At the conclusion of a performance at a theatre, the defendant was the first, or almost the first, to leave the gallery. He ran down the staircase, put out the gaslights on the staircase, and placed an iron bar across the exit doorway, the doors of which became closed. On the lights being put out, panic seized the audience, who rushed down the staircase, and a large number were injured through the pressure from behind forcing those in front against and under the iron bar and against the doors. The defendant was convicted of unlawfully and maliciously inflicting grievous bodily harm on two of those injured.

Held: the defendant had been rightly convicted.

Notes. Applied: *R. v. Halliday*, [1886-90] All E.R.Rep. 1028. Followed: *R. v. Chapin* (1909), 22 Cox, C.C. 10. Considered: *R. v. Cunningham*, [1957] 2 All E.R. 412. Referred to: *R. v. Clarence*, [1886-90] All E.R.Rep. 133.

As to acts causing grievous bodily harm, see 10 HALSBURY'S LAWS (3rd Edn.) 735-737; and for cases see 15 DIGEST (Repl.) 999, 1,000. For the Offences Against the Person Act, 1861, s. 20, see 5 HALSBURY'S STATUTES (2nd Edn.) 795.

Case referred to:

(1) *R. v. Pembleton* (1874), L.R. 2 C.C.R. 119; 43 L.J.M.C. 91; 30 L.T. 405; 38 J.P. 454; 22 W.R. 553; 12 Cox, C.C. 607, C.C.R.; 14 Digest (Repl.) 503, 4852.

Case Reserved by the deputy recorder of Leeds.

At the general quarter sessions for the borough of Leeds, held on July 4, 1881, Edward Martin was charged on an indictment charging, inter alia, that, on Apr. 30, 1881, he unlawfully and maliciously inflicted grievous bodily harm on George Pybus and Martin Dacey, contrary to s. 20 of the Offences Against the Person Act, 1861. The evidence for the prosecution was to the following effect. The gallery in the Theatre Royal at Leeds was reached from the street by a stone staircase, which was lighted by three gaslights, of which one was at the top, one on a landing about the middle, and the third over the door of the pay office, which was at the bottom of the stairs. Those lights were all fastened to the walls at the height of seven feet or thereabouts above the stairs or landings. Between the street and the bottom of the staircase there were a pair of folding doors opening outwards into the street.

Each of those doors were divided into halves, of which the halves nearest to the door posts or walls on each side could be kept closed by means of strong iron bars let into sockets in the stonework of the staircase and connected with the doors by iron bolts. Those bars were moveable. The practice was to open only the central halves of the doors whilst the audience were assembling, and passing the pay office so as to limit the number of those who could pass in at the same time, and to remove the iron bars, and open the whole of the doors, some time before the conclusion of the performance, so as to allow the audience to pass out into the street more quickly.

It was proved that, on the night of April 30, 1881, shortly before the conclusion of the performance, the folding doors were opened to their full extent, and the iron bars placed against the wall of the staircase to the right hand of a person leaving the theatre and close to the door, according to the usual practice. The evidence showed that the gallery on that night was filled to the extent of about three-fourths of its total capacity. The defendant (who was well acquainted with the theatre,

having assisted on several occasions as a supernumerary) was proved to have been in the gallery on that night, and to have been the first, or almost the first, to leave it at the conclusion of the performance. He ran quickly down the gallery staircase, and, as he did so, he reached up with his hand and put out the gaslight on the middle landing, and also that over the pay office. As he passed out into the street, he took one of the iron bars which was leaning against the wall close to the door on his right-hand side, and threw it or placed it partly across the doorway. Almost immediately after this had been done by the defendant the whole of the folding doors became closed. The result of the doors being closed and the lower lights extinguished was to leave the lower part of the gallery stairs in almost entire darkness.

Almost immediately after the lights were put out a panic seemed to have seized the audience, who rushed down the stairs and endeavoured to find their way into the street. In consequence of the presence of the iron bar which the defendant had placed or thrown across one part of the doorway, and of the doors being shut, it was some time before any of them could reach the street, and in the meantime the pressure from behind forced those in front against and under the iron bar and against the doors, and a large number of persons were very seriously injured and had to be removed to the infirmary. Amongst those injured were George Pybus and Martin Dacey. The medical evidence was to the effect that George Pybus showed signs of a fracture of the base of the skull, which was probably caused by his slipping and falling backwards as he was running down the stairs after the gaslights had been extinguished, and so striking his head on the stairs; and that Martin Dacey was suffering from collapse, the result of partial suffocation, arising from the pressure to which he had been subjected in the crowd or at the foot of the stairs. It was clearly proved that the defendant was on the stage of the theatre after the accident assisting the injured persons who had been brought there. There was no evidence of any previous quarrel or dispute between him and the managers or officials of the theatre, or between him and any person in the gallery. The defence set up for the defendant was an alibi.

In summing-up the evidence to the jury the recorder directed them that malice was an essential ingredient in the offence charged against the defendant, and that, if they were of opinion that his conduct in extinguishing the gaslights and throwing the iron bar across the doorway amounted to nothing more than a piece of foolish mischief, they ought to acquit him, but that, if they believed that he did those acts with a deliberate and malicious intention, they ought to convict him, and the following questions were left to the jury: (i) Did the prisoner extinguish the gaslights, or either of them? (ii) Did he place or throw the bar across the doorway in such a manner as to make the means of exit more difficult? (iii) If he did extinguish the lights, or either of them, did he do so as a mere piece of thoughtless mischief, or with the intention of causing terror and alarm in the minds of the persons leaving the gallery? (iv) If he did throw or place the bar across the doorway, did he do so as a mere piece of thoughtless mischief, or with the intention of wilfully obstructing the means of exit from the gallery? (v) Were Pybus or Dacey, or either of them, injured by reason of any of the acts of the prisoner, and if so by which of them?

The jury found the defendant guilty, answered the first two questions and the latter portions of the third and fourth questions in the affirmative, and stated that they found that both Pybus and Dacey were injured by reason of each of the acts of the defendant mentioned in the first and second questions.

The question for the opinion of the court was whether, on the above facts and finding of the jury, the defendant was properly convicted.

No counsel appeared.

LORD COLERIDGE, C.J.—I confess that I entertain no doubt that the conviction of the prisoner was right, and certainly he received as favourable treatment as he deserved in the summing-up of the learned recorder who tried the case. His

A offence, in my opinion, was more serious than it seems to have been considered at the trial.

As to the question of law raised at the trial, the prisoner was indicted under the Offences Against the Person Act, 1861, s. 20, which enacts that

B "Whosoever shall unlawfully and maliciously wound, or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of a misdemeanour, and being convicted thereof shall be liable"

to certain specified punishments. The words "with or without any weapon or instrument" are worthy of attention, because those familiar with the old law know that difficulties often arose as to the construction of the word "weapon," and the words "with or without any weapon or instrument" were introduced to meet those difficulties. What the prisoner did was this: he was the first, or almost the first, to leave the gallery at the conclusion of the performance, he ran down the staircase, put out the gaslights, and, as he passed into the street, seized one of the iron door bars and threw it or placed it across the doorway, and then went his way. This caused a panic among the audience who rushed down the stairs, and the pressure from the people behind forced those in front against and under the iron bar, and against the doors, and a large number of persons were seriously injured, but happily no one was killed. For that the prisoner was indicted for unlawfully and maliciously inflicting grievous bodily harm, and the jury have found all that was necessary to sustain the charge, and that he did unlawfully and maliciously inflict grievous bodily harm on the persons named in the indictment without any weapon or instrument in his hand.

E The question is whether, under the circumstances, he was guilty within the meaning of the section. I am of opinion that he was. The prisoner must be taken to have intended the natural and probable consequences of what he did; and what he did was that which would certainly alarm and frighten a number of persons, and also obstruct their exit from the theatre, and cause them to run against the iron bar which he placed before the door, and do themselves serious injury. So that, if a person was thus injured, the prisoner would be guilty of unlawfully and maliciously inflicting on him grievous bodily harm, maliciously not in the sense of malice against the particular person injured, but in the sense of doing an unlawful act from which another person suffered grievous bodily harm, as in the familiar instance where a person who wantonly fires a rifle down a street and kills another person is in point of law guilty of murder, though he never saw or heard of that person. The same principle is applicable to this case. The prisoner, therefore, in my opinion, was properly convicted.

FIELD, J.—I am of the same opinion.

H HAWKINS, J.—I am of the same opinion.

I STEPHENS, J.—I am also of the same opinion. It appears to me that the learned recorder left the questions to the jury much more favourably than, in my judgment, he ought to have done, for he left it to the jury to say whether the prisoner extinguished the gaslights or placed the iron bar across the doorway as a piece of foolish mischief or with the intention of causing terror and alarm, and wilfully obstructing the exit of the persons leaving the gallery. If the prisoner did extinguish the gaslights or place the iron bar across the doorway, and the natural consequence of either act was to cause alarm and terror in the people leaving the theatre, and to lead to their injuring themselves and each other, that comes within the definition of malice. I do not understand what is meant by foolish mischief in such a case; if the prisoner did these acts recklessly he did them wilfully. This ought to be understood, as the word "malicious" is a word capable of being misunderstood. In *R. v. Pembleton* (1), BLACKBURN, J., said (L.R. 2 C.C.R. at p. 122):

"We have not now to consider what would be malice aforethought to bring a given case within the common law definition of murder; here the statute says that the act must be unlawful and malicious, and 'malice' may be defined to be 'where any person wilfully does an act injurious to another without lawful excuse.'"

This case falls within that definition.

CAVE, J.—I am of the same opinion.

Conviction affirmed.

[Reported by J. THOMPSON, ESQ., Barrister-at-Law.]

STANDING v. BOWRING

[COURT OF APPEAL (Lord Halsbury, L.C., Cotton and Lindley, L.JJ.), August 10, December 18, 1885]

[Reported 31 Ch.D. 282; 55 L.J.Ch. 218; 54 L.T. 191; 34 W.R. 204; 2 T.L.R. 202]

Gift—Acceptance—Stock—Transfer into joint names of donor and donee—Donee without knowledge of transfer—Legal title of donee.

A transfer of property to a person vests the property in him at once, even if he does not know of the transfer, subject to his right to repudiate when he is informed of the transfer.

In 1880, the plaintiff, a widow, transferred certain consols into the joint names of herself and the defendant, who was her godson and a relative of her late husband. She did this intending to receive the dividends during her life and that, in the event of the defendant surviving her, he should become entitled to the consols. Two years later the defendant became aware for the first time of the transaction by means of a letter requiring him to re-transfer the consols to the plaintiff.

Held: although the defendant had not assented to the transfer, his legal title was complete since the legal title of a transferee of stock was complete without acceptance; on the evidence, there had been no intention on the part of the plaintiff to make the defendant a mere trustee for her; and, therefore, the defendant could not be compelled to re-transfer the stock.

Notes. The National Debt Act, 1870, s. 22, has been repealed. Provisions as to transfer and registration of government stock are now contained in the Finance Act, 1942, s. 47 (21 HALSBURY'S STATUTES (2nd Edn.) 1274), and the Government Stock Regulations, 1943 (14 HALSBURY'S STATUTORY INSTRUMENTS 232), as amended, which are in some respects different from s. 22 of the Act of 1870.

Applied: *Re Howes*, *Howes v. Platt* (1905), 21 T.L.R. 501. Considered: *Young v. Sealey*, [1949] 1 All E.R. 92. Referred to: *London and County Banking Co. v. London and River Plate Bank* (1888), 21 Q.B.D. 535; *Re Blake*, *Blake v. Power* (1889), 60 L.T. 663; *Re Arbib and Class's Contract*, [1891] 1 Ch. 601; *Re Weston*, *Davies v. Tagart*, [1900] 2 Ch. 164; *Mallott v. Wilson*, [1900-3] All E.R.Rep. 326; *Brown v. Brown*, [1936] 2 All E.R. 1616; *Curran v. Newport Cinemas, Ltd.*, [1951] 1 All E.R. 295.

As to acceptance and disclaimer of a gift, see 18 HALSBURY'S LAWS (3rd Edn.) 388, 389; and for cases see 25 DIGEST (Repl.) 569 et seq.

Cases referred to:

- (1) *Butler and Baker's Case* (1591), 3 Co. Rep. 25a; 1 And. 348; 3 Leon. 271; Poph. 87; Moore, K.B. 254; 76 E.R. 684; 25 Digest (Repl.) 570, 145.

- A (2) *Thompson v. Leach* (1690), as reported in 2 Vent. 198; 86 E.R. 391; on appeal (1692), 2 Vent. 208, H.L.; 25 Digest (Repl.) 569, 144.
- (3) *Siggers v. Evans* (1855), 5 E. & B. 367; 3 C.L.R. 1209; 24 L.J.Q.B. 305; 25 L.T.O.S. 213; 1 Jur.N.S. 851; 119 E.R. 518; 25 Digest (Repl.) 570, 149.
- (4) *Smith v. Wheeler* (1671), as reported in 1 Vent. 128; 86 E.R. 88; sub nom. *Smyth v. Wheeler*, 2 Keb. 772; 43 Digest 700, 1393.
- B (5) *Small v. Marwood* (1829), 9 B. & C. 300; 4 Man. & Ry.K.B. 181; 7 L.J.O.S.K.B. 197; 109 E.R. 112; 43 Digest 701, 1395.

Also referred to in argument:

- Xenos v. Wickham* (1866), L.R. 2 H.L. 296; 36 L.J.C.P. 313; 16 L.T. 800; 16 W.R. 38; 2 Mar.L.C. 537, H.L.; 17 Digest (Repl.) 216, 153.
- C *Clavering v. Clavering* (1704), Prec. Ch. 235; 2 Vern. 473; 1 Eq. Cas. Abr. 24, pl. 6; 24 E.R. 114; affirmed (1705), 7 Bro. Parl. Cas. 410, H.L.; 17 Digest (Repl.) 216, 149.
- Doe d. Garmons v. Knight* (1826), 5 B. & C. 671; 8 Dow. & Ry.K.B. 348; 4 L.J.O.S.K.B. 161; 108 E.R. 250; 17 Digest (Repl.) 218, 174.
- Tate v. Leithead* (1854), Kay, 658; 2 Eq. Rep. 1105; 23 L.J.Ch. 736; 23 L.T.O.S. 252; 2 W.R. 630; 69 E.R. 279; 25 Digest (Repl.) 584, 243.
- D *Fowkes v. Pascoe* (1875), 10 Ch. App. 343; 44 L.J.Ch. 367; 32 L.T. 545; 23 W.R. 538, L.J.J.; 25 Digest (Repl.) 568, 142.
- Re Eykyn's Trusts* (1877), 6 Ch.D. 115; 37 L.T. 261; 27 Digest (Repl.) 152, 1103.
- Dyer v. Dyer* (1788), 2 Cox, Eq. Cas. 92; 30 E.R. 42; 25 Digest (Repl.) 559, 84.

Appeal by executors of the plaintiff from an order of PEARSON, J.

- E In November, 1880, the plaintiff, being then a widow, and aged eighty-six years, transferred £6,000 consols, to which she had become entitled in 1861, as the survivor of herself and her first husband, into the joint names of the defendant and herself. The defendant was a relative of the plaintiff's first husband, and was the godson of the plaintiff herself as well as of her husband, and it appeared that the plaintiff had, before making the transfer, expressed her intention of thereby conferring a benefit on the defendant on her own death, and, in particular, so informed her stockbroker. She did not, however, inform the defendant of what she had done. She continued to receive the dividends, and treated the fund as her own separate property. In December, 1882, the plaintiff was married for the second time, and shortly afterwards the defendant was asked to concur in re-transferring the consols into the plaintiff's name. That was the first information which the defendant had that the stock had been transferred into their joint names.
- G On his declining to concur, the plaintiff claimed declarations that she was absolutely entitled for her separate use to the £6,000 consols and that the defendant was a trustee of the stock for herself. PEARSON, J., held that, as the transfer was originally made with the intention of benefiting the defendant, and not with a view to create a trust, the defendant could not be compelled to re-transfer the stock and dismissed the action with costs. The plaintiff having died, the appeal was brought by her executors.
- H

Cozens-Hardy, Q.C., and *Chadwyck Healey* for the executors.
Giffard, Q.C., and *Dunning* for the defendant.

Cur. adv. vult.

- I Dec. 18, 1885. **LORD HALSBURY, L.C.**—In the year 1880, the plaintiff, being then eighty-six years of age and possessed of consols to the extent of £6,000, transferred them, by an instrument appropriate for that purpose, into the names of herself and the defendant Robert Alner Bowring, who was her godson. I think it was proved that she was aware when she did this that the effect would be to enable her, during her lifetime, to receive the dividends, and that if her godson survived her, which seemed probable, and has in fact now happened, he would become entitled as survivor to the consols so transferred. I think it is proved that this was her object and intention, but, for reasons which she explained herself, namely,

that the anticipated wealth would make him less active in the duties of life, she kept from him any knowledge of the disposition which she had made. Two years afterwards she married, and shortly afterwards the defendant became aware for the first time of the facts above stated, by the receipt of a letter requiring him to re-transfer, into the name of the plaintiff, the stock in question. A

The facts which I have assumed to be proved seemed, on the argument, to have disposed of every question but one, and that one is whether the intended gift was complete, in which case it would not be revocable at the option of the donor, or, to speak more accurately, whether, the gift not being complete, it rested only in intention, although the subject-matter of the gift remained within the control of the donor. If the matter were to be discussed now for the first time, I think that it might well be doubted whether the assent of the donee was not a preliminary to the actual passing of the property. One certainly cannot make a man accept as a gift that which he does not desire to possess. That is a matter which is settled by authorities which were not called to our attention during the argument. B C

In *Butler and Baker's Case* (1) (3 Co. Rep. at p. 26 b) it is said :

"The same law of a gift of goods and chattels, if the deed be delivered to the use of the donee, the goods and chattels are in the donee presently, before notice or agreement; but the donee may make refusal in pais, and by that the property and interest will be divested." D

That case was decided in the year 1591. In *Thompson v. Leach* (2), the question again arose, and was decided in the same way by the Court of Queen's Bench, against the opinion of VENTRIS, J. But that opinion so given was reversed afterwards by the House of Lords, and that was a very strong case indeed, because the effect of the surrender was to bar a contingent remainder which would otherwise have become vested by the birth of a son, which happened before the assent of the surrenderee. In *Siggers v. Evans* (3), which was decided in 1855, the old authorities are reviewed in the judgment of LORD CAMPBELL, who formulated the principle which I have indicated above, and by which this case must be governed, that, where the party taking the legal interest under a deed has also the beneficial interest, no assent is necessary to complete his title. E F

In the present case, it seems to me that both the beneficial and the legal interests in the consols passed to the defendant. If both the legal and the beneficial interest were intended to pass, and did pass, I do not see how any question of trust can arise. The result, therefore, is, that I agree with the decision which the learned judge in the court below has arrived at, and I think that that decision must be affirmed, and this appeal dismissed with costs. G

COTTON, L.J.—The late plaintiff commenced this action in order to have it declared that the defendant was a trustee for her of a sum of £6,000 consols. The facts have been sufficiently stated by the Lord Chancellor. Though the defendant was the nephew of the first husband of the late plaintiff, she was not in loco parentis to him, and the rule is well settled that, where there is a transfer by a person into his own name jointly with that of a person who is not his child or his adopted child, there is, *prima facie*, a resulting trust in favour of the transferor. But that is a presumption capable of being rebutted by showing that at the time the transferor intended a benefit to the transferee, and in the present case there is ample evidence that, at the time of the transfer, and for some time previously, the late plaintiff intended to confer a benefit by this transfer on her late husband's godson. In fact, when she desired to get the stock back again, what she said showed that she had originally intended to confer a benefit on the defendant but that, in consequence of something which he had done which had displeased her, she desired, if possible, to take back that which she had intended to be a benefit to him. That being so, the presumption that there would be a resulting trust for her is entirely rebutted, and it must be taken here that, although she did not intend the defendant to have any right to the dividends during her lifetime, she intended H I

A to give him a beneficial interest in the stock. Therefore, on her death, as he survived her, the legal right must prevail, and he must take the property for his own benefit.

B Another question, which has been already referred to by the Lord Chancellor, was raised in this case, viz., whether anything vested in the defendant, inasmuch as, until he was informed that the plaintiff desired to get back this stock, he never knew of the transfer. The transfer of stock in the public funds is regulated by Act of Parliament, and the statutory mode of transfer is by an entry in the books of the Bank of England, signed by the transferor. That was done here, and, although the National Debt Act, 1870, recognises an acceptance by the transferee, yet it does not make that acceptance necessary or essential to a complete transfer, for s. 22 [repealed. See the Finance Act, 1942, s. 47: 21 HALSBURY'S STATUTES (2nd Edn.) 1274] provides that

C "the person to whom a transfer is so made may, if he thinks fit, underwrite his acceptance thereof."

D I take the rule of law to be that, where there is a transfer of property to a person, even although it carries with it some obligations which may be onerous, it vests in him at once before he knows of the transfer, subject to his right when informed of it to say, if he pleases, that he will not take it. When informed of it he may repudiate it, but it vests in him until he so repudiates it. *Siggers v. Evans* (3) which was referred to by the Lord Chancellor, is a case to that effect, in which the earlier authorities are reviewed, and one very remarkable case, *Smith v. Wheeler* (4) is cited by LORD CAMPBELL. It is also cited in *Small v. Marwood* (5). There

E the right of the Crown was defeated by an assignment made before that right accrued, but not communicated to the assignee until after the title of the Crown had accrued. It was held that, although the assignee knew nothing of the assignment, it became effectual at once so as to defeat the title of the Crown, which accrued before the knowledge was communicated to the assignee, and, therefore, of course, before acceptance by the assignee. In my opinion, therefore, the

F appeal fails.

LINDLEY, L.J.—The right of the plaintiff to have the £6,000 consols in question in this action re-transferred to her depends on the legal effect of her own conduct on Nov. 3, 1880. On that day, she caused £6,000 consols, then belonging to her, to be transferred in the books of the Bank of England into the joint names of

G herself and the defendant, and the evidence shows that she did this deliberately, after being advised that she would not be able to rescind the transaction, and clearly at the time intending the defendant to keep the consols for his own benefit after her death in the event of his surviving her, which event was highly probable. The transfer was made without consideration, and without any knowledge on the part of the defendant of what was done. She now wishes to have

H the consols re-transferred into her own name, and the question is whether she is entitled to have them back.

The transfer of stock and the rights of stockholders (or of persons in whose names stock is standing) depend partly on general principles and partly on the provisions of the National Debt Act, 1870. By this statute, a transferee of stock *prima facie* acquires the legal title to it; and if his transferor had himself a good title to the

I stock and a right to transfer it, and has transferred it, the transfer cannot be treated by him or by the Bank of England as a nullity. Nor is there any method by which the transferor can get back his stock without the concurrence of the transferee or some order of a competent court requiring him to execute a re-transfer. Formal acceptance by the transferee of the transfer to him is not necessary to complete his legal title (see s. 22). The defendant in this case declines to re-transfer the stock, and the question is, therefore, reduced to this—viz., whether there are any grounds on which the court can order him to do so or make him account to the plaintiff for the value of the stock which she seeks to get back from him. The

plaintiff in her statement of claim and in the court below rested her case on equitable grounds, and sought to establish a trust in her favour. But the only trust which was consistent with the evidence was a trust to pay her the income of the consols for the joint lives of herself and the defendant. This trust was not in controversy, but is not sufficient for the plaintiff's purpose. No trust will suffice short of an absolute trust for herself. But it is impossible to impose such a trust on the defendant when the evidence conclusively shows that she never intended to create any trust of the kind. Trusts are neither created nor implied by law to defeat the intentions of donors or settlors; they are created or implied, or are held to result in favour of donors or settlors, in order to carry out and give effect to their true intentions, expressed or implied. It appears to me that there are no equitable, as distinguished from legal, grounds on which the plaintiff can obtain relief.

It was, however, contended before us that the legal title had not passed to the defendant; that, as he never knew of the transfer or assented to it until after he was requested to re-transfer the stock, the gift of it to him was really incomplete, and that the legal title to it was still in the plaintiff. I am of opinion, however, that this is not the case. An incomplete gift can, of course, be revoked by the donor at any time; and I believe that, by the civil law, and the laws of some if not all foreign countries founded on it, a gift is incomplete until the donee has assented to it, or at least until he has been informed of it and has tacitly assented to it by not objecting to it. But I have not been able to ascertain that this doctrine is ever applied where, as in this case, the donor has put the thing given out of his own power, and has placed it in such a position that he can only get the thing back with the concurrence of the donee. When once the possession is changed, it is too late to revoke; but whether possession is changed until the donee has assented to the change is not so clear.

However this may be on general principles or by the civil law, our own law as to the necessity of assent to gifts seems settled by *Butler and Baker's Case* (1), *Thompson v. Leach* (2) in the House of Lords, and *Siggers v. Evans* (3). The older authorities were carefully examined in this last case by LORD CAMPBELL, and I take it now to be settled that, although a donee may dissent from and thereby render null a gift to him, yet that a gift to him of property, whether real or personal, by deed, vests the property in him subject to his dissent. The same principle appears to me to be applicable to transfers of stock in the books of the Bank of England. If the assent of the transferee were necessary to complete his legal title, the legislature would not have made his formal acceptance of a transfer to him unnecessary, as it has done by the section to which I have already alluded. It would be very embarrassing to the Bank of England if acceptance of a transfer were necessary, and yet that no evidence of it in their books should be so. For these reasons, I am of opinion that the plaintiff's attempted revocation of her gift was too late, and that the appeal fails, and ought to be dismissed, with costs.

Appeal dismissed.

Solicitors : *Sandom, Kersey & Knight; Bell, Brodrick & Gray.*

[*Reported by FRANK EVANS, Esq., Barrister-at-Law.*]

A

THE ALHAMBRA

[COURT OF APPEAL (James, Brett and Cotton, L.JJ.), March 25, 1881]

[Reported 6 P.D. 68; 50 L.J.P. 36; 44 L.T. 637; 29 W.R. 655;
4 Asp.M.L.C. 410]

B

Shipping—Charterparty—"Port"—"Safe port"—Port at which ship could not safely always lay and discharge afloat.

C

By a charterparty a vessel was to sail to Falmouth for orders, "thence to a safe port in the United Kingdom . . . or as near thereunto as she can safely get, and always lay and discharge afloat." The vessel was ordered to Lowestoft. On account of her draught when loaded, the vessel could not be unloaded in Lowestoft harbour, and the master, despite an offer by the purchaser of the cargo to lighten the cargo in Lowestoft Roads, discharged the cargo at Harwich. At the trial of an action by the charterers for damages for breach of the charterparty against the owners, evidence was adduced that it was the custom at Lowestoft for vessels which were too deep to enter the harbour to discharge a portion of their cargo in Lowestoft Roads, at a distance from the harbour, and that this could be done with reasonable safety.

D

Held: (i) since the vessel could not "always lay afloat and discharge" in Lowestoft harbour, it was not a "safe port" within the meaning of the charterparty and the owners were not liable in damages for the refusal of the master to discharge the cargo there; (ii) the evidence as to the custom of the port at Lowestoft was not admissible.

E

Notes. Considered: *Horsley v. Price* (1883), 52 L.J.Q.B. 603. Followed: *Reynolds v. Tomlinson*, [1896] 1 Q.B. 586. Applied: *Hall Bros. Steamship Co., Ltd. v. R. and W. Paul, Ltd.*, [1914-15] All E.R.Rep. 234. *Axel Brostrom & Son v. Louis Dreyfus & Co.* (1932), 38 Com. Cas. 79. Referred to: *The Curfew*, [1891] P. 131; *Erasmus Treglia v. Smith's Timber Co.* (1896), 1 Com. Cas. 360; *Carlton Steamship Co. v. Castle Mail Packets Co.* (1897), 66 L.J.Q.B. 819.

F

As to safe ports, see 35 HALSBURY'S LAWS (3rd Edn.) 438 et seq.; and for cases see 41 DIGEST 521-523.

Cases referred to:

G

- (1) *Shield v. Wilkins* (1850), 5 Exch. 304; 19 L.J.Ex. 238; 155 E.R. 130; 41 Digest 444, 2786.
- (2) *Hillstrom v. Gibson and Clark* (1870), 8 Macph. (Ct. of Sess.) 463; 22 L.T. 248; 41 Digest 564, 3894.

Also referred to in argument:

Capper & Co. v. Wallace (1880), 5 Q.B.D. 163; 49 L.J.Q.B. 350; 42 L.T. 130; 28 W.R. 424; 4 Asp.M.L.C. 223, D.C.; 41 Digest 519, 3478.

H

Appeal by the defendants from a decision of SIR ROBERT PHILLIMORE in the Admiralty Division, reported 5 P.D. 256, holding that the plaintiffs were entitled to damages for breach of contract.

I

By a charterparty dated Nov. 8, 1879, the ship *Alhambra* was chartered by James Knox & Co. for a voyage from Baltimore to Queenstown or Falmouth for orders, "thence to a safe port in the United Kingdom . . . or as near thereunto as she can safely get, and always lay and discharge afloat . . ." The vessel having arrived at Falmouth with a cargo, the plaintiffs, the purchasers of the cargo, ordered the master to proceed to Lowestoft and there discharge. The master objected to discharge at Lowestoft on account of the ship's draught of water when loaded, and the plaintiffs told him that they were prepared to lighten the vessel sufficiently in Lowestoft Roads to enable her to "always lay afloat" in Lowestoft harbour. The master proceeded to Harwich as the nearest safe port and there discharged the cargo which the plaintiffs received under protest. In an action by the charterers for damages for breach of contract against the owners

evidence was adduced that it was the custom at Lowestoft for vessels which were too deep to enter the port to discharge a portion of their cargo in Lowestoft Roads, and that this could be done reasonably safely. A

The action came on before SIR ROBERT PHILLIMORE, who decided that the defendants had broken their contract and the plaintiffs were entitled to damages.

The defendants appealed.

Butt, Q.C. (with him *Clarkson, Q.C.*), for the defendants. B

Millward, Q.C., and *J. P. Aspinall* for the plaintiffs.

JAMES, L.J.—I am of opinion that the question in this case depends on what construction is to be put on the words used in the charterparty. The charterers had the right to order the ship to proceed to a safe port—any safe port—or as near thereto as she could safely go, and there “always lay and discharge afloat.” On the construction of the whole of the charterparty, the plain meaning is that she is to be sent to a safe port, that is, a port in which a position of safety was to be got, and, moreover, a port into which the ship could safely get and always lie and discharge afloat. She has contracted to go to such a port only, and not to that port with a little variation. In making the charterparty, the shipowner says: “I will go to that port if I can get there; if I cannot get there I will get as near thereto as I can safely get and lie afloat and discharge, whether at Lowestoft or not, so long as I go to a safe port.” It is conceded that Lowestoft was not a port in which a ship of the size and burthen of the ship in question could safely go when she was drawing 16 ft. 6 in. It is admitted that at low water at Lowestoft there is not more than 11 ft., and sometimes less; that was not in my opinion a safe port. A safe port is not a port in which a vessel can lie with safety merely by reason that there is somewhere outside the place in which the ship can lie afloat, and in which she can discharge a part of her cargo, as is contended ought to have been done in this case. It may be all very well that that should be done in some cases, but that is not the contract which the parties entered into. The contract was to go to some place of safety for a ship of such a burthen, and which complies with the other requisites. C D E F

I am of opinion, therefore, that the defendants are entitled to the judgment of the court.

BRETT, L.J.—I am of the same opinion. The question is what was the sort of port to which, when the ship arrived at Falmouth for orders, the charterers or their agent had the right to order the ship to go. The first necessity was to order her to go to a port in the sense in which that word is used in seafaring language. Secondly, it should be a port in which she might always lie and discharge afloat, and according to my view, the meaning of that is that it should be a port in which, from the moment she entered into it, in the condition in which she was entitled to go into it, she should be able to lie afloat until the time of final discharge. The condition in which she was entitled to go in would be the condition of a fully loaded vessel, and she was not bound to unload before, but to go into that port. The meaning, then, must be a port in which she would, when fully loaded, be able to lie afloat, and to lie afloat from that moment until discharged in a reasonable way. G H

But there is something more than that; it must be a safe port. Therefore, if ordered to a port where she could lie afloat from the beginning to the end of her discharge, yet if it were not a safe port, she was not bound to go to it at all. The question is whether Lowestoft was a port to which, taking that construction of the charterparty, the plaintiffs were entitled to order her to go. They ordered her to go to Lowestoft. The meaning of that is not to go to Lowestoft Roads, but to Lowestoft harbour. Therefore, the question must be whether Lowestoft harbour was a place into which she could enter fully loaded, and lie afloat and unload. In my opinion, it was not. It was said that she could have done it if she had partially unloaded in Lowestoft Roads at a distance from I

A the harbour, and a custom to do so was vouched. It seems to me that that custom is inadmissible, because it related to a thing to be done before the ship got to Lowestoft. Therefore, it seems to me that that was a thing which she was not authorised to do. *Shield v. Wilkins* (1) is an authority in point. I will reserve my opinion as to *Hillstrom v. Gibson* (2), as the question there decided does not arise here.

B **COTTON, L.J.**—I am also of the same opinion. In my opinion, the true construction of the charterparty is that a safe port means a safe port for a vessel loaded. *Shield v. Wilkins* (1) is exactly in point. The port must also have been safe. The only question is whether Lowestoft was such a place, or whether there was anything as regards the custom to justify the plaintiffs in ordering the ship there, and whether Lowestoft means the Lowestoft Roads. The Roads are not part of the port. The plaintiffs ordered the ship to go to the port. Must not that mean the harbour where the ship can safely unload always lying afloat? That will not entitle the plaintiffs to say that the ship shall go to the Roads. As to the custom, it is that, when the ship has got to the port, the unloading will be according to the custom of the port. In this particular case, the construction of the contract must be that the ship in a loaded state shall safely go in and unload and discharge, and that is varied by this, that at this particular port ships do lie outside and take out part of their cargoes. The custom is in no way admissible as a construction of the charterparty. When the port is fixed the custom may regulate certain things to be done, but, in my opinion, the custom of a port to which a ship shall go cannot apply in this place.

E **JAMES, L.J.**—I only wish to say a word as to the custom. The custom attempted to be established in this case is that Lowestoft does not mean Lowestoft, but something else.

Appeal allowed.

Solicitors : *H. C. Coote*, for *C. Diver*, Yarmouth; *Hughes, Hooker & Co.*

[*Reported by F. W. RAIKES, Esq., Barrister-at-Law.*]

GILLINGHAM v. WALKER

[QUEEN'S BENCH DIVISION (Huddleston, B., Hawkins and Bowen, JJ.), May 31, 1881]

[Reported 44 L.T. 715; 45 J.P. 470; 29 W.R. 896]

Railway—Offence—Travelling without having paid fare—Travelling in class superior to that for which fare paid—Intent to avoid payment of proper fare—Railway Clauses Consolidation Act, 1845 (8 & 9 Vict., c. 20), s. 103.

The respondent paid for a third-class railway ticket and travelled in a second-class carriage. He being charged with travelling without having paid his fare and with intent to avoid payment thereof, contrary to s. 103 of the Railway Clauses Consolidation Act, 1845, the magistrate found that he had acted fraudulently and with intent to avoid payment of the second-class fare, but dismissed the charge on the ground that, as he had paid the third-class fare, he could not be convicted of not having paid his fare. On appeal,

Held: the respondent, not having paid the fare proper for the class by which he travelled should have been convicted.

Notes. The Railways Clauses Consolidation Act, 1845, s. 103, is replaced (except as regards the offence of not quitting a carriage) by s. 5 of the Regulation of Railways Act, 1889, as amended by the Transport Act, 1962, ss. 84 (2), 93 (1) (42 HALSBURY'S STATUTES (2nd Edn.) 653, 662).

As to offences in relation to tickets and fares, see 31 HALSBURY'S LAWS (3rd Edn.) 669-671; and for cases see 8 DIGEST (Repl.) 119, 120. For the Railway Clauses Consolidation Act, 1845, s. 103, and the Regulation of Railways Act, 1889, s. 5, see 19 HALSBURY'S STATUTES (2nd Edn.) 644, 865.

Case referred to:

- (1) *Langdon v. Howells* (1879), 4 Q.B.D. 337; 48 L.J.M.C. 133; 40 L.T. 880; 43 J.P. 717; 27 W.R. 657, D.C.; 8 Digest (Repl.) 119, 765.

Case Stated by a metropolitan police magistrate.

The appellant, on behalf of the Great Western Rail. Co. and the Metropolitan Rail. Co., preferred an information against the respondent, charging that, on Jan. 22, 1881, contrary to the provisions of s. 103 of the Railway Clauses Consolidation Act, 1845, he travelled in a carriage of the companies on their joint railway, without having previously paid his fare and with intent to avoid payment thereof. It was proved that the respondent, on Jan. 22, 1881, took a third-class ticket and paid the third-class fare from Hammersmith on the joint railway to Westbourne Park, available in the alternative from Hammersmith to Notting Hill, and that, without having paid any other than such third-class fare, he travelled in a second-class carriage of the companies on their joint railway from Hammersmith to Notting Hill. The magistrate found as a fact that the respondent travelled without having paid the proper second-class fare, fraudulently and with intent to avoid payment of such fare, but dismissed the information on the ground that, although the respondent had not paid his proper fare for the class of carriage in which he travelled, yet he had paid a fare for travelling in a third-class carriage, and, therefore, that he could be said to have travelled in any carriage of the companies without having previously paid his fare within the meaning of s. 103 of the Railway Clauses Consolidation Act, 1845.

By the Railway Clauses Consolidation Act, 1845, s. 103:

"If any person travel or attempt to travel in any carriage of the company, or of any other company or party using the railway, without having previously paid his fare and with intent to avoid payment thereof, or if any person having paid his fare for a certain distance, knowingly and wilfully proceed in any such carriage beyond such distance, without previously paying the additional fare for the additional distance, and with intent to avoid payment thereof . . .

A every such person shall for every such offence forfeit to the company a sum not exceeding forty shillings."

Butterworth for the appellant.

The respondent did not appear.

B **HUDDLESTON, B.**—There was a case decided in this division on s. 103 of the Railways Clauses Consolidation Act, 1845 [*Langdon v. Howells* (1)], in which it was held that the words "having paid his fare" mean having paid the fare for the class by which the passenger has travelled. The respondent here had a third-class ticket and travelled in a second-class carriage, and the magistrate finds that there was evidence of that having been done fraudulently and with intent to avoid payment of the second-class fare. Under these circumstances, the question being
C whether the respondent had paid his fare, although he had paid a fare, he had not paid the fare proper for the class by which he travelled. I am, therefore, of opinion that he ought to have been convicted.

HAWKINS and BOWEN, JJ., concurred.

Appeal allowed.

D Solicitor: *R. R. Nelson.*

[*Reported by W. E. GORDON, Esq., Barrister-at-Law.*]

E

WHITMORE v. FARLEY AND OTHERS

[COURT OF APPEAL (James, Baggallay and Lush, L.JJ.), May 13, 14, 1881]

F [Reported 45 L.T. 99; 29 W.R. 825; 14 Cox, C.C. 617]

Contract—Illegality—Public policy—Compounding felony—Larceny by bailee—Prosecution withdrawn—Agreement to repay money stolen.

A., having been arrested at the instance of B. on a charge of having committed the offence of larceny by a bailee, was brought before a magistrate and remanded. A.'s wife induced B. to withdraw the prosecution on her agreeing
G to charge her separate real estate with the amount taken. The title deeds of the property were deposited at a bank in the joint names of the solicitors of the parties. A. being again brought before the magistrate, the latter, having been informed of the terms, allowed the prosecution to be withdrawn. A.'s wife afterwards refused to perform her agreement. In an action by B. to enforce the charge, A.'s wife counterclaimed for a declaration that she was entitled to have the deeds delivered up to her.

H

Held: the agreement to charge her separate property, being an agreement to compound a felony, was illegal, and she was entitled to the declaration she sought.

Per Curiam: Even if the offence had been a misdemeanour, the agreement would still have been illegal.

I

Notes. Referred to: *Windhill Local Board of Health v. Vint* (1890), 45 Ch.D. 351.

As to agreements tending to pervert the course of justice, see 8 HALSBURY'S LAWS (3rd Edn.) 136–138; and for cases see 12 DIGEST (Repl.) 286 et seq.

Cases referred to:

- (1) *Keir v. Leeman* (1846), 9 Q.B. 371; 15 L.J.Q.B. 360; 7 L.T.O.S. 347; 11 J.P. 38; 10 Jur. 742; 115 E.R. 1315, Ex. Ch.; 12 Digest (Repl.) 290, 2236.

- (2) *Williams v. Bayley* (1866), L.R. 1 H.L. 200; 35 L.J.Ch. 717; 14 L.T. 802; 30 J.P. 500; 12 Jur.N.S. 875, H.L.; 12 Digest (Repl.) 331, 2566.
- (3) *Davis v. Holding* (1836), 1 M. & W. 159; 1 Gale, 380; Tyr. & Gr. 371; 5 L.J.Ex. 102; 150 E.R. 388; 4 Digest (Repl.) 162, 1471.

Also referred to in argument :

- Re Shepherd, Ex parte Ball* (1879), 10 Ch.D. 667; 48 L.J.Bey. 57; 40 L.T. 141; 27 W.R. 563; 14 Cox, C.C. 237, C.A.; 1 Digest (Repl.) 76, 566.
- Haigh v. Kaye* (1872), 7 Ch. App. 469; 41 L.J.Ch. 567; 26 L.T. 675; 20 W.R. 597, L.J.J.; 12 Digest (Repl.) 337, 2607.
- White v. Spettigue* (1845), 1 Car. & Kir. 673; 13 M. & W. 603; 14 L.J.Ex. 99; 4 L.T.O.S. 317; 9 J.P. 761; 9 Jur. 70; 153 E.R. 252; 1 Digest (Repl.) 74, 557.
- Davies v. London and Provincial Marine Insurance Co.* (1878), 8 Ch.D. 469; 38 L.T. 478; 26 W.R. 794; sub nom. *London and Provincial Marine Insurance Co. v. Davies, Davies v. London and Provincial Marine Insurance Co.*, 47 L.J.Ch. 511; 12 Digest (Repl.) 322, 2484.
- Osbaldiston v. Simpson* (1843), 13 Sim. 513; 1 L.T.O.S. 335; 7 Jur. 734; 60 E.R. 199; 12 Digest (Repl.) 104, 610.

Appeal by the plaintiff from a decision of FRY, J., reported 43 L.T. 192.

The plaintiff, Miss Whitmore, in the early part of 1878, placed in the hands of the defendant, J. N. Anstruther, a financial agent and moneylender, certain securities which belonged to her of the value of about £800, and on which the defendant was to raise money; but he was not to part with the securities, and was to pay interest thereon. On Mar. 14, 1878, an agreement was signed by the plaintiff and the defendant Anstruther, by which he undertook to hold the securities on certain terms, and to return the same to the plaintiff on six months' notice. The six months' notice was given to him by the plaintiff on the same day. The six months' notice expired on Sept. 14, 1878, but the defendant Anstruther failed to return the securities with the exception of one of them. Time elapsed, but no more of the securities were returned, and, on July 27, 1879, he was adjudicated a bankrupt. The plaintiff received notice of the proceedings, and that she had been included in the list of creditors. On Sept. 5, 1879, the plaintiff swore an information against the defendant Anstruther for the crime of larceny by a bailee, and he was arrested. On Sept. 9, he was brought up at the Mansion House before SIR A. LUSK, and remanded till Sept. 11. On Sept. 10, the defendant, Mrs. Anstruther, wife of the defendant Anstruther, went with a solicitor to call on the plaintiff for the purpose of obtaining the withdrawal of the prosecution against the defendant Anstruther. Some terms were proposed by Mrs. Anstruther, but the plaintiff declined to withdraw from the prosecution without the advice of her solicitor. The next morning, before the time for the hearing arrived, an interview took place between the plaintiff and the defendant Mrs. Anstruther, and their respective solicitors, at which an agreement was come to by which the prosecution was to be withdrawn, if the consent of the Lord Mayor, or the alderman representing him, could be obtained, and Mrs. Anstruther was to charge her separate estate with the loss which the plaintiff had incurred through the conduct of the defendant Anstruther. After the interview, Mrs. Anstruther's solicitor, accompanied by a Mr. Leader (a clerk of the plaintiff's solicitor), went to Messrs. Hoare's bank, and there deposited the title deeds of a certain freehold property, which was vested in the defendant G. C. Farley, as a trustee for the defendant Mrs. Anstruther's separate use, such deposit being made in the joint names of the firm of solicitors of Mrs. Anstruther, who had a charge on the property, and of Mr. Leader, the deeds not to be delivered without a joint receipt. When the case was called on at the Mansion House, before SIR A. LUSK, the solicitor who appeared for the defendant Anstruther informed the alderman that the plaintiff had agreed to withdraw from the prosecution, the defendant Mrs. Anstruther being prepared to give a charge on her separate estate for her husband's defalcations.

A SIR A. LUSK gave his sanction to the prosecution being withdrawn, which was accordingly done.

The defendant Mrs. Anstruther subsequently declined to make good to the plaintiff the loss which she had sustained, and, on Nov. 19, 1879, the present action was commenced by the plaintiff against Mr. and Mrs. Anstruther, and the latter's trustee, in which the plaintiff sought to charge the separate estate of Mrs. Anstruther with the sum in question. Mrs. Anstruther, by her defence, set out the facts as to the prosecution of her husband, but did not expressly rely on the illegality of the compromise of the criminal proceedings. She also denied that any agreement had been arrived at, or that the transactions between her and the plaintiff had progressed beyond mere negotiations, and she alleged that the defendant Anstruther had been discharged because no case had been shown to support the charge against him; and she also pleaded the Statute of Frauds, the agreement not having been reduced to writing or signed. She also put in a counter-claim, by which she claimed a declaration as against the plaintiff that she was entitled to the delivery up to her of the title deeds. Fry, J., held that the deposit of title deeds in pursuance of the contract was a sufficient part performance to take the case out of the Statute of Frauds. He also held that the agreement alleged had been entered into by the defendant Mrs. Anstruther, but that it was against public policy, and could not be enforced. He dismissed the action without costs, and made the declaration claimed by the defendant Mrs. Anstruther. The plaintiff appealed.

Fischer, Q.C., and Oswald for the plaintiff.

North, Q.C., and Godefroi for the defendants.

E **JAMES, L.J.**—This case has been argued at length and with perseverance. It is a case of great hardship on the plaintiff, who has lost a considerable sum of money through the default of the defendant husband. However hard the case may be, we must decide it on principles of law, and those are as plain and clear as ever occurred in any court.

F The facts of the case which raised the question to be decided are shortly as follows. There was a criminal prosecution for larceny by a bailee, which is felony. Whether the offence was a felony or misdemeanour does not matter so far as this case is concerned. The husband was in the dock. His wife desired to relieve him from the prosecution. She proposed to give a security on her separate property to stop the prosecutrix from proceeding. That proposal was acceded to by the prosecutrix. In the course of the negotiations the title deeds relating to the defendant Mrs. Anstruther's property were handed over to a bank. No evidence has been given as to what was precisely agreed on, but it has been clearly shown what was intended to be done. The learned judge in the court below himself took the objection that an illegal agreement was sought to be given effect to, as it is the duty of every court to take the objection when such facts appear as to show that something has been done to stop a criminal prosecution. The court is bound to say: "We will do nothing to enforce such an agreement against public policy." I think that any party setting up such case would probably think twice before he admitted in his pleading that he had been party to such an agreement. The authorities clearly show that what was done here was an offence which might have been made the subject of a prosecution. It is said that there is a difference in this case from the ordinary offence of compounding a felony by the fact of the presiding magistrate having consented to reparation being made to the prosecutrix. There might be something to be said on that score as to the amount of punishment to be inflicted on the offender; but if authority were wanted to show that what was done did not make the affair lawful, there is a decision of the Exchequer Chamber in *Keir v. Leeman* (1) that even a judge of assize cannot lawfully consent to such a compromise of a prosecution for felony.

I It is said by counsel for the plaintiff that the judge in the court below has not only denied the plaintiff the relief to which she was entitled, but that he has

given the defendant relief, thus ignoring the maxim in *pari delicto potior est conditio possidentis*, and that no relief ought to have been given to the defendant Mrs. Anstruther on the counterclaim set up by her. Independently of the cases which have been cited to me, it has been decided in the House of Lords in *Williams v. Bayley* (2) that, where there has been pressure in cases like this, the court will grant relief to the person on whom such pressure has been put. But here what has been done is that a declaration has been made which is a logical result of what was claimed by the plaintiff in the action. The plaintiff says: "I have a charge on Mrs. Anstruther's separate estate." The court declares, in answer to the plaintiff's question, that she has no such charge. Thereupon the defendant Mrs. Anstruther and her estate are necessarily held to be free from the charge which has been claimed. The court, thinking the case a hard one, did even more for the plaintiff than she was entitled to ask should be done, for it made no order as to costs, although it is impossible to say that the action was not unfounded. Having obtained a decision of a competent court on a point which was evidently clearly against the plaintiff, she chooses to bring an appeal from such decision. She does so at her own risk, and, although her case is a hard one, I see no reason for making any exception to the rule as to costs. In my opinion, the appeal should be dismissed with costs.

BAGGALLAY, L.J., stated the facts, and continued: I am clear that, on the authorities, it is immaterial whether the charge which was attempted to be compromised was a felony or only a misdemeanour. Any agreement to compound a criminal prosecution for a public offence is illegal, and it is wholly immaterial that such agreement has received the sanction in court of the magistrate before whom the charge was brought. The sanction of the magistrate cannot render valid a transaction which would otherwise be illegal. I am of opinion, therefore, that the appeal must be dismissed.

LUSH, L.J.—I am of the same opinion. I share fully in the sympathy which has already been expressed for the plaintiff, but I cannot give legal effect to my sympathy. There is no doubt that to compound a felony is an illegal act, and also a crime which renders the person guilty of committing it liable to punishment. Every agreement, therefore, by which a prosecutor, in consideration of a private benefit, has consented to compound or withdraw from a charge of felony is one which, on account of its illegality, the court will not enforce. There is certainly no legal obligation on a person who has suffered injury by the commission of a felony to prosecute the person who has committed the crime; but, if he has once instituted the prosecution, he has acted on behalf of the public, and used the name of the sovereign as representing the public, and cannot legally enter into a binding agreement to discontinue the prosecution. The cases clearly establish that any such agreement in consideration of a benefit to the prosecutor is illegal and cannot be enforced. It is utterly immaterial whether the charge is proved or not, if once it has been made. Although the offence here was a felony, it would not matter if it were a misdemeanour. There are, no doubt, certain cases, as that of an assault, where the parties may compromise the offence without being guilty of an illegal act. But this does not apply to misdemeanours of a serious kind. Embezzlement is only a misdemeanour, yet it is a criminal offence to compromise a prosecution for embezzlement.

The principle has been stated by LORD ABINGER, C.B., in *Davies v. Holding* (3). The court there held that an agreement which was illegal and void, as being against the general policy of the law, should not be enforced, and applied the doctrine to an agreement to abandon a fiat in bankruptcy. The doctrine has also been applied in cases where a debtor has entered into a bargain with certain creditors not to oppose him in obtaining a composition with the general body of his creditors. It is a well-established doctrine that an agreement to forego public rights is an illegal agreement. Whether the felony could have been proved here

A or not, there is no doubt that a criminal charge was made, and the prosecutrix could not legally withdraw it. The fact that the presiding magistrate consented to such withdrawal of the charge does not make it legal. The claim set up by the plaintiff cannot be made the subject of an action. Then nobody can invoke the authority of the court to give effect to an illegal agreement, and there is no doubt that the judge was quite right in interfering and of his own motion pointing out the illegality of the transaction, and the impossibility of allowing the plaintiff's claim. There was, however, quite enough on the pleadings, without the interference of the judge, to set up the defence of illegality. We are quite at liberty, where facts are stated which show an illegal act, to allow a case of illegality to be proved, although it is not expressly stated in the pleadings that the defendant pleads illegality.

C **JAMES, L.J.**—I desire to be understood as giving no opinion, either way, on the point decided in the court below as to the Statute of Frauds. That point requires to be further considered if it ever arises again.

Solicitors: *F. Bradley; Remnant, Penley & Grubbe.*

[Reported by FRANK EVANS, Esq., Barrister-at-Law.]

E

PERUVIAN GUANO CO. v. BOCKWOLDT AND OTHERS

[COURT OF APPEAL (Sir George Jessel, M.R., Lindley and Bowen, L.JJ.), February 14, 16, 1883]

F [Reported 23 Ch.D. 225; 52 L.J.Ch. 714; 48 L.T. 7; 31 W.R. 851; 5 Asp.M.L.C. 29]

Conflict of Laws—Lis alibi pendens—Concurrent actions in English and foreign courts—Election.

G The plaintiffs, an English company, brought an action in England against a French company for the delivery of the cargoes of seven ships, or, alternatively, for damages, and for an injunction and a receiver. At the time the action was commenced, the ships were in British waters, but they were later removed to French ports, and the defendants sold the cargoes and received the proceeds. The plaintiffs instituted proceedings in a French court against the defendants in relation to six of the cargoes. The defendants moved that the plaintiffs be ordered to elect whether they would proceed with the English action or the French action.

H

Held: since the double proceedings were not vexatious, the plaintiffs would not be put to their election.

I **Notes.** Applied: *Hyman v. Helm* (1883), 24 Ch.D. 531; *The Christiansborg* (1885), 10 P.D. 141. Considered: *Mutrie v. Binney* (1887), 35 Ch.D. 614; *Armstrong v. Armstrong*, [1892] P. 98; *Logan v. Bank of Scotland*, [1904-7] All E.R.Rep. 438; *The Hagen*, [1908-10] All E.R.Rep. 21; *The Golaa*, [1926] P. 103. Referred to: *St. Pierre v. South American Stores (Gath and Chaves), Ltd.*, [1936] 1 K.B. 382.

As to *lis alibi pendens*, see 7 HALSBURY'S LAWS (3rd Edn.) 170 et seq.; and for cases see 11 DIGEST (Repl.) 542 et seq.

Case referred to:

(1) *McHenry v. Lewis* (1882), 22 Ch.D. 397; 52 L.J.Ch. 325; 47 L.T. 549; 31 W.R. 305, C.A.; 11 Digest (Repl.) 542, 1512.

Also referred to in argument :

Pieters v. Thompson (1815), Coop.G. 294.

Appeal by the defendants from a decision of BACON, V.-C., dismissing a motion by the defendants that the plaintiffs be ordered within seven days to elect whether they would proceed with the action relating to seven ships or with an action brought by them in France in relation to six of the same ships.

On May 6, 1880, the plaintiffs, an English company, commenced an action against the defendants, who were captains of certain ships called the *Charles Dickens*, the *Woodfield*, the *True Briton*, the *British Princess*, the *Chancellor*, the *North Star*, and the *Struan*, claiming delivery of the cargoes of the ships, or, alternatively, for damages, and for an injunction and a receiver. On June 8, 1880, Messrs. Dreyfus Bros. & Co., merchants, of London and Paris, were made defendants in the place of the captains, who were dismissed from the action. On Dec. 2, 1882, Dreyfus Bros. & Co. were served with a citation to appear before the Tribunal of Commerce of the Department of the Seine, sitting at Paris, in an action by the plaintiffs for restoration of the cargoes of all the ships, except the *Struan*, or payment of their value, and for damages. At the commencement of the English action, the ships were in British waters, but they had since been removed to ports in France, and it was admitted that all the cargoes had since been sold and the proceeds received by the defendants.

Ingle Joyce for the defendants.

Millar, Q.C., and *H. B. Buckley* for the plaintiffs.

SIR GEORGE JESSEL, M.R.—It is very important in these cases that the court should, in stopping an action, clearly see that it does not do injustice. Of course a man brings an action at the peril of having to pay the costs if the action does not succeed, and, as a general rule, that is sufficient to protect defendants from ill-founded actions. There is another protection, which is that, where the action is vexatious, it may be stayed. It may be vexatious on many grounds. It may be so utterly absurd that the court can see that it cannot possibly succeed, but that it is brought only for annoyance; and then there is jurisdiction to stay the action. That is pure vexation. Or it may be vexatious in this way: the plaintiff, not intending to annoy or harass the defendant, but thinking that he will get some fanciful advantage, sues him at the same time in two courts within the same jurisdiction—in two of the Queen's courts. That is vexatious, because, whatever the intention of the plaintiff may be, he cannot get any benefit in that way, and the defendant is harassed by two suits. Similar, although not perhaps the same, considerations apply in a case where the actions are brought, one in a foreign country and one in this country.

I have recently had to consider the general rule in *McHenry v. Lewis* (1) and I went so fully into it there that I do not think that it is necessary for me to discuss it further. It may be put shortly, as regards this case, in this way. It is not vexatious to bring an action in each country where there are substantial reasons of benefit to the plaintiff. He has the right to bring an action, and, if there are substantial reasons to induce him to bring the two actions, why should we deprive him of that right? Seeking to obtain a substantial advantage is not vexatious. It is very unpleasant no doubt to be sued twice, and it is unpleasant to many people to be sued once; but still that does not make it vexatious, in a legal sense, where the plaintiff seeks to get a real substantial advantage. You cannot accuse him of vexation because he endeavours to obtain an advantage. As I put it in *McHenry v. Lewis* (1), and as I put it now, suppose in the one action a plaintiff could get execution against defendants residing and having large property in France, but not resident or having any property in England, that might be a good reason for suing them in France, and that might seem a reason for doing so when the action here was so advanced that the plaintiff saw his way to a verdict here. The plaintiff says: "I shall get a verdict and judgment, but that will not avail me unless I can

A get execution. I can use the verdict and judgment in my French action; now I am here I will go on with my English action, and I will use the verdict in the French action with the view of getting judgment and execution." All that seems to be not unreasonable, and certainly not vexatious. That, I think, is one ground for declining to interfere.

B But there is another ground. The plaintiffs say: "Our action in France does not relate to the same number of ships as the action in England does." Junior counsel for the defendants said that this was a device to enable the plaintiffs to escape the rule, but, if it does enable them to escape it, it is a very good device. Take this case: The plaintiffs have a right to six cargoes under the same title. The defendants have a place of business in England, and a place of business in France. The plaintiffs bring an action for three cargoes in England, and three
C in France. Why may they not do so? They may think that they may get sufficient to satisfy a judgment in England for three cargoes, but not for six. You could not stop the action in either country on the ground that the six cargoes were sued for under the same title. They, in fact, bring two actions for two different subject-matters. Does it make any difference that the action is for six in one country and one in the other? It appears to me that it cannot be so. They have
D a right to sue in each country for a different subject-matter.

That brings me to the substance of the case. Supposing the plaintiffs elected to go on with the French action for six cargoes, and in England for one, which is what is suggested on the part of the defendants that they might do, what good would that be to anybody? The two actions would still go on, and the only consequence suggested is that a witness or two less would possibly—not necessarily—be required in carrying on the litigation. That is not a ground for putting a man to his
E election. I asked whether any precedent could be found for putting a man to his election simply because he might have to call a witness or two less in one of the two actions, and I need not say that no such precedent could be produced. All the election rules proceed on the doctrine that you can put a final stop to at least one action, and this appears to be quite a novel attempt—and an attempt which is not
F founded in sufficient reason—to stop one action on the ground that you can have a little less evidence in the other action, or try it in a less expensive mode. It seems to me that this, also, is a reason for our not interfering; and, again, the fact that there is no precedent for such an interference, is also a reason for this court not interfering. I think that, if a precedent could have been found for an election, not between two actions, but between so much of the subject-matter of one
G action as is embraced in another, it would have been discovered a long time ago. The absence of precedent is not immaterial; and, considering the danger of depriving men of the opportunity of asserting rights which they are asserting bona fide, unless it is clear that the assertion of them is vexatious, I think that we ought to be slow to extend the doctrine beyond the case to which our attention has been called.

For these reasons, I think that the appeal should be dismissed with costs.

H **LINDLEY, L.J.**—I am of the same opinion. The principles by which the court ought to be guided on applications of this nature were fully examined and discussed in *McHenry v. Lewis* (1). I have had an opportunity of reading the judgments in that case and it appears to me to be a most valuable decision. As I understand it, it comes to this, that where the plaintiff is suing in this country and abroad in
I respect of the same matter, and a motion is made to compel the plaintiff to elect, it is not sufficient for the person so moving to point out that two proceedings are being taken with reference to the same matter; he must go a step further and show that there is vexation in point of fact, that is to say, that there is no necessity for harassing the defendant by double litigation.

I think that the court ought to be very cautious before it interferes in cases of that kind, and for this reason: the court here is not, and cannot be, alive to all the advantages which a person may have in suing in the foreign court. It does not know with accuracy, unless the matter is called to its attention, what reasons

there may be for preferring one court to another. If in any case it is established that there is nothing except vexatious litigation, there is ample jurisdiction in this court to make the order asked, but we ought to take care what we are about, and I am bound to say that, in this case, I do not see my way to make such an order as is asked. In other words, I do not see that there is such vexation in this case as to justify our interference. Apart from the fact that the action in France is for six cargoes, whereas the action here is for seven there are certainly reasons—not vexatious reasons, not trumpery reasons, not harassing reasons—for bringing that action in France. The fact that the action in France is for six cargoes, and that the action here is for seven, satisfies me that it would be wrong to stop that action, because both actions must go on together, unless we see our way to stop one action altogether. I do not see how we are to do that. If we were to interfere in the way in which it is suggested that we ought to interfere, we should not accomplish what ought to be the result of interference, that is to say, stopping one action out of two; both actions would still go on. I think that the appeal ought to be dismissed with costs.

BOWEN, L.J.—I am of the same opinion. I think that the law is clear enough. The difficulties which arise are the difficulties of administering or applying that law. When a plaintiff comes into an English court he asks for justice, and the court is bound not to refuse him justice. The court is bound, therefore, not to refuse to hear his case and not to put him under difficulties in the way of having the action brought to a conclusion. Of course, that rule does not mean that a plaintiff, under the pretence of asking for justice, is to do that which is oppressive and vexatious, and the courts have always at law—with which I am more familiar—and no doubt in equity also, interfered to prevent a plaintiff, under the colour of asking for justice, doing injustice for the sake of harassing others. Therefore, when what the plaintiff has been asking for has been frivolous, or sometimes when he has asked for it in a way which necessarily involves injustice, the courts have interfered. It seems to me that the principle on which a plaintiff is put to his election, when it is suggested that a double action is being pursued, is a branch of the general law. The reason for putting him to his election and compelling him to decide whether he will go on with one action or the other is that the prosecution of either one or the other appears to the court to be necessarily attended with injustice—that although one of the actions is right, two of them necessarily must be wrong. It is really a branch of the general law.

How are we to apply that doctrine to foreign courts? It seems to me that we have no sort of right, moral or legal, to take away from a plaintiff any real chance which he may have of an advantage. If there is a fair possibility that he may have an advantage, and a just advantage, by prosecuting a suit in two countries, why should this court interfere and deprive him of it? I think that this case has illustrated, during its progress, the necessity of being very careful in exercising on behalf of the court this sort of prerogative power of interfering with actions. It turned out in the course of the argument that the French suit had this advantage, that the plaintiffs could, or thought that they could, get execution more easily—and, as far as I know, they can get execution more successfully, and with more completeness—against the defendants than if they rested only on the English action. The defendants are so conscious, although they are applying to us to stay this action and to put the plaintiffs to their election, that there is something in that, that they cannot undertake (without referring to their clients abroad) to cure the blot, and put the procedure here on exactly the same footing with regard to the remedy as the procedure in France. That seems to me to illustrate exactly what was said by the court in *McHenry v. Lewis* (1), and what I think ought always to be in the minds of the court in interfering with these actions. Persons who sue in different countries very often have reasons for doing so, which are not easily explained. There may be many reasons why a French action at the same time as an English action may not be vexatious or unreasonable. One obvious

A reason has been pointed out to us, and that is the facility of execution in the French action. I am, myself, very much impressed by the fact that, although we have had two cases within the last two months on this point, neither in the one case nor in the other have we had anything like a precedent shown us, or anything which approaches a light or easy interference on the part of the court in this country, to prevent double litigation, where the double litigation has no other element of oppression than this, that an action is going on simultaneously abroad.

Appeal dismissed.

Solicitors: *Clements; C. & S. Harrison & Co.*

[Reported by FRANK EVANS, Esq., Barrister-at-Law.]

PALMER v. JOHNSON

[COURT OF APPEAL (Sir Baliol Brett, M.R., Bowen and Fry, L.JJ.), May 13, 1884]

[Reported 13 Q.B.D. 351; 53 L.J.Q.B. 348; 51 L.T. 211;
33 W.R. 36]

E Auction—Sale of land—Error of description in particulars of sale—Condition providing for compensation—Right to recover after conveyance accepted.

The plaintiff purchased freehold property at a sale by auction. The particulars of sale erroneously stated the value of the rental, in consequence of which mistake the plaintiff gave more for the property than he otherwise would have done. The conditions of sale contained a provision that if any error should be discovered in the particulars the purchaser should be entitled to compensation. The plaintiff did not find out the error until after he had paid the purchase money and had accepted the conveyance of the property.

Held: the acceptance of the conveyance did not bar the right of the plaintiff to recover compensation as provided by the conditions of sale.

G Notes. Explained: *Clayton v. Leech*, [1886–90] All E.R.Rep. 446. Considered: *Saunders v. Cockrill* (1902), 87 L.T. 30; *Lawrance v. Cassell*, [1930] 2 K.B. 83. Referred to: *Re Orange and Wright's Contract* (1885), 52 L.T. 606; *A.-G. and Hare v. Metropolitan Rail. Co.* (1893), 69 L.T. 811; *Mason v. Schupisser* (1899), 81 L.T. 147; *Greswolde-Williams v. Barnely* (1900), 49 W.R. 203; *De Lassalle v. Guilford*, [1901] 2 K.B. 215; *Knight Sugar Co. v. Alberta Railway and Irrigation Co.*, [1938] 1 All E.R. 266.

H As to rights under particular conditions in sale of land, see 34 HALSBURY'S LAWS (3rd Edn.) 232 et seq.; and for cases see 40 DIGEST (Repl.) 111 et seq.

Cases referred to:

- (1) *Cann v. Cann* (1830), 3 Sim. 447; 57 E.R. 1065; 40 Digest (Repl.) 107, 821.
- (2) *Bos v. Helsham* (1866), L.R. 2 Exch. 72; 15 L.T. 481; sub nom. *Boss v. Helsham*, 4 H. & C. 642; 36 L.J.Ex. 20; 15 W.R. 259; 40 Digest (Repl.) 107, 822.
- (3) *Besley v. Besley* (1878), 9 Ch.D. 103; 38 L.T. 844; 42 J.P. 806; 27 W.R. 184; 35 Digest (Repl.) 117, 162.
- (4) *Allen v. Richardson* (1879), 13 Ch.D. 524; 49 L.J.Ch. 137; 41 L.T. 615; sub nom. *Allen v. Richardson*, *Richardson v. Allen*, 28 W.R. 313; 40 Digest (Repl.) 107, 826.
- (5) *Re Turner and Skelton* (1879), 13 Ch.D. 130; 49 L.J.Ch. 114; 41 L.T. 668; 28 W.R. 312; 40 Digest (Repl.) 107, 825.

- (6) *Joliffe v. Baker* (1883), 11 Q.B.D. 255; 48 L.T. 966; 47 J.P. 678; sub nom. *A Joliffe v. Baker*, 52 L.J.Q.B. 609; 32 W.R. 59; 40 Digest (Repl.) 109, 846.
- (7) *Hart v. Swaine* (1877), 7 Ch.D. 42; 47 L.J.Ch. 5; 37 L.T. 376; 26 W.R. 30; 40 Digest (Repl.) 395, 3156.
- (8) *Leggott v. Barrett* (1880), 15 Ch.D. 306; 51 L.J.Ch. 90; 43 L.T. 641; 28 W.R. 962, C.A.; 17 Digest (Repl.) 347, 1538.

Also referred to in argument: 4

- Manson v. Thacker* (1878), 7 Ch.D. 620; 47 L.J.Ch. 312; 42 J.P. 485; sub nom. *Manson v. Thacker*, *Ex parte Croshaw*, 38 L.T. 209; sub nom. *Manson v. Thacker*, *Thacker v. Manson*, 26 W.R. 604; 40 Digest (Repl.) 107, 823.

Appeal from a decision of A. L. SMITH, J., on further consideration, reported 12 Q.B.D. 32, in an action brought by the purchaser of certain property against the vendor to recover damages for a misdescription of the property contained in the particulars of sale.

The property in question was sold by auction, and was described in the particulars of sale as producing a net annual rental of £39. In consequence of this statement the plaintiff gave £650 for the property. After the conveyance of the property to the plaintiff had been completed he discovered that the rental which had been described as a net annual rental was in reality a gross rental, and that the net rental was considerably less than £39. The conditions of sale contained (*inter alia*) the following provision:

"The property is believed and shall be taken to be correctly described, but if any error, misstatement, or omission in the particulars be discovered, the same shall not annul the sale, but compensation shall be allowed by the vendor or purchaser, as the case may require; the amount of such compensation to be settled, regard being had to the purchase money, by the auctioneer, whose decision shall be final."

The auctioneer refused to adjudicate. At the trial of the action the jury found that there had been no fraudulent representation, but that the plaintiff purchased the property believing that the net annual rental was £39, which was in fact the gross rental. The defendant contended that the plaintiff could not recover after having taken a conveyance of the property, as the conveyance contained no provision similar to the above provision in the conditions of sale. A. L. SMITH, J., on further consideration, gave judgment for the plaintiff. The defendant appealed.

Lawrance, Q.C., and *Graham* for the defendant.

Buszard, Q.C., and *Stanger* for the plaintiffs, were not called on to argue.

SIR BALIOL BRETT, M.R.—In this case, deliberately and I think rightly, one point and one point alone has been argued, and that point is, that the right of the plaintiff to recover damages cannot be maintained after the conveyance of the property sold has been completed. The point that the auctioneer has not settled the amount of compensation, as he was to do according to the terms of the conditions of sale, is not taken, and, therefore, I express no opinion upon it. Therefore, the question is this: whether, where the particulars of a sale by auction of real property contain a mis-statement of fact, and where they also contain an express contract in the form of the contract in these particulars of sale, the purchaser can recover compensation in respect of the mis-statement on the completion of the conveyance.

It must be borne in mind that this is not a case in which it is sought to set aside the conveyance on the ground of fraudulent mis-statement, it is not a case in which after the completion of the conveyance any action is brought upon the ground of fraud, and further, it is not a case of some mistaken assertion being contained in the conditions of sale, while those conditions do not contain any express contract as to the mode of dealing with that mistaken assertion, but it is a case of express mis-statement with an express contract made between the parties

A as to how that mis-statement is to be dealt with. The contract, therefore, is in effect the same as the contract in *Cann v. Cann* (1) and in *Bos v. Helsham* (2), and every point taken in this case was clearly and obviously open in both those cases. To my mind it is impossible for us to decide this case in favour of the defendant without clearly overruling both *Cann v. Cann* (1) and *Bos v. Helsham* (2). Such a transaction as this is of daily occurrence. Nothing can be more common than the sale of real property by auction, and when we find a decision like that in *Cann v. Cann* (1), which was come to fifty-four years ago, and like that in *Bos v. Helsham* (2), which was come to eighteen years ago, and when we find that these cases were not challenged at the time, and have since gone forth as a deliberate and judicial statement of the law, by what rule are we to be guided when it is suggested that such cases are to be overruled? It has always been the legal practice to say that where the matter which is affected by the decision is of common and daily occurrence, and must constantly have been carried out upon the assumption that the decision in question is good law, yet if the decision has lasted and has been acted on for some time, a court of error will not reverse that decision, even though it should be of opinion that it would not have come to the same conclusion. For this reason I do not think it is open to D us now to overrule *Cann v. Cann* (1) and *Bos v. Helsham* (2).

It is true that two cases have been cited to us in *Besley v. Besley* (3) and *Allen v. Richardson* (4) in which MALINS, V.-C., differed from the views expressed in those cases; but, according to the comity of the courts of this country, courts of co-ordinate jurisdiction do not overrule co-ordinate courts, and I think that rule must be applied to the cases before MALINS, V.-C., and with great respect to his memory I do not think he was justified in differing from similar cases decided in a court of co-ordinate jurisdiction with his own; and that view was expressed by SIR GEORGE JESSEL, M.R., in *Re Turner and Skelton* (5), who was also of opinion that the learned Vice-Chancellor ought to have followed the current of authority. To speak my own mind, uninfluenced by authority, I cannot doubt that strong arguments may be used against the view upheld by *Cann v. Cann* (1) and *Bos v. Helsham* (2); but it is not because we can see that strong arguments may be used against the decision that we are to say that we should not then have decided in the same manner. The judgments in the cases I have referred to seem strong and fairly conclusive, and I am far from saying that if I had had to decide those cases at that time I should have ventured to differ from the conclusion which was then arrived at. On the contrary, I think I should have agreed with those conclusions; but I wish to be understood to rest my decision in this case on this ground, that we cannot now overrule cases which, in a matter of daily occurrence, have laid down a rule of law which has been acted upon as a good rule of law through a long series of years.

Several other cases were cited to us, but I do not think I need deal with any of them, except to say that I do not agree with *Besley v. Besley* (3) and *Allen v. Richardson* (4) decided by MALINS, V.-C., and to say further, that if the judgment of WILLIAMS, J., in *Joliffe v. Baker* (6) is in conflict with *Cann v. Cann* (1) and *Bos v. Helsham* (2), I do not agree with it; and I prefer the judgment of A. L. SMITH, J., in the present case. *Hart v. Swaine* (7) was much pressed upon us, but I do not think that has anything to do with the point. That was a case of fraud, and FRY, L.J., sitting as a jury, found that there was fraud, and set aside the deed in consequence, but there is no question of that sort here. As to *Leggott v. Barrett* (8), which was used as an authority for the proposition that the contracts contained in these conditions of sale had been merged in the deed of conveyance, I see nothing wrong in that case; and I think I said nothing there which I repent of now, but the case is not applicable to the present case. A. L. SMITH, J., in his judgment in the court below in the present case, is quite right, in my opinion, when he points out what was the sole point of the decision in *Leggott v. Barrett* (8). For these reasons, I think that the judgment of A. L. SMITH, J., was right, and that this appeal must be dismissed.

BOWEN, L.J.—I am of the same opinion. We have to decide what was the true agreement made between these parties, and it is a question of construction to a considerable extent. It is said that it is involved in the nature of this transaction that it was the intention of the parties that the formal deed of conveyance should displace the conditions of sale; but I think that cannot be so, because nothing is easier to conceive than a clause inserted in these conditions which would manifestly have vitality after the completion of the conveyance, and, therefore, we must interpret these conditions of sale. A B

I confess that, if the question were quite untouched by authority, I should have felt that there was much to be said for the view for which counsel for the defendant contended; but I do not think that even on this question of construction we are left free to consider the main arguments that may be advanced upon it, because we find that, rightly or wrongly, a judicial construction has already been placed upon such a contract as this, which judicial construction must have constantly been acted upon in the daily occurrence of these sales by auction contracts during the many years through which those judgments have stood. The state of authority seems to have been this: that the point was apparently open, but apparently it was only open on account of the view taken by one learned judge—MALINS, V.-C., and which view I do not think, looking at the other authorities in co-ordinate courts, he was justified in taking. I agree with what the Master of the Rolls has said about *Joliffe v. Baker* (6), and, as it seems to me that we cannot properly consider this point, as it is in truth concluded by authority, I think this appeal must be dismissed. C D

FRY, L.J.—I am of the same opinion. The question is really one of construction. Does the condition in the conditions of sale provide for payment of compensation at any time, or only before the completion of the conveyance? I think that much might be said upon both sides of the question, and no one can be insensible of some of the inconveniences which arise from the view contended for by the plaintiffs, but that view has been commonly acted upon in these transactions for a long series of years. *Cann v. Cann* (1) decided the point in favour of that view as long ago as 1830, and there was no authority varying from that until, I think, the year 1866; meanwhile *Cann v. Cann* (1) had been upheld in *Bos v. Helsham* (2). I entirely agree with the opinion expressed by the other members of this court, that under these circumstances it is not desirable to interfere with the state of the law, upon the ground that in everyday transactions of this sort much must have been done upon the footing that the law is as then laid down. E F

Then the only remaining question is whether this contract has been varied by the conveyance. I think that is not so. I can find in this conveyance nothing in any way approaching an expressed intention to vary. The only other point I wish to mention is this, that in *Besley v. Besley* (3) and *Joliffe v. Baker* (6) there was no such express contract as there is in this case, and that point must always be remembered when those cases are cited as authority upon this point. G H

Appeal dismissed.

Solicitors: *Swann & Co.*, for *Elborne*, Nottingham; *Lee, Ockerby & Everington*, for *Bright*, Nottingham.

[Reported by A. A. HOPKINS, ESQ., Barrister-at-Law.]

Re CURTOYS. Ex Parte PILLERS

[COURT OF APPEAL (James, Baggallay and Lush, L.JJ.), April 28, May 5, 1881]

[Reported 17 Ch.D. 653; 50 L.J.Ch. 691; 44 L.T. 691;
29 W.R. 575]

Bankruptcy—Property available for distribution—Debt due to bankrupt—Garnishee order served on debtor to bankrupt before petition, but after act of bankruptcy—No notice of act of bankruptcy.

A judgment creditor, before the presentation of a bankruptcy petition against the debtor, but after the commission of the act of bankruptcy, of which he had no notice, served a garnishee order nisi attaching moneys due to the debtor from a third party,

Held: he was not protected under the Bankruptcy Act, 1869, s. 95 (3) [now Bankruptcy Act, 1914, s. 45], and, therefore, was not entitled to the debts attached as against the trustee in bankruptcy.

Notes. The Bankruptcy Act, 1869, s. 94 (3), has been replaced by the Bankruptcy Act, 1914, s. 45 (d).

Considered: *Re Chinn, Ex parte Sulger* (1881), 17 Ch.D. 839; *Butler v. Wearing* (1885), 17 Q.B.D. 182; *Re O'Shea's Settlement, Courage v. O'Shea*, [1895] 1 Ch. 325; *Hosack v. Robins*, [1918–19] All E.R.Rep. 565. Applied: *George v. Tompson's Trustee*, [1949] 1 All E.R. 554. Referred to: *Re Bannister, Ex parte Vale* (1881), 45 L.T. 200.

As to attachment of debts, see 16 HALSBURY'S LAWS (3rd Edn.) 79 et seq.; for cases see 5 DIGEST (Repl.) 895–896. For the Bankruptcy Act, 1914, ss. 45, 46, see 2 HALSBURY'S STATUTES (2nd Edn.) 382, 383; and for Bankruptcy (Amendment) Act, 1926, s. 4, see *ibid.* 453.

Cases referred to in argument:

Re Bissell, Ex parte Duignam (1871), 6 Ch. App. 605; 40 L.J.Bey. 68; 25 L.T. 286; 19 W.R. 1127, L.C. & L.JJ.; 5 Digest (Repl.) 895, 7443.

Holmes v. Tutton (1855), 5 E. & B. 65; 24 L.J.Q.B. 346; 25 L.T.O.S. 177; 1 Jur.N.S. 975; 3 C.L.R. 1343; 119 E.R. 405; 4 Digest (Repl.) 387, 3514.

Wadling v. Oliphant (1875), 1 Q.B.D. 145; 45 L.J.Q.B. 173; 33 L.T. 837; 24 W.R. 243; 5 Digest (Repl.) 794, 6722.

Hirsch v. Coates (1856), 18 C.B. 757; 25 L.J.C.P. 315; 27 L.T.O.S. 202; 4 W.R. 656; 139 E.R. 1568; 21 Digest (Repl.) 731, 1568.

Emanuel v. Bridger (1874), L.R. 9 Q.B. 286; 43 L.J.Q.B. 96; 30 L.T. 194; 22 W.R. 404; 4 Digest (Repl.) 388, 3520.

Re Watt, Ex parte Joselyne (1878), 8 Ch.D. 327; 47 L.J.Bey. 91; 38 L.T. 661; 26 W.R. 645, C.A.; 4 Digest (Repl.) 387, 3516.

Anglo-Italian Bank v. Davies (1878), 9 Ch.D. 275; 47 L.J.Ch. 833; 39 L.T. 244; 27 W.R. 3, C.A.; 21 Digest (Repl.) 773, 2586.

Re Watkins, Ex parte Evans (1879), 13 Ch.D. 252; 49 L.J.Bey. 7; 41 L.T. 565; 28 W.R. 127, C.A.; 4 Digest (Repl.) 390, 3542.

Re Stanhope Silkstone Collieries Co. (1879), 11 Ch.D. 160; 48 L.J.Ch. 409; 40 L.T. 204; 27 W.R. 561, C.A.; 10 Digest (Repl.) 998, 6855.

Appeal by Alfred William Pillers, the trustee in bankruptcy of Charles Curtoys, from a decision of BACON, Chief Judge, affirming a decision of the Bath County Court judge holding that a garnishee order nisi served by William Henry Taggart, a judgment creditor of Curtoys, was valid against the trustee in bankruptcy.

The bankrupt, Charles Curtoys, of the Walcot Brewery, Bath, mortgaged his brewery to Charles King. The mortgage deed contained a provision whereby King was at liberty to purchase the business at a valuation. Pursuant to this provision King purchased the brewery on Aug. 11, 1880, and after repaying the amount due

upon his mortgage, retained the balance in his hands, amounting to £503 7s. 7d., in trust for Curtoys. On Aug. 14, Curtoys committed an act of bankruptcy. On Aug. 30 William Henry Tagart, a brewer at Bath, recovered judgment against Curtoys. On Sept. 1 Tagart obtained a garnishee order nisi, attaching the balance in the hands of King. This order was served upon King on Sept. 2. At that time Tagart had no notice of any act of bankruptcy having been committed by Curtoys. On Sept. 3 a bankruptcy petition was presented against Curtoys, the alleged act of bankruptcy being that he had on Aug. 14, 1880, with intent to defeat or delay his creditors, departed from his dwelling-house, or otherwise absented himself. On Sept. 15, the garnishee order nisi was made absolute, and on the 25th the debtor was adjudicated a bankrupt. At the first meeting held on Oct. 23 Alfred William Pillers was appointed trustee.

The judge of the Bath County Court held that the service of the garnishee order nisi before the filing of the bankruptcy petition, followed by adjudication, made the judgment creditor a secured creditor within the Bankruptcy Act, 1869, independently of any prior act of bankruptcy, and that, inasmuch as in his opinion the garnishee order nisi was "a dealing" with the bankrupt under s. 94 (3), and was obtained without notice of an act of bankruptcy committed by the bankrupt, and available against him for adjudication, it came within the protection of that subsection. On Feb. 28, 1881, BACON, Chief Judge, affirmed the decision of the county court judge, but on different grounds, holding that the transaction was protected under s. 95 (3). The trustee appealed.

By the Bankruptcy Act, 1869, s. 94:

"Nothing in this Act contained shall render invalid . . . (3) Any contract or dealing with any bankrupt, made in good faith and for valuable consideration, before the date of the order of adjudication, by a person not having, at the time of making such contract or dealing, notice of any act of bankruptcy committed by the bankrupt, and available against him for adjudication."

By s. 95:

"Subject and without prejudice to the provisions of this Act relating to the proceeds of the sale and seizure of goods of a trader, and to the provisions of this Act avoiding certain settlements, and avoiding on the ground of their constituting fraudulent preferences, certain conveyances, charges, payments, and judicial proceedings, the following transactions by and in relation to the property of a bankrupt shall be valid, notwithstanding any prior act of bankruptcy, . . .

(2) Any execution or attachment against the land of the bankrupt, executed in good faith by seizure before the date of the order of adjudication, if the person on whose account such execution or attachment was issued had not at the time of the same being so executed by seizure notice of any act of bankruptcy committed by the bankrupt, and available against him for adjudication:

(3) Any execution or attachment against the goods of any bankrupt, executed in good faith by seizure and sale before the date of the order of adjudication, if the person on whose account such execution or attachment had not at the time of the same being executed by seizure and sale notice of any act of bankruptcy committed by the bankrupt, and available against him for adjudication."

By the statute 6 Geo. 4, c. 16, s. 81 [repealed by the Bankrupt Law Consolidation Act, 1849]:

"All conveyances by and all contracts and other dealings and transactions by and with any bankrupt bona fide made and entered into more than two calendar months before the date and issuing of the commission against him, and all executions and attachments against the lands and tenements or goods and chattels of such bankrupt, bona fide executed or levied more than two

A calendar months before the issuing of such commission, shall be valid notwithstanding any prior act of bankruptcy by him committed: Provided . . ."

Winslow, Q.C., and Finlay Knight for the trustee.

Roxburgh, Q.C., and Charles J. Ruscombe Poole for the judgment creditor.

JAMES, L.J.—I find it impossible to agree with the decision of the Chief Judge in this case. I am also unable to concur in the opinion expressed by the county court judge, that a garnishee order, which is an execution in invitum, is a "contract or dealing" with the bankrupt, within the meaning of sub-s. (3) of s. 94 of the Bankruptcy Act, 1869. Whatever the effect of the execution may be, in order to be protected it must be brought within the words of sub-s. (3) of s. 95 of the Act, or within the reasonable meaning of those words. It is there expressly provided that the attachment, in order to be protected, must be "executed in good faith by seizure and sale before the date of the order of adjudication," without notice of any act of bankruptcy available for adjudication. The particular thing now in question was not capable of being seized and sold. A debt which is attached under a garnishee order is not capable of being seized and sold, and is not within the exact words of the subsection. The procedure under which debts are taken in execution is called an "attachment" of debts; it is pointed out that the word "attachment" is used in the Bankruptcy Act, and it is said that it is necessary for the court to give effect to every word of the statute. But the only attachment which is protected under sub-s. (3) of s. 95 is an attachment "against the goods." If debts are to be held to be protected under this subsection, we must construe "goods" as including debts.

Without expressing a final opinion on this point, I must state that I have a very strong impression that the word "goods" here means goods and chattels which are capable of being sold, and the title to which may be perfected by seizure and sale. It has been argued that, unless you apply the word "attachment" to the process now in question, that word has no meaning; and I was at first impressed by the consideration that there were no things in the nature of goods which were the subject of attachment. The word "attached" was, however, used in the Bankrupts Act, 1825 (6 Geo. 4, c. 16), and I think the legislature from that time downwards, when using the word "attachment," has had in view the equitable execution in a court of equity whereby goods were sequestered and sold. Any person who obtained an attachment in respect of a sum which had been ordered to be paid by the Court of Chancery, applied to the court for an order for sale, and for payment, out of the proceeds of such sale of the sum of money owing to him. When that word "attached" was first used by the legislature, there was something, therefore, to satisfy every word in the statute then passed. If a meaning is to be given to the words applicable to the present case, the only equivalent to a sale of goods would be the realising of the security by actual payment to the garnishee of the debts which have been attached. So long as the security is not realised, and the thing remains in fieri, it is impossible for us to put an attachment of a debt in a higher position than that of a seizure under a writ of *fi. fa.* which has not been perfected by a sale.

BAGGALLAY, L.J., stated the facts, and continued: The county court judge, when the case came before him, held that this transaction was a "dealing" with the bankrupt which was protected under sub-s. (3) of s. 94 of the Bankruptcy Act, 1869. The Chief Judge did not take that view, but held that it came under sub-s. (3) of s. 95. If the debt which has been attached is part of the bankrupt's goods and chattels, the transaction, in order to be protected under s. 95, must have been perfected by seizure and sale of the debt. If the debt was not part of the goods, the attachment is not within the section at all. But, in my opinion, what is meant by "attachment against goods" under s. 95 is one against the goods and chattels, commonly so called, of the bankrupt. Such a thing as an attachment of debts, provided for by the Common Law Procedure Act, 1854, was not known when the bankruptcy statute (the statute 6 Geo. 4, c. 16) was passed, which first referred to a

process of attachment. There was then a process of attachment in the Mayor's Court of London and elsewhere by custom, and there was also another attachment, which was a process used to compel the payment of an equitable debt, and which was a transaction only supported in bankruptcy if followed by seizure and sale. Whether I am right in applying that view of the Act or not, I feel no hesitation in saying that the process of attachment in this case, not having been completely executed by seizure and sale, the creditor's argument cannot prevail.

LUSH, L.J.—I entirely agree with my learned colleagues that it is not necessary to inquire whether sub-s. (3) of s. 95 of the Bankruptcy Act applies to an attachment of debts by a garnishee order, but I do not wish it to be supposed that I agree with the construction which they have put on the clause. I think, however, that we must give effect to every word of the clause; and when the word "attachment" was used in the Bankruptcy Act passed in the reign of Geo. 4, the word was not known in the sense in which it has since been used in the Common Law Procedure Act, 1854, but in 1869, when the Bankruptcy Act now in force was passed, the process of attachment of debts was well known by that name, and I cannot help thinking that the two subsections (2) and (3), of s. 95 of the Act of 1869 were intended to apply, when taken together, to all property which passed to the trustee in the bankruptcy. If the word "goods" does not apply to debts, they do not come within sub-s. (3) at all. If the word does apply, when this attachment was made the debt was not, by reason of the relation back of the trustee's title, within the power of the bankrupt at all. The subsection protects, upon given conditions, goods which are seized under a *fi. fa.*, or their proceeds. They must have been actually sold; otherwise the seizure is not protected. In order to take the property out of the trustee there must be seizure and sale. We must find an equivalent to the sale of goods (assuming that debts are within the section) after a garnishee order has been obtained. The only equivalent, in the proceedings for attachment, of a debt is obtaining payment of the debt attached, either voluntarily or by an execution against the garnishee. The debt is not sold, and there has been in this case no such equivalent for seizure and sale as I have suggested. Until there has been sale or an equivalent for it the seizure is not perfected. To hold otherwise would be to bring us within the maxim *Qui hæret in litera, hæret in cortice*.

JAMES, L.J.—If the case ever arises we must not be held to have decided what takes place where the money has been actually received by the judgment creditor before the date of the order of adjudication.

LUSH, L.J.—I agree.

Solicitors: *Van Tromp*, for *Benson & Carpenter*, Bath; *Whitakers & Woolbert*, for *Simmons, Clark & Collins*, Bath.

[Reported by FRANK EVANS, Esq., Barrister-at-Law.]

A

KEARSLEY v. PHILIPS AND ANOTHER

[COURT OF APPEAL (Sir Baliol Brett, M.R., Lindley and Fry, L.JJ.), June 29, 1883]

B

[Reported 11 Q.B.D. 621; 52 L.J.Q.B. 581; 49 L.T. 435;
31 W.R. 909]

Distress—For rent—Mortgage—Mortgagor attorning tenant to mortgagee—arrear of rent—Right of mortgagee to distrain.

C

A mortgage deed contained a clause by which the mortgagor attorned tenant to the mortgagees at a yearly rent. After the mortgage the mortgagor let the premises to a tenant who assigned goods which were on the premises to the plaintiff by a bill of sale. The mortgagees seized the goods so assigned to the plaintiff as a distress for rent due from the mortgagor. In an action by the plaintiff to recover damages for the seizure of the goods,

D

Held: the attornment clause created a rent properly so called with all its incident remedies, and, therefore, the distress was justified, and the plaintiff was not entitled to recover.

Notes. As to distress by mortgagees, see 12 HALSBURY'S LAWS (3rd Edn.) 95; and for cases see 18 DIGEST (Repl.) 267-272.

Cases referred to:

E

- (1) *Keech v. Hall* (1778), 1 Doug.K.B. 21; 99 E.R. 17; 30 Digest (Repl.) 420, 631.
- (2) *Morton v. Woods* (1869), L.R. 4 Q.B. 293; 9 B. & S. 632; 38 L.J.Q.B. 81; 17 W.R. 414, Ex. Ch.; 18 Digest (Repl.) 256, 68.
- (3) *Anderson v. Midland Rail. Co.* (1861), 3 E. & E. 614; 30 L.J.Q.B. 94; 3 L.T. 809; 25 J.P. 405; 7 Jur.N.S. 411; 121 E.R. 573; 18 Digest (Repl.) 354, 1014.
- (4) *Jolly v. Arbutnot* (1859), 4 De G. & J. 224; 28 L.J.Ch. 547; 33 L.T.O.S. 263; 23 J.P. 677; 5 Jur.N.S. 689; 7 W.R. 532; 45 E.R. 87, L.C.; 18 Digest (Repl.) 268, 163.
- (5) *Pinkhorn v. Souster* (1853), 8 Exch. 763; 1 C.L.R. 99; 22 L.J.Ex. 266; 21 L.T.O.S. 92; 1 W.R. 336; 155 E.R. 1560; 18 Digest (Repl.) 269, 171.

G

Also referred to in argument:

- Evans v. Elliot* (1838), 9 Ad. & El. 342; 1 Per. & Dav. 256; 1 Will. Woll. & H. 744; 8 L.J.Q.B. 51; 112 E.R. 1242; 18 Digest (Repl.) 272, 185.
- Trent v. Hunt* (1853), 9 Exch. 14; 1 C.L.R. 752; 22 L.J.Ex. 318; 22 L.T.O.S. 23; 17 Jur. 899; 1 W.R. 481; 156 E.R. 7; 18 Digest (Repl.) 267, 154.
- Snell v. Finch* (1863), 13 C.B.N.S. 651; 1 New Rep. 328; 32 L.J.C.P. 117; 7 L.T. 747; 9 Jur.N.S. 333; 11 W.R. 341; 143 E.R. 258; 18 Digest (Repl.) 267, 155.
- Re Kitchen, Ex parte Punnett* (1880), 16 Ch.D. 226; 50 L.J.Ch. 212; 44 L.T. 226; 29 W.R. 129, C.A.; 25 Digest (Repl.) 354, 591.

H

Appeal by the plaintiff, Robert Kearsley, from a decision of FIELD, J., on a demurrer, dismissing his claim against the defendants, the mortgagees of certain premises, for damages for the seizure of goods distrained by them.

I

The statement of claim alleged that a person named King was tenant of certain premises to one James Kearsley, and that King had in his possession on the premises certain goods which he had assigned to the plaintiff, Robert Kearsley, by a bill of sale dated Nov. 22, 1881, and duly registered. On Dec. 2, 1881, the defendants seized the above-mentioned goods of the plaintiff as a distress for rent. At the time of the distress no rent was due from King. The plaintiff claimed damages in respect of the seizure of his goods. The statement of defence alleged that the premises in question were mortgaged to the defendants to secure a sum

of £6,000 which the defendants had advanced to James Kearsley. By an indenture of mortgage, dated Aug. 23, 1875, James Kearsley demised the premises to the defendants for the residue then unexpired, except the last day, of a term of 993 years, created by an indenture of lease to James Kearsley, dated Jan. 31, 1875, which term commenced from Sept. 29, 1874. By the indenture of mortgage James Kearsley attorned and became tenant to the defendants, at the yearly rent of £360, payable half-yearly; and the indenture of mortgage provided that it should be lawful for the mortgagees to determine the tenancy by giving seven days' notice to the mortgagor. On Dec. 2, 1881, James Kearsley was in arrear with his rent to the defendants, and the defendants, by their agents, lawfully distrained the goods and chattels on the demised premises, which were the trespasses complained of. The plaintiff, by his reply, joined issue, and further alleged that neither the plaintiff nor King had any notice or knowledge of the indenture of Aug. 23, 1875, or of the contents or provisions thereof. In November, 1881, James Kearsley was lawfully and in fact in possession of the premises, and in receipt of the rents and profits thereof, and the defendants never in any way interfered with or required the same. King then became tenant of the premises to James Kearsley, at a yearly rent of £435. James Kearsley was not at the time of the alleged attornment in occupation or possession of the premises, or of any part thereof. King had not, nor had the plaintiff, at any time previous to the commission by the defendants of the acts complained of, any notice of the alleged attornment or tenancy of James Kearsley to the defendants. FIELD, J., gave judgment on a demurrer for the defendants, and the plaintiff appealed.

The case is reported on a question as to production of documents 10 Q.B.D. 36, 465.

Ambrose, Q.C., and *Bigham* for the plaintiff.
Smyly for the defendants.

SIR BALIOL BRETT, M.R.—I am of opinion that the judgment of FIELD, J., is right and ought to be affirmed. There was an attornment clause in the mortgage deed, and it is not denied that the mortgagor had power to make such a deed. Then the question is, what is its effect? I am of opinion that the statement of the law in the note to *Keech v. Hall* (1) in 2 SMITH'S LEADING CASES (8th Edn.), p. 583, is correct in terms. It is as follows:

"A mortgage deed sometimes contains an agreement that the mortgagor shall be tenant to the mortgagee at a rent; or a power enabling the mortgagee to distrain for interest, by which no tenancy is created. The object of such provisions is generally to further secure the payment of the interest, an object more completely effected by adopting the former rather than the latter mode of framing the deed, because, whilst the former makes the mortgagor tenant at will only to the mortgagee, so that his interest may be put an end to by demand of possession, and at the same time creates a rent, properly so called, with all its incident remedies, the latter mode operates merely by way of personal licence from the mortgagor, and affects his interest only."

Therefore, such a deed as the present creates a rent, properly so called, with all its incident remedies.

After the mortgage the mortgagor let the land to a tenant, and this tenant assigned his goods by bill of sale to the plaintiff. With regard to the mortgagor and mortgagees the plaintiff was a stranger, and his goods were seized as a distress for rent due from the mortgagor to the mortgagees. It is not denied that if the relation of landlord and tenant exists the goods can be seized, but the question is whether the mortgagee, as well as the rent, has all the incident remedies for the recovery of that rent.

As to *Morton v. Woods* (2), I am of opinion that the reasoning of the judgment shows that at law the mortgagor is tenant to the mortgagee, and the right of distress exists. *Anderson v. Midland Rail. Co.* (3) is an authority to the same

A effect; it applies the Distress for Rent Act, 1737, giving power to distrain in cases of fraudulent removal to the case of an agreement for a lease. Therefore, *Anderson v. Midland Rail. Co.* (3) is a clear authority (even if *Morton v. Woods* (2) does not make it clear), that such a deed as this creates the relation of landlord and tenant, both in equity and at common law, and therefore all remedies for the recovery of rent are applicable. It follows that this appeal must be dismissed.

B **LINDLEY, L.J.**—It seems to me obvious that the judgment appealed from is right, and ought to be affirmed. The case depends on whether the mortgagor became tenant to the defendants by virtue of the attornment clause contained in the mortgage deed. This point has been decided several times—in *Jolly v. Arbuthnot* (4); in *Morton v. Woods* (2); and in *Anderson v. Midland Rail. Co.* (3). It was also raised and decided in *Pinhorn v. Souster* (5), where the facts were very similar to those alleged here, and it was held that a tenancy at will was created, and the right to distrain existed. The question in the present case is, was there a tenancy? It is shown that there was, and it follows that there was also a right to distrain.

D **FRY, L.J.**, concurred.

Appeal dismissed.

Solicitors: *Pritchard & Englefield*, for *Storer & Lloyd*, Manchester; *Johnson & Wetheralls*, for *Wigglesworth & Rogerson*, Manchester.

[Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.]

E

F STEEL AND ANOTHER v. DIXON AND OTHERS

[CHANCERY DIVISION (Fry, J.) March 26, 28, 29, 1881]

[Reported 17 Ch.D. 825; 50 L.J.Ch. 591; 45 L.T. 142;
29 W.R. 735]

G *Guarantee—Co-sureties—Security given to two co-sureties—Later guarantee by further sureties—No knowledge of security previously given—Right of further sureties to share benefit of security.*

H R. having borrowed a sum of money, two persons became sureties upon R. agreeing to charge certain property as security for any loss they might sustain. Later, two other persons also became sureties, not then knowing of the charge. R. failed to repay the money, and the four sureties contributed equal amounts to make up the sum he had borrowed.

I **Held:** where a surety obtained a benefit in respect of the suretyship which he had undertaken he must bring it into account as between himself and co-sureties; this applied whether the benefit was obtained by a bargain entered into between the co-surety and the debtor at the time of his becoming a surety, or related to a voluntary security subsequently given, or arose in any other manner whatever, and it applied even though the other co-sureties did not know of the security when they became sureties; accordingly, the charge enured for the benefit of all the sureties.

Per Curiam: The principle that a benefit obtained by a co-surety must be brought into hotchpot may be varied by contract between the co-sureties, and cases may arise in which one co-surety, by reason of his default in performing his duty towards the other, may estop himself from the equity which otherwise he would have had against his co-surety.

Notes. Considered: *Berridge v. Berridge* (1890), 44 Ch.D. 168. Referred to: *Re Arcedeckne, Atkins v. Arcedeckne* (1883), 24 Ch.D. 709; *Ellesmere Brewery Co. v. Cooper*, [1895-9] All E.R.Rep. 1121; *Re Denton's Estate, Licensers Insurance Corpn. and Guarantee Fund v. Denton*, [1903] 2 Ch. 670.

As to the rights and liabilities of co-sureties inter se, see 18 HALSBURY'S LAWS (3rd Edn.) 484-492; and for cases see 26 DIGEST (Repl.) 154-155.

Cases referred to:

- (1) *Dering v. Earl of Winchelsea* (1787), 1 Cox, Eq. Cas. 318; 29 E.R. 1184; sub nom. *Deering v. Earl of Winchelsea*, 2 Bos. & P. 270; 26 Digest (Repl.) 145, 1065.
- (2) *Pendlebury v. Walker* (1841), 4 Y. & C.Ex. 424; 10 L.J.Ex. 27; 5 Jur. 334; 160 E.R. 1072; 26 Digest (Repl.) 146, 1067.
- (3) *Miller v. Sawyer*, 30 Vermont, 412.
- (4) *Hall v. Robinson*, 8 Tredell, 56.

Also referred to in argument:

- Stirling v. Forrester* (1821), 3 Bli. 575; 4 E.R. 712; 26 Digest (Repl.) 143, 1048.
Craythorne v. Swinburne (1807), 14 Ves. 160; 33 E.R. 482, L.C.; 26 Digest (Repl.) 145, 1063.
Swain v. Wall (1641), 1 Rep. Ch. 149; 21 E.R. 534; 26 Digest (Repl.) 149, 1093.
McCune v. Belt, 45 Missouri, 174, 179.
Knight v. Hughes (1828), 3 C. & P. 467; Mood. & M. 247, N.P.; 26 Digest (Repl.) 150, 1103.
Hindsdill v. Murray, 6 Vermont, 136.
Aldrich v. Hapgood, 39 Vermont, 617, 620.
Done v. Walley (1848), 2 Exch. 198; 17 L.J.Ex. 225; 12 Jur. 338; 154 E.R. 463; 26 Digest (Repl.) 154, 1143.

Action by which the plaintiffs Messrs. Steel and Chater, sought to enforce a claim against the defendants Messrs. Dixon and Gurney, as their co-sureties, to share the benefit of a security which the defendants had obtained to guard them against loss in consequence of their becoming sureties.

On Oct. 28, 1878, William Robinson, of Heston, borrowed the sum of £800 from his bankers, Messrs. Hull, Smith & Co., of Uxbridge, on the security of a joint and several promissory note, signed by the defendants, George William Dixon and Jason Gurney, payable on April 30, 1879. Robinson had induced the defendants to sign the note by promising to give them security to cover any liability which they might thereby incur. On Oct. 28, in accordance with his promise, Robinson signed an agreement by which he assigned the whole of his furniture and effects in and about Bulstrode House, Hounslow, to the defendants to secure them against any loss they might sustain in consequence of becoming sureties for him to the extent of £400, and he agreed to execute a more formal charge or mortgage. About Nov. 15, 1878, the plaintiffs, Thomas Arthur Steel and William Chater, signed the same promissory note, and were not informed that security had been given to Dixon and Gurney. By an indenture, dated Feb. 24, 1879, Robinson demised to Dixon and Gurney a leasehold house at Hounslow, and assigned to them the furniture in the house to secure them against any loss they might sustain in consequence of becoming his sureties. The deed, after declaring that the premises demised and assigned, should be held by the defendants Dixon and Gurney upon trust for sale, provided that Dixon and Gurney

"Shall and will apply the proceeds of such sale, in the first place, in the payment of all expenses of, or incidental to, the sale and to the preparation and execution of this security. And, in the second place, in or towards payment of the share or shares of the moneys which shall or may become payable upon or in respect of the said promissory note for £800, and which share or shares the said George William Dixon and Jason Gurney shall or may, as between themselves and the said William Chater, jun., and Thomas Steel, be

A liable to pay or contribute in the event of default being made by the said William Robinson in payment of all or any part of the moneys due under the said promissory note. And, in the third place, in or towards payment of the residue of the moneys which shall or may become payable upon, or in respect of, the said promissory note, and which residue the said William Chater, jun., and Thomas Steel will, upon default of the said William Robinson, be primarily

B liable to pay or contribute; but so that the said William Chater, jun., and Thomas Steel, or either of them, shall have no right or power to interfere or claim any benefit in the provisions of the security. And, lastly, the said George William Dixon and Jason Gurney, or the survivors of them, his executors or administrators, or their or his assigns, shall pay any surplus of the said proceeds to the said William Robinson."

C On Mar. 18, 1879, Robinson filed his petition for the liquidation of his affairs by arrangement, and the defendant Joseph John Saffery was appointed trustee in the liquidation. When the promissory note became due, the four co-sureties discharged the debt by equal payments of £200. In June and July, 1879, Dixon and Gurney sold the property comprised in the deed of Feb. 24, 1879, and realised slightly over £600. They paid the expenses of the sale, and the £400 which they

D had paid on account of the promissory note, and a small balance was left available for Steel and Chater. The latter, however, claimed to share equally with the defendants in the proceeds of the sale, and this action was eventually commenced.

By their statement of claim the plaintiffs asked that it might be declared that the defendants were bound to account to the plaintiffs, as co-sureties of the promissory note of Oct. 28, 1878, for the sums received by them in exercise of the powers contained in the indenture of Feb. 24, 1879, and for an account and payment by the

E defendants Dixon and Gurney to each of the plaintiffs of one equal fourth part of what, upon taking such account, should appear to have been received by them as aforesaid. Saffery, as trustee of Robinson's estate, was made a party to the action at the instance of the defendants Dixon and Gurney, and alleged that the deed of indemnity was void, and asked that it might be set aside. The first

F question argued was whether, assuming the deed was not void as against Saffery, and created a good security in favour of Dixon and Gurney, the plaintiffs were entitled to share in the benefit of it equally with Dixon and Gurney.

Cookson, Q.C., and Warmington for the plaintiffs.

North, Q.C., and Chubb for the defendants Dixon and Gurney.

G *Millar, Q.C., and Maidlow* for the defendant Saffery.

FRY, J.—On Oct. 28, 1878, the sum of £800 was advanced by the bank at Uxbridge to Mr. Robinson. It was done upon the faith of the promissory note which was then signed by the defendants Dixon and Gurney. Dixon and Gurney consented to sign it upon an agreement between themselves and Robinson, that

H Robinson should give to them the security of a charge upon a certain house and furniture. At a subsequent date the same note was signed by the plaintiffs, Messrs. Steel and Chater. Mr. Chater signed some time before Nov. 15, and Mr. Steel signed on the 15th, in pursuance of a bargain made on the 8th. I refer to those dates in order to make it apparent that the plaintiffs Steel and Chater signed after the defendants Gurney and Dixon, and to add the observation that Steel and

I Chater, when so signing, and when, therefore, knowing that they would become liable with Gurney and Dixon for one-fourth of the entire debt, were informed of the bargain which had been made between Robinson and Gurney and Dixon. In February, 1879, a deed was executed upon the property which I have already referred to, by which, after payment of the expenses of the trust, the trustees were directed to hold £400 for the benefit of Dixon and Gurney, and subject to that to hold another £400 for the benefit of Steel and Chater; Steel and Chater, therefore, being postponed, as regards their demand on the fund, to the demand of Gurney and Dixon. In March, Robinson became a liquidating debtor, and on April 30,

the day of the maturity of the note, the money was paid in equal fourths by the four co-sureties to the bank. In June and July the greater portion of the property comprised in the deed of February was sold and realised £604 7s. 6d., which, after payment of expenses, seems to have left enough to pay the £400 reserved by way of indemnity for benefit of Gurney and Dixon, and enough to leave something over for the next £400 reserved by way of indemnity for the benefit of Steel and Chater.

The result is, that the indemnity of Gurney and Dixon is preferred to the indemnity of Steel and Chater. The plaintiffs, by their reply to Saffery, who is the trustee in liquidation of the defendant Robinson, make no claim under the deed except to the extent of the £400 which has been raised under it for Dixon and Gurney, and the question, therefore, on which I have now to express my opinion, assuming that the deed of February, 1879, created a valid security in favour of Dixon and Gurney, is, whether Steel and Chater, as between themselves and Dixon and Gurney, are entitled to share in the security.

In my opinion the plaintiffs are entitled to share in the benefit secured by that deed to the defendants. I base my conclusion on the general principle applicable to co-sureties, as established by the well-known and often-cited case of *Dering v. Earl of Winchelsea* (1), the short effect of which I take to be that, as between co-sureties, there is equality of burden or benefit. When I say equality, I do not mean necessarily equality in its simplest form, but what has been sometimes called the proportionable equality. The result of that case has been expressed by ALDERSON, B., in *Pendlebury v. Walker* (2) in these terms (4 Y. & C.Ex. at p. 441), that

“where the default of the principal renders all the co-sureties responsible all are to contribute; and then the law superadds that which is not only the principle, but the equitable mode of applying the principle, that they should all contribute equally if each is a surety to an equal amount; and, if not equally, then proportionably to the amount for which each is a surety.”

I hold, therefore, that the result of that case is to require that the ultimate burden, whatever it may be, as between co-sureties is borne by them in proportion to the share of the principal's debt for which they made themselves responsible. If that be the case, it follows that each surety must bring into hotchpot every benefit which he has received in respect of the suretyship which he undertook, and if he received a benefit by way of indemnity from the principal debtor, it appears to me he is bound to bring that into hotchpot as between himself and his other co-sureties, in order that that ultimate burden may be distributed between them equally or proportionately, as the case may require.

In coming to that conclusion, which I do upon principle, I am much strengthened by the American authorities to which my attention has been called by counsel for the plaintiffs. STORY, J., in his work on EQUITY JURISPRUDENCE (11th Edn.), pl. 499, asserts that principle in these terms

“Sureties are not only entitled to contribution from each other for moneys paid in discharge of their joint liabilities for the principal, but they are also entitled to the benefit of all securities which have been taken by any one of them to indemnify himself against such liabilities.”

In *Miller v. Sawyer* (3), which was before the Court of Chancery in the State of Vermont, the principle is stated in these terms by the learned judge who delivered the judgment of the court, BARRETT, J. Having referred to *Dering v. Earl of Winchelsea* (1), he says this (30 Vermont, at p. 417):

“For present purposes it is needless to cite and discuss the books and cases to any considerable extent, in which this subject is treated, and the leading principles of it applied in settling the rights and duties of parties. It may be comprehensively stated that persons subject to a common burden stand in their relation to each other upon a common ground of interest and of right, and

A whatever relief, by way of indemnity, is furnished to either by him for whom the burden is assumed, enures equally to the relief of all the common associates."

And in the course of his judgment he refers among other cases to that of *Hall v. Robinson* (4), in which RUFFIN, C.J., said :

B "The relief between co-sureties in equity proceeds upon the maxim that equality is equity, and that maxim is but a principle of the simplest natural justice. It is a plain corollary from it that, when two or more embark in the common risk of being sureties for another, and one of them subsequently obtains from the principal an indemnity or counter-security to any extent, it enures to the benefit of all. The risk and the relief ought to be co-extensive."

C Those American decisions are exactly, it seems to me, in point.

Senior counsel for the defendants Dixon and Gurney has urged that a difference may arise on this question, namely, whether the security taken by one or more co-sureties is taken by virtue of a bargain entered into between the co-surety and the debtor at the time of his becoming surety. In my judgment that is immaterial. I think it does not affect the principle of equity to which I have referred, whether the security is the result of contract between the debtor at the time of the co-surety becoming surety, or is a voluntary security subsequently given, or arises in any other manner whatever. I repeat, whatever goes to diminish the total amount of burden must, in my judgment, be brought into hotchpot.

E In saying that, I wish to guard myself against its being supposed that this equity may not in any case be varied or departed from. Those to whose benefit the security enures may contract themselves out of the benefit, and the question may, therefore, well be considered in each case, whether there has been such a contract between the co-sureties. But a contract between one surety and the debtor is not to be confounded with a contract between the co-sureties by one co-surety renouncing his equity in favour of another.

F In the next place it appears to me that many cases may arise in which one co-surety, by reason of his default in performing his duty towards the other, may estop himself from the equity which otherwise he would have had against his co-surety. Some of such cases have been suggested by senior counsel for the defendants Dixon and Gurney in the course of his argument, but neither of those principles appear to me to apply in the present case, because here the contract upon which the security was given was one between the debtor and two co-sureties, and was not communicated at the time of the suretyship to the other sureties, and here there appears to me to be nothing in the contracts of the plaintiffs upon the assumption of which I am now proceeding, which deprives them of the benefit of their right against the co-sureties. Therefore, on those assumptions I hold the plaintiffs would be entitled to the benefit they claim.

H Solicitors : *Armstrong & Lamb* ; *J. B. Churchill* ; *Stocken & Jupp*.

[*Reported by W. C. Briss, Esq., Barrister-at-Law.*]

SMALLEY AND ANOTHER *v.* HARDINGE

[COURT OF APPEAL (Bramwell, Baggallay and Lush, L.JJ.), March 31, 1881]

[Reported 7 Q.B.D. 524; 50 L.J.Q.B. 367; 44 L.T. 503;
29 W.R. 554]*Bankruptcy—Disclaimer—Lease—Bankruptcy of lessee after granting sub-lease—Right of lessor to recover possession as against sub-lessee.*

A lessee of premises for a term of years assigned part of the premises to a sub-lessee for a shorter term. The sub-lessee having entered into possession, the lessee became bankrupt, and his trustee, under an order of the court, disclaimed the lessee's interest in the premises. The sub-lessee received reasonable notice of the application for leave to disclaim. The lessor sought to recover possession of that part of the premises demised to the sub-lessee.

Held: the lessor was not entitled to recover possession.

Taylor v. Gillott (1) (1875), L.R. 20 Eq. 682, distinguished.

Notes. The Bankruptcy Act, 1869, s. 23, has been replaced by s. 54 of the Bankruptcy Act, 1914.

Considered: *Re Levy, Ex parte Walton* (1881), 17 Ch.D. 746; *Re Cock, Ex parte Shilson* (1887), 20 Q.B.D. 343. Referred to: *East and West India Dock Co. v. Hill* (1882), 22 Ch.D. 14; *Hardinge v. Preece* (1882), 9 Q.B.D. 281; *Hill v. East and West India Dock Co.* (1884), 48 J.P. 788.

As to disclaimer of property by a trustee in bankruptcy, see 2 HALSBURY'S LAWS (3rd Edn.) 457 et seq.; and for cases see 5 DIGEST (Repl.) 1008 et seq. For the Bankruptcy Act, 1914, s. 54, see 2 HALSBURY'S STATUTES (2nd Edn.) 389.

Cases referred to:

- (1) *Taylor v. Gillott* (1875), L.R. 20 Eq. 682; 44 L.J.Ch. 740; 32 L.T. 795; 24 W.R. 65; 5 Digest (Repl.) 1018, 8241.
- (2) *O'Farrell v. Stephenson* (1879), 4 L.R.Ir. 151, 715; I.L.T. 161; 5 Digest (Repl.) 1020, *4543.

Also referred to in argument:

- Doe d. Beadon v. Pyke* (1816), 5 M. & S. 146; 105 E.R. 1005; 31 Digest (Repl.) 585, 7057.
- Smyth v. North* (1872), L.R. 7 Exch. 242; 41 L.J.Ex. 103; 20 W.R. 683; 5 Digest (Repl.) 1018, 8238.
- Re Roberts, Ex parte Brook* (1878), 10 Ch.D. 100; 48 L.J.Bey. 22; 39 L.T. 458; 43 J.P. 53, 286; 25 W.R. 255, C.A.; 5 Digest (Repl.) 1015, 8210.
- Lowrey v. Barker* (1880), 5 Ex.D. 170; 49 L.J.Q.B. 433; 42 L.T. 215; 28 W.R. 559, C.A.; 5 Digest (Repl.) 1015, 8212.
- Re Shand, Ex parte Corbett* (1880), 14 Ch.D. 122; 49 L.J.Bey. 74; 42 L.T. 164; 28 W.R. 569, C.A.; 4 Digest (Repl.) 475, 4173.
- Re Muller, Ex parte Buxton* (1880), 15 Ch.D. 289; 43 L.T. 183; 29 W.R. 28, C.A.; 5 Digest (Repl.) 1010, 8154.
- Re Woods, Ex parte Ditton* (1876), 3 Ch.D. 459; 45 L.J.Bey. 141; 24 W.R. 1008; 2 Char. Pr. Cas. 66, C.A.; 5 Digest (Repl.) 1012, 8173.

Appeal by the defendant from a decision of MATHEW, J., reported 6 Q.B.D. 371, overruling a demurrer to the plaintiffs' statement of claim which sought to recover possession of certain premises.

The plaintiffs were the owners of the messuage and premises known as 90, New Bond Street, in the county of Middlesex. By an indenture of lease dated Dec. 30, 1870, the plaintiff Smalley demised to F. Jones the said messuage for the term of sixty-one years from Dec. 25, 1868, at a certain rent, and by the indenture F. Jones covenanted that he would not at any time thereafter during the term alien, assign, or otherwise convey, give, or dispose of the lease, and the premises thereby demised, or any part thereof, without licence in writing of and from the plaintiff

A Smalley, his executors, administrators, or assigns, first had and obtained. On May 19, 1871, F. Jones, by an indenture of lease, but without the proper authority from the plaintiff Smalley, demised a portion of the said premises to one J. Gardner for a period of twenty-one years from Mar. 25, 1870. J. Gardner subsequently, by an indenture of lease, assigned to the defendant, without the proper licence of the plaintiff Smalley, all his interest in the indenture of May 19, 1871, and
B the defendant thereupon entered and took possession of the premises. In December, 1879, the said F. Jones filed a petition in bankruptcy for the liquidation of his affairs by arrangement, and afterwards a resolution for the liquidation of the affairs of F. Jones was duly passed and registered, and on Jan. 23, 1880, J. Ferrier was duly appointed trustee under the said liquidation. On April 29, 1880, J. Ferrier, as such trustee, applied to the court for leave to disclaim the interest
C of F. Jones in the premises demised to him as above, and by an order of court dated June 31, 1880, leave was given to J. Ferrier, as such trustee, to disclaim such interest. Shortly after the making of the application the defendant received notice thereof and within a reasonable time before June 3, 1880, the defendant received notice that the application would be heard and disposed of by the Court of Bankruptcy on June 3. On July 14, 1880, J. Ferrier, by virtue of the order
D of the court, dated June 3, by writing duly disclaimed the interest of F. Jones in the above premises.

The plaintiffs claimed possession of the premises, and the defendant demurred to the claim.

By the Bankruptcy Act, 1869, s. 23 :

E “When any property of the bankrupt acquired by the trustee under this Act consists of land of any tenure burdened with onerous covenants, of unmarketable shares in companies, or unprofitable contracts, or of any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money, the trustee, notwithstanding he has endeavoured to sell, or has taken possession of such property or exercised any act of ownership
F in relation thereto, may, by writing under his hand, disclaim such property, and upon the execution of such disclaimer the property disclaimed shall, if the same is a contract, be deemed to be determined from the date of the order of adjudication, and if the same is a lease be deemed to have been surrendered on the same date, and if the same be shares in any company be deemed to be forfeited from that date, and if any other species of property it shall revert to the person entitled on the determination of the estate or interest
G of the bankrupt, but if there shall be no person in existence so entitled, then in no case shall any estate or interest therein remain in the bankrupt. Any person interested in any disclaimed property may apply to the court, and the court may, on such application, order possession of the disclaimed property to be delivered up to him, or make such other order as to the possession thereof
H as may be just. Any person injured by the operation of this section shall be deemed a creditor of the bankrupt to the extent of such injury, and may accordingly prove the same as a debt under the bankruptcy.”

Warmington for the defendant.

A. Charles, Q.C. (Moorsom with him), for the plaintiffs.

I **BRAMWELL, L.J.**—This seems to me a plain case. I cannot but regret that MATHEW, J., did not exercise his independent judgment on it, instead of following, as he thought he was doing, HALL, V.-C., in *Taylor v. Gillott* (1). Our duty is not to speculate on hardship to one side or the other, as is admirably explained by GIBBON, L.J., in *O’Farrell v. Stephenson* (2). What does s. 23 of the Bankruptcy Act, 1869, say? “. . . the property disclaimed shall . . . if the same is a lease be deemed to have been surrendered on the date of the order of adjudication”; that is to say, the courts are to treat it, whenever it comes before

them, as if it had been surrendered on that day. But if the lease that has been disclaimed in this case had been surrendered on the date of the order of adjudication, this action could not be brought. Then it is said that we are to treat it, not as if it had been surrendered, but as if it had never existed. But the Act does not say so. It is argued that this cannot be treated as a surrender, because a surrender can only take place with the consent of the landlord, and this is involuntary on his part. The answer to that is that the Act says that a thing that is not voluntary on the part of the landlord is to be treated as if it was voluntary. As to hardship, I think that the landlord has a much better opportunity of protecting himself than the under-tenant has. I do not think, with all respect to MATHEW, J., that we are overruling HALL, V.-C.'s decision in *Taylor v. Gillott* (1). I think that the Irish case of *O'Farrell v. Stephenson* (2), is expressly in point, and that the reasons given by the learned judges of the Court of Appeal in that case cannot be added to or improved.

BAGGALLAY, L.J.—The giving effect to s. 23 of the Bankruptcy Act, 1869, by which a trustee may disclaim the interest of the bankrupt as lessee, may inflict hardship on one side or the other. But we are not to consider questions of hardship, but what is the legal effect of the statute. A discussion has taken place as to the effect of the disclaimer; but the Act says that the effect of the disclaimer of a lease is that it is to be deemed to have been surrendered. What, then, is the effect on a sub-lessee of the surrender of the lease? The Real Property Act, 1845, was in force at the date of this order of adjudication, and, by s. 9 of that Act,

“When the reversion expectant on a lease, made either before or after the passing of this Act, of any tenements or hereditaments, of any tenure, shall after the first day of October, 1845, be surrendered or merge, the estate which shall for the time being confer as against the tenant under the same lease the next vested right to the same tenements or hereditaments, shall, to the extent and for the purpose of preserving such incidents to, and obligations on, the same reversion, as, but for the surrender or merger thereof, would have subsisted, be deemed the reversion expectant on the same lease.”

The estate of the sub-lessee has not, therefore, been extinguished by the surrender of the reversion expectant on it.

LUSH, L.J.—I am unable to agree with MATHEW, J., that *Taylor v. Gillott* (1) governs this case. They seem to me essentially different. This case was that of an under-tenant in possession by virtue of an indenture of lease for twenty-one years which had not expired. He had, therefore, a definite legal interest, which would have entitled him to remain in possession for the remainder of the term if the bankruptcy had not taken place. In *Taylor v. Gillott* (1) no estate was created between Pask and Taylor before Pask became bankrupt; his trustee then disclaimed, and thereby surrendered Pask's interest to his lessor. I am unable to see what obligation there was on the lessor to carry out the undertaking of the lessee that he would grant Taylor a lease. The estate of the bankrupt, Pask, was entirely gone; there was no privity whatever between Gillott and Taylor, and no obligation on Gillott that the court could enforce to carry out the undertaking of his lessee. The essential distinction between the cases is that, in this case, there was an existing legal interest at the time of the bankruptcy in the defendant; in that case, there was nothing more in the plaintiff than an equitable claim to have a lease granted him. I entirely dismiss all considerations of hardship in this case. We have to carry out the statute, according to its language.

Appeal allowed.

Solicitors: *Walters, Deverell & Walters; W. H. Herbert.*

[Reported by A. H. BITTLESTON, ESQ., Barrister-at-Law.]

Re EARL OF CHESTERFIELD'S TRUSTS

[CHANCERY DIVISION (Chitty, J.), June 23, 1883]

[Reported 24 Ch.D. 648; 52 L.J.Ch. 958; 49 L.T. 261;
32 W.R. 361]

Administration of Estates—Apportionment between tenant for life and remaindermen—Residuary personal estate—Property falling in after testator's death.

A testator by his will gave his residuary personal estate to trustees upon trust to convert the same (with power to postpone such conversion if they should think fit), to invest the proceeds in real estate, and to hold the same upon trust for C. for life, with remainder to P. for life, with remainders over. The residuary estate included outstanding personal estate, the conversion of which the trustees in the exercise of their discretion postponed for the benefit of the estate, which eventually fell in some years after the testator's death, and among other things a mortgage debt with arrears of interest and moneys payable on a life policy. A petition for advice was presented by the executors and trustees of the will as to the apportionment of the fund in question between the tenants for life and the remaindermen, and whether the tenants for life were to receive simple or compound interest.

Held: the outstanding personal estate should, on falling in, be apportioned as between capital and income by ascertaining the sum which, put out at interest at 4 per cent. per annum on the day of the testator's death, and accumulating at compound interest calculated at that rate with yearly rests, deducting income tax, would, with the accumulations of interest, have produced, at the day of receipt, the amount actually received; the sum so ascertained should be treated as capital and the residue as income, such income also being apportionable between the successive tenants for life.

Beavan v. Beavan (1) post p. 740, applied.

Notes. *Re Hobson, Walker v. Appach* (1885), 55 L.J.Ch. 422; *Re Flower, Matheson v. Goodwyn* (1890), 62 L.T. 216; *Re Morley, Morley v. Haig*, [1895] 2 Ch. 738. Considered: *Re Goodenough, Marland v. Williams*, [1895] 2 Ch. 537. Applied: *Re Hollebone, Hollebone v. Hollebone*, [1918-19] All E.R.Rep. 323. Distinguished: *Re Woodhouse, Public Trustee v. Woodhouse*, [1941] 2 All E.R. 265. Applied: *Re Fisher, Harris and Fisher v. Fisher*, [1943] 2 All E.R. 615; *Re Payne, Westminster Bank, Ltd. v. Payne*, [1943] 2 All E.R. 675. Considered: *Re Holliday's Will Trusts, Houghton v. Adlard*, [1947] 1 All E.R. 695. Applied: *Re Chance, Westminster Bank v. Chance*, [1962] 1 All E.R. 942. Referred to: *Re Nash, Sweet v. Nash* (1894), 38 Sol. Jo. 478; *Re Hubbuck, Hart v. Stone* (1895), 73 L.T. 738; *Re Searle, Searle v. Baker*, [1900] 2 Ch. 829, *Re Whiteford, Inglis v. Whiteford*, [1903] 1 Ch. 889; *Re Woods, Gabellini v. Woods*, [1904] 2 Ch. 4; *Re Davy, Hollingsworth v. Davy*, [1908] 1 Ch. 61; *Re Baker, Baker v. Public Trustee*, [1924] 2 Ch. 271; *Re McKee, Public Trustee v. McKee*, [1931] 2 Ch. 145; *Re Plowman, Westminster Bank, Ltd. v. Plowman*, [1943] 2 All E.R. 532; *Re Hey's Settlement Trusts and Will Trusts, Hey v. Nickell-Lean*, [1945] 1 All E.R. 618; *Re Berry (decd.), Lloyds Bank, Ltd. v. Berry*, [1961] 1 All E.R. 529.

As to settled residuary estate, see 16 HALSBURY'S LAWS (3rd Edn.) 379-384; and for cases see 20 DIGEST (Repl.) 388-392.

Case referred to:

(1) *Beavan v. Beavan* (1869), post p. 740; 24 Ch.D. 649, n.; 52 L.J.Ch. 961, n.; 49 L.T. 263, n.; 32 W.R. 363, n.; 20 Digest (Repl.) 389, 1109.

Also referred to in argument:

Wilkinson v. Duncan (1857), 23 Beav. 469; 26 L.J.Ch. 495; 29 L.T.O.S. 35; 3 Jur.N.S. 530; 5 W.R. 398; 53 E.R. 184; 20 Digest (Repl.) 389, 1108.

Cox v. Cox (1869), L.R. 8 Eq. 343; 38 L.J.Ch. 569; 17 W.R. 790; 40 Digest (Repl.) 763, 2476. A

Wright v. Lambert (1877), 6 Ch.D. 649; 26 W.R. 206; 40 Digest (Repl.) 732, 2205.

Re Grabowski's Settlement (1868), L.R. 6 Eq. 12; 37 L.J.Ch. 926; 40 Digest (Repl.) 760, 2456.

Petition presented under Lord St. Leonard's Act (the Law of Property Amendment Act, 1859) by the executors and trustees of the testator, the seventh earl of Chesterfield, raising the question whether certain moneys, which were paid to them several years after the death of the testator under a mortgage and a policy of life assurance, and which formed part of the residuary personal estate of the testator, ought to be apportioned between the successive tenants for life and remaindermen under his will, and if so, upon what principle the apportionment should be made. B C

By an indenture dated Mar. 18, 1850, and made between Col. Tynte, of the one part, and George, sixth earl of Chesterfield, of the other part, Col. Tynte covenanted with the earl that in case he, the colonel, should be living at the death of his father, C. K. K. Tynte, he, the colonel, would, within six calendar months after the death of his said father, pay to the earl, his executors, administrators, or assigns, the sum of £18,310, with interest for the same at the rate of 5 per cent. per annum from the day of such death until payment of the principal sum; and the colonel conveyed his life interest in remainder expectant on the death of his said father in the Tynte family estates (subject to certain prior encumbrances) to the earl by way of mortgage for securing the repayment of the £18,310 and interest. The earl then effected two policies of insurance for £5,000 each on Col. Tynte's life, and these policies were thenceforward kept up, and the premiums thereon paid by the earl during his life. Colonel Tynte's father died in 1860; but as there were prior mortgages of Col. Tynte's life interest, it was not until 1878 that any of the moneys due under the earl's mortgage were paid, as hereinafter mentioned. The sixth earl died on June 1, 1866, having by his will given all his property to his son, the seventh earl of Chesterfield, absolutely, and appointed him sole executor. D E F

The seventh earl, by his will dated May 6, 1871, after certain specific bequests and legacies, devised and bequeathed unto and to the use of his trustees his real and residuary personal estate upon trust, as to his real and personal estate in the county of Derby, to pay the income thereof to his mother the Dowager Countess of Chesterfield for life, and after her death to his sister Evelyn Countess of Carnarvon during her life for her separate use; and after the decease of the survivor of his said mother and sister, as to his real and personal estate in the county of Derby, and from and after his decease as to all other his said real and personal estate, upon trust that his said trustees or trustee should at such times or time after his decease as they or he should in their or his absolute discretion think fit, and with power to postpone such conversion at such discretion, get in, receive, and convert into money so much of his personal estate as should not consist of money, and out of the money arising thereby should pay his debts and funeral and testamentary expenses and legacies, and in the next place should pay all the debts of his late father then remaining unpaid, and after such payments should lay out the surplus of such personal estate in the purchase of lands and hereditaments in England or Wales to be settled upon the uses thereinafter declared of his real estate, or as near thereto as circumstances would permit. The will went on to declare limitations of the testator's real estate in favour of his sister Evelyn Countess of Carnarvon during her life for her separate use, and after her decease in trust for Lord Porchester during his life with remainders over. The testator declared that all pecuniary legacies and bequests of personalty and all annuities under his will should bear interest at the rate of 4 per cent. per annum from his death until payment. The testator, the seventh earl, died on Dec. 1, 1871, without issue. Shortly after the death of the seventh earl, his trustees got G H I

A in and converted his personal estate not specifically bequeathed (except the debt due from Col. Tynte and the policies on his life) and exhausted the proceeds in payment of his funeral and testamentary expenses, and of some of his debts and legacies.

B The Chesterfield family estates consisted of large estates in the counties of Derby and Nottingham, the bulk of which stood limited under certain circumstances to such uses as he should by deed appoint, and subject thereto to the use of the seventh earl in tail male, with remainder to him in tail general, with remainder to the heirs of the body of his father, the sixth earl, in tail general, with remainders over. On the death of the seventh earl without issue it was ascertained that his will did not operate upon the settlement estates, his power of appointment over them being exercisable by deed only. The will, however, did operate upon the real estate in both counties which had been purchased by himself and the sixth earl. On this being ascertained the Countess of Carnarvon barred the estate tail in the settlement estates which devolved upon her as the only other child of the sixth earl, and executed a settlement. Under this indenture, dated Aug. 6, 1874 (being a re-settlement of the Chesterfield family estates), all the hereditaments subject to the will of the seventh earl, whether originally devised or directed to be purchased with his residuary personal estate, and to be conveyed to the uses of the will, and also his residuary personal estate until invested in land as by the said will directed, became limited to the use of the said Countess of Carnarvon during her life, with remainder (subject to a rentcharge thereby limited in favour of Lord Porchester on his attaining twenty-one) to the use of her husband, the Earl of Carnarvon, during his life, with remainder to the use of Lord Porchester during his life, with remainders over. The Countess of Carnarvon died on Jan. 25, 1875, having by her will appointed the Earl of Carnarvon her executor.

E From the death of the sixth Earl of Chesterfield the two policies on Col. Tynte's life were kept up by the seventh earl during his life, after his death by the Countess of Carnarvon during her life, and after her death by the eighth Earl of Carnarvon down to the end of 1878. In 1878 the time at length arrived for the payment out of the income of the Tynte family estates of the debt of £18,310 and interest due from Col. Tynte, and the trustees of the will of the seventh earl from time to time, in the course of the years 1878, 1879, 1880, and 1881, accordingly received in respect of the said debt and interest sums of money amounting together to £36,641 5s. 4d. (hereinafter referred to as "the Tynte moneys"), of which F £18,310 represented principal, and £18,331 5s. 4d. accumulations of interest from the death of Col. Tynte's father. On Mar. 6, 1879, the trustees of the will of the seventh earl, out of the Tynte moneys, repaid to the eighth Earl of Carnarvon the aggregate amount of the premiums paid by himself and the countess on the policies, and thenceforward the trustees, out of the same moneys, paid the premiums on the policies down to Col. Tynte's death. Col. Tynte died on Sept. 16, 1882, and thereupon the trustees duly received the sum of £10,000, the amount of the policies. They had also received at various times during Col. Tynte's life sums H amounting to £539, by way of bonuses on the policies. These two sums, amounting together to £10,539, are hereinafter referred to as "the policy moneys." The trustees invested the Tynte and policy moneys, amounting together to £47,181 8s. 11d. in Exchequer-bills, and from time to time as opportunities arose I sold out portions of such Exchequer-bills and applied the proceeds in payment of past and other premiums on the policies, and in discharge of certain charges and encumbrances on their testator's estate, the balance remaining in their hands being represented by £15,000 Exchequer-bills, and £1,428 10s. 1d. cash. The question then arose whether the balance was distributable as between capital and income, and, if so, upon what principle.

The real estates subject to the seventh earl's will were still subject to certain charges and encumbrances exceeding the balance of the Tynte and policy moneys; and in consequence of the falling in of the Tynte and policy moneys his estate

was subject to some further liability for legacy duty, and a further question arose as to how this duty should be borne. A

Macnaghten, Q.C., and *Douglass Round* for the petitioners.

Romer, Q.C., and *Bromehead* for the respondents, the Earl of Carnarvon and Lord Porchester.

CHITTY, J.—It appears to me that *Beavan v. Beavan* (1)* adopts the right principle, and I, therefore, follow it in the present case. B

The order stating the opinion of the court was, so far as is material, in the following form:

“Upon the petition, etc., this court is of opinion that the said Tynte moneys are apportionable between principal and income by ascertaining the respective sums which put out at 4 per cent. per annum on Dec. 1, 1871, the day of the death of the seventh Earl of Chesterfield, and accumulating at compound interest calculated at that rate, with yearly rests, and deducting income tax, would, with the accumulations of interest, have produced, at the respective dates of receipt, the amounts actually received; and that the aggregate of the sums so ascertained ought to be treated as principal, and be applied accordingly, and the residue should be treated as income; and that the amount apportioned in respect of income is payable to the Earl of Carnarvon in his own right, and as representing his late wife, Evelyn, Countess of Carnarvon, deceased; and that the policy moneys, including bonuses, after deducting and repaying the sums advanced for premiums with simple interest at 4 per cent., are apportionable and distributable in the same way; and this court is also of opinion that the legacy and other duty is payable out of capital and income according to their respective liability thereto; and that the costs of the petitioners and respondents of this petition ought to be apportioned between capital and income according to their respective amounts.” C D E

Solicitors: *Frere, Foster & Co.*; *Bowlings, Foyer & Hordern.*

[*Reported by A. COYSGARNE SIM, Esq., Barrister-at-Law.*] F

NOTE

BEAVAN v. BEAVAN

[CHANCERY DIVISION (Lord Romilly, M.R.), February 22, 1869]

Adjourned Summons in an action for the administration of the estate of the testator, Henry William Beavan, deceased, and a decree for that purpose was made on March 5, 1853.

By his will, dated Mar. 8, 1849, the testator gave the residue of his real and personal estate to his trustees upon trust to sell his real estate at such times and in such manner as they should, in their uncontrolled discretion, think most advantageous to his estate, and should with all convenient speed after his decease, and in such manner as they should, in their discretion, think most beneficial, sell, call in, and convert into money all the said residuary personal estate (except such part thereof as should consist of ready money), and should, out of the moneys which should arise therefrom, pay his debts, and funeral and testamentary expenses and legacies, and subject thereto should invest the same, and should pay the income thereof to his said wife during her life or widowhood, with remainders over. The testator appointed his said wife sole executrix. G H

The testator died on June 23, 1852, leaving surviving him his widow the defendant Joanna Beavan, and the plaintiffs, the remaindermen. Part of the testator's personal estate consisted of a moiety of an annuity of £675 granted by Col. Tynte (named in the principal case) on Mar. 10, 1847, for ninety-nine years if three persons who were now still living, or any of them, should so long live. The annuity was secured principally upon certain estates and trust moneys to which Col. Tynte was entitled for life in remainder expectant on the several deceases of his father and other persons, subject to incumbrances, and was payable quarterly with interest at 5 per cent. per annum on any quarterly payment remaining unpaid. The entire annuity was redeemable at any time on payment of £4,668 15s., and arrears (if any) of interest and costs. Nothing whatever was paid to the testator during his life, nor to his executrix, in respect of the annuity from the time it was granted down to Aug. 8, 1865, there being in fact no income of the estates charged with the annuity until after the death of Col. Tynte's father, and the colonel himself being personally unable to pay it. The testator also died possessed of a mortgage dated Mar. 31, 1848, whereby Col. Tynte mortgaged the above- I

* See *infra*.

A mentioned estates to him as security for the repayment of the sum of £3,000 and other principal sums therein mentioned, with interest at 5 per cent. per annum.

B By the chief clerk's certificate, dated Feb. 23, 1858, it was certified that, having regard to the nature of the mortgage of Mar. 31, 1848, and the testator's moiety of the said annuity, which securities were certified as part of the testator's estate outstanding or undisposed of, it was fit and proper and for the benefit of all parties interested under the will that the same should not be sold, but allowed to remain in their then present state during the life of the colonel's father, the tenant for life of the greater part of the estates comprised in the securities, and who was then eighty-two years of age, or until further order. Col. Tynte's father died on Nov. 22, 1860, whereupon the colonel's life interest in two estates fell into possession, and his life interest in the remaining estate and trust moneys fell into possession at a later period. At the death of Col. Tynte's father certain suits relating to the family estates were pending, and shortly afterwards a suit of *Ford v. Tynte* and other suits were instituted also relating to those estates.

C In 1865 orders were made in these suits for payment of all arrears of the said annuity and interest on such arrears, and for keeping down the same. The total sum received for arrears and interest of the testator's moiety of the annuity down to Aug. 8, 1865, was £8,656 10s. 7d., of which £1,949 15s. 3d. represented arrears and interest due at his death. For the same reasons as those which delayed the payment of the annuity no payment was made in respect of the mortgage of 1848 until 1866, and ultimately the balance of the whole principal money and interest was paid off in 1868. The sums received by the defendant Joanna Beavan, as executrix of the testator under orders in *Ford v. Tynte* and the other suits on account of the sum of £3,000, part of the sums secured by the mortgage of 1848, amounted, in five payments made during the years 1866, 1867 and 1868, to £5,950 17s. 6d., consisting of £3,000 for principal money and £616 0s. 3d. for arrears of interest thereon due at the testator's death, and of £2,334 17s. 3d. for interest at 5 per cent. accrued subsequent to his death. The two sums of £8,656 10s. 7d. and £5,950 17s. 6d. having been received by the testator's estate as above mentioned, the question arose upon what principle they ought to be apportioned as between the tenant for life and the remaindermen under the will. The summons was adjourned into court.

E *Jessel, Q.C.*, and *Archibald Smith* for the defendant Joanna Beavan, the tenant for life, in support of the summons.

Sir Richard Baggallay, Q.C., and *Macnaghten* for the plaintiffs, the remaindermen.

Lord Romilly, M.R., held that the £8,656 10s. 7d. and the £5,950 17s. 6d. ought to be apportioned on the principle laid down in *Wilkinson v. Duncan*, but that in making such apportionment the several amounts should be calculated at compound and not simple interest.

The order was, so far as is material:

F "On the application of the defendant Joanna Beavan, &c., his Lordship is of opinion
G "That the £8,656 10s. 7d. received by the defendant Joanna Beavan on Aug. 8, 1865, in respect of the arrears of the testator's moiety of the annuity of £675 and interest, ought to be apportioned as on that day as between corpus and income by ascertaining the sum which, put out at interest at 4 per centum per annum on June 23, 1852, the day of the death of Henry William Beavan, the testator in the cause, and accumulating at compound interest calculated at that rate with yearly rests, and deducting income tax, would, with the accumulations of interest, amount on Aug. 8, 1865, to £8,656 10s. 7d., and that the sum so ascertained ought to be treated as corpus as on that day, and the difference between £8,656 10s. 7d. and the sum so ascertained ought to be treated as income payable on that day to the defendant Joanna Beavan as tenant for life.

H "2. That each of the instalments of the said moiety of the annuity of £675, with or without interest, received after Aug. 8, 1865, or to be hereafter received, ought to be apportioned between corpus and income as on the day on which such instalment was or shall be received, on the same principle on which the £8,656 10s. 7d. received on Aug. 8, 1865, is hereinbefore directed to be apportioned.

"3. That each of the several sums making up the sum of £5,950 17s. 6d. received by the defendant Joanna Beavan on account of principal and interest on the sum of £3,000, part of the sum secured by the mortgage of Mar. 31, 1848, irrespective of premiums, ought to be apportioned between corpus and income as on the day on which each such sum was received, on the same principle on which the said £8,656 10s. 7d. is to be apportioned as aforesaid."

Solicitors: *C. J. & H. Shoubridge*.

MADDISON v. ALDERSON

[HOUSE OF LORDS (The Earl of Selborne, L.C., Lord O'Hagan, Lord Blackburn and Lord FitzGerald), April 17, 19, 20, 23, June 4, 1883]

[Reported 8 App. Cas. 467; 52 L.J.Q.B. 737; 49 L.T. 303;
47 J.P. 821; 31 W.R. 820]

Land—Disposition of land—Contract—Contract not in writing—Part performance—Acts required to be unequivocally referable to contract.

The appellant lived with A. for many years as his housekeeper, and he became indebted to her for unpaid wages. She wished to leave his service, but, as she asserted, she was induced to remain with him by a promise that he would leave her a life interest in a certain farm. Accordingly, she remained with him till his death without receiving any wages, and he made a will leaving her a life interest in the farm. This will was, however, inoperative, not being duly attested. The heir-at-law of A. brought an action to recover the title deeds of the farm, and the appellant made a counterclaim for a declaration that she was entitled to a life interest in the farm.

Held: the appellant had not established any contract between her and her employer; even if there were a contract, it would only be enforceable if the appellant's acts relied on as part performance to take it out of the operation of s. 4 of the Statute of Frauds, 1677, were unequivocally and in their own nature referable to the contract: per LORD SELBORNE, LORD O'HAGAN and LORD FITZGERALD and (per LORD FITZGERALD) they would necessarily have to affect the land which was the subject of the agreement; the appellant's acts were not unequivocally referable to any contract for they were manifestly capable of an explanation in no degree involving the assumption that an agreement ever was made, since she might have remained with her employer in the enjoyment of some present comforts and in the expectation of some future provision though no contract had ever been contemplated; and, accordingly, the action failed.

Estoppel—Estoppel by representation—Representation of existing fact, not of future promise.

Per the EARL OF SELBORNE, L.C.: The doctrine of estoppel by representation is applicable only as to representations as to some state of facts alleged to be at the time actually in existence, and not as to promises de futuro, which, if binding at all, must be binding as contracts.

House of Lords—Costs—Jurisdiction to vary order of Court of Appeal, otherwise correct, as to costs.

Per the EARL OF SELBORNE, L.C., and LORD FITZGERALD: A decree of the Court of Appeal, being correct in other respects, cannot be varied in respect of costs by the House of Lords.

Notes. The words in the Statute of Frauds, 1677, s. 4, dealing with contracts relating to land and interests therein were replaced by the Law of Property Act, 1925, s. 40 (1) (20 HALSBURY'S STATUTES (2nd Edn.) 500).

Considered: *Gillman, Spencer & Co. v. Carbutt & Co.* (1889), 61 L.T. 281; *Blackburn v. Blackburn* (1891), 36 Sol. Jo. 27; *Hodson v. Heuland*, [1896] 2 Ch. 428; *Miller and Aldworth v. Sharp*, [1899] 1 Ch. 622; *Thursby v. Eccles* (1900), 70 L.J.Q.B. 91; *Re Holland*, *Gregg v. Holland*, [1902] 2 Ch. 360; *Chaproniere v. Lambert*, [1917] 2 Ch. 356; *Re A Bankruptcy Notice*, [1924] 2 Ch. 76. Applied: *Rawlinson v. Ames*, [1925] Ch. 96. Referred to: *A.-G. v. Hubbuck* (1884), 13 Q.B.D. 275; *Re Beetham, Ex parte Broderick* (1886), 18 Q.B.D. 380; *Miles v. New Zealand Alford Estate Co.* (1886), 32 Ch.D. 266; *McManus v. Cooke* (1887), 35 Ch.D. 681; *Lucas v. Dixon* (1889), 22 Q.B.D. 357; *Davis v. Leicester Corpn.*, [1894] 2 Ch. 208; *Licenses Insurance Corpn. and Guarantee Fund v. Lawson*

- A (1896), 12 T.L.R. 501; *Coleman v. North* (1898), 47 W.R. 57; *Isaacs v. Evans* (1899), 16 T.L.R. 113; *Re Fickus, Farina v. Fickus*, [1900] 1 Ch. 331; *Banbury v. Bank of Montreal*, [1918-19] All E.R.Rep. 1; *Morris v. Baron*, [1918] A.C. 1; *Houghton & Co. v. Nothard, Lowe and Wills, Ltd.*, [1927] All E.R.Rep. 97; *Ariff v. Rai Jadunath Majumdar Bahadur* (1931), 47 T.L.R. 238; *Bessler, Waechter, Glover & Co. v. South Derwent Coal Co.*, [1937] 4 All E.R. 552;
- B *Veitch v. Caldicott* (1945), 173 L.T. 30.

As to contracts required to be in writing, see 8 HALSBURY'S LAWS (3rd Edn.) 87 et seq.; as to part performance, see *ibid.*, vol. 36, pp. 292-298; as to estoppel by representation, see *ibid.*, vol. 15, p. 223 et seq.; as to contracts to leave property by will, see *ibid.*, vol. 36, p. 280. For cases see 12 DIGEST (Repl.) 182 et seq.; 40 DIGEST (Repl.) 38 et seq.; 21 DIGEST (Repl.) 372 et seq.; and 44 DIGEST 178 et seq., respectively.

Cases referred to:

- (1) *Pengall v. Lord Ross* (1709), 2 Eq. Cas. Abr. 46; 22 E.R. 40, L.C.; 40 Digest (Repl.) 39, 219.
- (2) *Loffus v. Maw* (1862), 3 Giff. 592; 32 L.J.Ch. 49; 6 L.T. 346; 8 Jur.N.S. 607; 10 W.R. 513; 66 E.R. 544; 24 Digest (Repl.) 677, 6655.
- D (3) *Parker v. Smith* (1845), 1 Coll. 608; 63 E.R. 564; 12 Digest (Repl.) 175, 1148.
- (4) *Hammersley v. Baron De Biel* (1841), 12 Cl. & Fin. 61 n.; on appeal (1845), 12 Cl. & Fin. 45; 8 E.R. 1312, H.L.; 24 Digest (Repl.) 676, 6642.
- (5) *Jorden v. Money* (1854), 5 H.L.Cas. 185; 23 L.J.Ch. 865; 24 L.T.O.S. 160; 10 E.R. 868, H.L.; 42 Digest 448, 198.
- E (6) *Prole v. Soady* (1859), 2 Giff. 1; 29 L.J.Ch. 721; 1 L.T. 309; 5 Jur.N.S. 1382; 8 W.R. 131; 66 E.R. 1; 24 Digest (Repl.) 671, 6598.
- (7) *Piggott v. Stratton* (1859), 1 De G.F. & J. 33; 29 L.J.Ch. 1; 1 L.T. 111; 24 J.P. 69; 6 Jur.N.S. 129; 8 W.R. 13; 45 E.R. 271, L.C., L.J.J.; 21 Digest (Repl.) 392, 1217.
- F (8) *Britain v. Rossiter* (1879), 11 Q.B.D. 123; 48 L.J.Q.B. 362; 40 L.T. 240; 43 J.P. 332; 27 W.R. 482, C.A.; 12 Digest (Repl.) 138, 861.
- (9) *Lassence v. Tierney* (1849), 1 Mac. & G. 551; 2 H. & Tw. 115; 15 L.T.O.S. 557; 41 E.R. 1379; sub nom. *Lassence v. Tierney*, *Lassence v. Lescher*, 14 Jur. 182; 40 Digest (Repl.) 510, 223.
- G (10) *Crosby v. Wadsworth* (1805), 6 East, 602; 2 Smith, K.B. 559; 102 E.R. 1419; 30 Digest (Repl.) 528, 1658.
- (11) *Leroux v. Brown* (1852), 12 C.B. 801; 22 L.J.C.P. 1; 20 L.T.O.S. 68, 100; 16 Jur. 1021; 1 W.R. 22; 138 E.R. 1119; 12 Digest (Repl.) 182, 1241.
- (12) *Lester v. Foxcroft*, cited in 2 Vern. p. 456; reversed sub nom. *Lester v. Foxcroft* (1701), Colles, 108; 1 E.R. 205, H.L.; 30 Digest (Repl.) 406, 493.
- H (13) *Clinan v. Cooke* (1802), 1 Sch. & Lef. 22, 33; 12 Digest (Repl.) 182, *706.
- (14) *Bond v. Hopkins* (1802), 1 Sch. & Lef. 413; 32 Digest 426, 1017 iii.
- (15) *Hollis v. Edwards, Deane v. Izard* (1683), 1 Vern. 159; 23 E.R. 385; 42 Digest 461, 300.
- (16) *Butcher v. Stapely* (1685), 1 Vern. 363; 23 E.R. 524, L.C.; 40 Digest (Repl.) 40, 233.
- I (17) *Lockey v. Lockey* (1719), Prec. Ch. 518; 1 Eq. Cas. Abr. 304; 24 E.R. 232, L.C.; 32 Digest 461, 1272.
- (18) *Potter v. Potter* (1750), 1 Ves. Sen. 437; 27 E.R. 1128; 44 Digest 371, 2051.
- (19) *Gunter v. Halsey* (1739), West temp. Hard. 681; Amb. 586; 27 E.R. 381; 12 Digest (Repl.) 191, 1312.
- (20) *Lacon v. Mertins* (1743), Dick. 664; 3 Atk. 1; 21 E.R. 480, L.C.; 12 Digest (Repl.) 184, 1259.
- (21) *Owen v. Davies* (1748), 1 Ves. Sen. 82; 27 E.R. 905, L.C.; 40 Digest (Repl.) 226, 1857.

- (22) *Seagood v. Meale and Leonard* (1721), 2 Eq. Cas. Abr. 49; Prec. Ch. 560; 1 A Stra. 426; 22 E.R. 43, L.C.; 40 Digest (Repl.) 40, 220.
- (23) *Hughes v. Morris* (1852), 2 De G.M. & G. 349; 21 L.J.Ch. 761; 19 L.T.O.S. 210; 16 Jur. 603; 42 E.R. 907, L.J.J.; 40 Digest (Repl.) 40, 230.
- (24) *Cooth v. Jackson* (1801), 6 Ves. 12; 31 E.R. 913, L.C.; 42 Digest 462, 308.
- (25) *Frame v. Dawson* (1807), 14 Ves. 386; 33 E.R. 569; 12 Digest (Repl.) 191, 1313. B
- (26) *Morphett v. Jones* (1818), 1 Wils. Ch. 100; 1 Swan. 172; 37 E.R. 45; 30 Digest (Repl.) 406, 497.
- (27) *Dale v. Hamilton* (1846), 5 Hare, 369; 16 L.J.Ch. 126; 11 Jur. 163; 67 E.R. 955; on appeal (1847), 2 Ph. 266; 16 L.J.Ch. 397; 11 Jur. 574, L.C.; 40 Digest (Repl.) 40, 229.
- (28) *Clerk v. Wright* (1737), 1 Atk. 12; 26 E.R. 9, L.C.; 12 Digest (Repl.) 167, C 1077.
- (29) *Whaley v. Bagnel* (1765), 1 Bro. Parl. Cas. 345; 1 E.R. 611, H.L.; 40 Digest (Repl.) 44, 260.
- (30) *Wills v. Stradling* (1797), 3 Ves. 378; 30 E.R. 1063, L.C.; 30 Digest (Repl.) 409, 533.
- (31) *Lamas v. Bayly* (1708), 2 Vern. 627; 1 Eq. Cas. Abr. 22; 23 E.R. 1011, L.C.; D 40 Digest (Repl.) 18, 60.
- (32) *O'Reilly v. Thompson* (1791), 2 Cox, Eq. Cas. 271; 30 E.R. 126; 40 Digest (Repl.) 43, 251.
- (33) *Walker v. Walker* (1740), 2 Atk. 98; Barn. Ch. 214; 26 E.R. 461, L.C.; 12 Digest (Repl.) 45, 274.
- (34) *Parker v. Smith* (1845), 1 Coll. 608; 63 E.R. 564; 12 Digest (Repl.) 175, E 1148.
- (35) *Simon v. Motivos* (1766), 3 Burr. 1921; 1 Wm. Bl. 599; 97 E.R. 1170; 3 Digest (Repl.) 7, 53.
- (36) *Kenworthy v. Schofield* (1824), 2 B. & C. 945; 4 Dow. & Ry.K.B. 556; 2 L.J.O.S.K.B. 175; 107 E.R. 633; 3 Digest (Repl.) 7, 50.

Also referred to in argument:

Humphreys v. Green (1882), 10 Q.B.D. 148; 52 L.J.Q.B. 140; 48 L.T. 60; 47 J.P. 244, C.A.; 40 Digest (Repl.) 40, 231.

Watt v. Evans (1834), 4 Y. & C.Ex. App. 579; 160 E.R. 1141; 40 Digest (Repl.) 40, 227.

Nunn v. Fabian (1865), 1 Ch. App. 35; 35 L.J.Ch. 140; 13 L.T. 343; 29 J.P. 758; 11 Jur.N.S. 868, L.C.; 30 Digest (Repl.) 409, 534. G

Podmore v. Gunning (1836), 7 Sim. 644; Donnelly, 74; 5 L.J.Ch. 266; 47 E.R. 235; 43 Digest 600, 478.

Buckmaster v. Harrop (1802), 7 Ves. 341; 32 E.R. 139; on approval (1807), 13 Ves. 456, L.C.; 40 Digest (Repl.) 38, 213.

Mundy v. Jolliffe (1839), 5 My. & Cr. 167; 9 L.J.Ch. 95; 3 Jur. 1045; 4 Jur. 621; 41 E.R. 334, L.C.; 30 Digest (Repl.) 441, 840. H

Wilson v. West Hartlepool Rail. Co. (1865), 2 De G.J. & Sm. 475; 5 New Rep. 289; 34 L.J.Ch. 241; 11 L.T. 692; 11 Jur.N.S. 124; 13 W.R. 361; 46 E.R. 459, L.J.J.; 40 Digest (Repl.) 41, 236.

Ungley v. Ungley (1877), 5 Ch.D. 887; 46 L.J.Ch. 854; 37 L.T. 52; 41 J.P. 628; 25 W.R. 733, C.A.; 40 Digest (Repl.) 41, 241. I

Coles v. Pilkington (1874), L.R. 19 Eq. 174; 44 L.J.Ch. 381; 31 L.T. 423; 23 W.R. 41; 30 Digest (Repl.) 407, 510.

Goilmere v. Battison (1682), 1 Vern. 48; 23 E.R. 301; sub nom. *Goylmer v. Paddiston*, 2 Vent. 353, L.C.; 42 Digest 540, 1011.

Surcome v. Pinniger (1853), 3 De G.M. & G. 571; 22 L.J.Ch. 419; 20 L.T.O.S. 255; 17 Jur. 196; 43 E.R. 224, L.J.J.; 40 Digest (Repl.) 511, 226.

Pain v. Coombs (1857), 1 De G. & J. 34; 30 L.T.O.S. 47; 21 J.P. 677; 3 Jur.N.S. 847; 44 E.R. 634, L.C. & L.J.J.; 30 Digest (Repl.) 405, 484.

- A *Needham v. Smith* (1828), 4 Russ. 318; 6 L.J.O.S.Ch. 107; 38 E.R. 825; 40 Digest (Repl.) 528, 385.
- Logan v. Wienholt* (1833), 7 Bli.N.S. 1; 1 Cl. & Fin. 611; 5 E.R. 674, H.L.; 44 Digest 180, 90.
- Coverdale v. Eastwood* (1872), L.R. 15 Eq. 121; 42 L.J.Ch. 118; 27 L.T. 646; 37 J.P. 212; 21 W.R. 216; 40 Digest (Repl.) 514, 249.
- B *Maunsell v. White* (1854), 4 H.L.Cas. 1039; 22 L.T.O.S. 293; 10 E.R. 769, H.L.; 40 Digest (Repl.) 514, 247.
- McCormick v. Grogan* (1869), L.R. 4 H.L. 82; 17 W.R. 961, H.L.; 43 Digest 600, 480.
- Hill v. Wilson* (1873), 8 Ch. App. 888; 42 L.J.Ch. 817; 29 L.T. 238; 21 W.R. 757, L.J.J.; 24 Digest (Repl.) 786, 7751.

C **Appeal** by the defendant in the action, Elizabeth Maddison, from a decision of the Court of Appeal (BAGGALLAY, BRAMWELL and BRETT, L.J.J.), reported 7 Q.B.D. 174, reversing a decision in her favour of STEPHEN, J., reported 5 Ex.D. 293, upon further consideration of an action tried before him at Durham Assizes. The action was brought by the respondent, as heir-at-law of one Thomas Alderson, who died in 1877, to recover from the appellant the title deeds of a property known as

D "Manor House Farm," at Moulton, Yorkshire.

The appellant lived for many years as housekeeper in the service of Thomas Alderson, who died on Dec. 16, 1877. She originally entered his service in 1845, and, having become his housekeeper some years before 1860, continued to serve him in that capacity down to the time of his death. He was, when he died, the owner in fee simple of a freehold estate at Moulton, in Yorkshire, called the Manor House Farm, in extent about 92 acres, and in value about £137 per annum, which had been devised to him by the will of an uncle. It was certain that he intended to leave the appellant a life-interest in this estate, subject to a small annuity, for he had a will prepared for that purpose in 1872, which he signed in 1874, but it failed for want of due attestation. The appellant having possessed herself of the title-deeds, the heir-at-law to whom the estate descended, brought the present

E action to recover them. The appellant, by her statement of defence and counter-

F claim, insisted that she was entitled to the same benefit which she would have taken under the will if duly executed, by virtue of a parol agreement alleged to have been made with her by Thomas Alderson for sufficient consideration, and to have been on her part performed.

The question which was left by STEPHEN, J., to the jury was,

G "whether the defendant was induced to serve Thomas Alderson as his house-keeper, without wages, for many years, and to give up other prospects of establishment in life, by a promise made by him to her that he would make a will leaving her a life estate in Moulton Manor Farm, if and when it became his property?"

H That question the jury answered in the affirmative. The evidence on which the verdict proceeded was that of the appellant herself, without any corroboration other than the unattested will, which made no mention of any such inducement. The material parts of her evidence were that in May, 1860, she, having been long in Thomas Alderson's service, contemplated leaving him, and had some idea of being married, and she so informed him. She had, ten years before, "begun to leave wages in his hands"; the arrears went on from that time owing to his straitened circumstances, and in May, 1860, £23 7s. 6d. remained due to her. He told her of his expectations from his uncle, and that his uncle wished her to stay with him as long as he lived, and wished him to "make her all right" by leaving her the Moulton Manor Farm, which he promised to do if she lived with him. She said in evidence that she had taken his advice and remained on by his promises. In another place, she said: "I did not leave him, because he advised me not." She did not afterwards "press him" for wages; but after his death she brought an action against his administrator for them, which was dropped, before

or at the time when, the present action was commenced. When Thomas Alderson signed his will he read it over to her, and asked her whether it was right, and "whether she was satisfied."

STEPHEN, J., entered judgment for the present appellant, but his decision was reversed by the Court of Appeal, and she appealed to the House of Lords.

Rigby, Q.C., and *Rawlins* for the appellant.

Davey, Q.C., and *G. Bruce (W. Barber, Q.C., with them)* for the respondent.

Their Lordships took time for consideration.

June 4, 1883. The following opinions were read.

THE EARL OF SELBORNE, L.C., stated the facts and continued: The case presented was manifestly one of conduct on the part of the appellant, affecting her arrangements in life and pecuniary interests, induced by promises of Thomas Alderson to leave her a life estate in the Moulton Manor Farm by will, rather than one of definite contract for mutual considerations made between herself and him at any particular time. There was certainly no contract on her part which she would have broken by voluntarily leaving his service at any time during his life; and I see no evidence of any agreement by her to serve without, or to release her claim to wages. If there was a contract on his part it was conditional upon, and in consideration of, a series of acts to be done by her, which she was at liberty to do or not to do, as she thought fit; and which, if done, would extend over the whole remainder of his life. If he had dismissed her, I do not see how she could have brought any action at law, or obtained any relief in equity.

It was admitted in the argument at the Bar that the appellant had endeavoured to bring her case within the supposed authority of *Loffus v. Maw* (2), decided by STUART, V.-C., under circumstances not dissimilar, on the doctrine of representation; for which purpose he relied upon some expressions used by LORD COTTENHAM in *Hammersley v. Baron De Biel* (4), and considered himself at liberty to disregard the reasons assigned by LORD CRANWORTH and LORD BROUGHAM for the later decision of this House in *Jorden v. Money* (5), STEPHEN, J., and the Court of Appeal, rightly in my opinion, took a different view. I have always understood it to have been decided in *Jorden v. Money* (5) that the doctrine of estoppel by representation is applicable only to representations as to some state of facts alleged to be at the time actually in existence, and not to promises de futuro, which, if binding at all, must be binding as contracts—a distinction which is illustrated by such cases as *Prole v. Soady* (6), and *Piggott v. Stratton* (7). *Hammersley v. Baron De Biel* (4) was a case of contract for valuable consideration, duly signed so as to fulfil the requirements of the Statute of Frauds, in the view both of LORD LANGDALE and LORD COTTENHAM in Chancery, and of LORD CAMPBELL in the House of Lords. Those decisions are consistent with each other; *Hammersley v. Baron De Biel* (4) does not justify, and *Jorden v. Money* (5) is irreconcilable with the reasons stated by STUART, V.-C., for his judgment in *Loffus v. Maw* (2).

STEPHEN, J., and the Court of Appeal arrived at the conclusion that a contract was proved in this case, notwithstanding the character of the evidence and the form of the verdict, on which, but for the Statute of Frauds, the appellant might have been entitled to relief; but they differed on the question of part performance, STEPHEN, J., thinking that there was part performance sufficient to take the case out of the Statute of Frauds, the Court of Appeal thinking otherwise.

This makes it necessary for your Lordships now to examine the doctrine of equity as to part performance of parol contracts. The case upon this subject, which are very numerous, have all, or nearly all, arisen under those words of s. 4 of the Statute of Frauds which provide that

"no action shall be brought to charge any person upon any contract for sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memo-

A random or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised."

It has been recently decided by the Court of Appeal in *Britain v. Rossiter* (8) that the equity of part performance does not extend, and ought not to be extended, to contracts concerning any other subject-matter than land—an opinion which seems to differ from that of LORD COTTENHAM (see *Hammersley v. Baron De Biel* (4), and *Lassence v. Tierney* (9)). That equity has been stated by high authority to rest upon the principle of fraud: "courts of equity will not permit the statute to be made an instrument of fraud." By this it cannot be meant that equity will relieve against a public statute of general policy in cases admitted to fall within it; and I agree with an observation made by COTTON, L.J., in *Britain v. Rossiter* (8), that this summary way of stating the principle, however true it may be when properly understood, is not an adequate explanation, either of the precise grounds, or of the established limits, of the equitable doctrine of part performance.

It has been determined at law, and in this respect there can be no difference between law and equity, that s. 4 of the Statute of Frauds does not avoid parol contracts, but only bars the legal remedies by which they might otherwise have been enforced: *Crosby v. Wadsworth* (10); *Leroux v. Brown* (11); *Britain v. Rossiter* (8). *Crosby v. Wadsworth* (10) was an action of trespass brought by the purchaser against the vendor of a growing crop. The contract was by parol, and it was held to be concerning an interest in land within s. 4 of the statute. LORD ELLENBOROUGH, C.J., said (6 East, at p. 611):

"But the statute does not expressly and immediately vacate such contracts, if made by parol; it only precludes the bringing of actions to enforce them by charging the contracting party, or his representatives, on the ground of such contract, and of some supposed breach thereof, which description of action does not properly apply to the one now brought, viz., a mere general action of trespass, complaining of an injury to the possession of the plaintiff, however acquired, by contract or otherwise. But, although the contract for this interest in or concerning land may not be in itself wholly void under the statute, merely on account of its being by parol, so that, if the same had been executed, the parties could have treated it as a nullity, yet being executory, and as for as the non-performance of it no action could have been by the provisions of s. 4 maintained, we think it might be discharged before anything was done under it which could amount to a part execution of it."

From the law thus stated the equitable consequences of the part performance of a parol contract concerning land appear to me naturally to result. In a suit founded on such part performance the defendant is really "charged" upon the equities resulting from the acts done in execution of the contract, and not within the meaning of the statute upon the contract itself. If such equities were excluded, injustice of a kind which the statute cannot be thought to have had in contemplation would follow. Let the case be supposed of a parol contract to sell land, completely performed on both sides as to everything except conveyance; the whole purchase money paid; the purchaser put into possession; expenditure by him, say in costly buildings, upon the property; leases granted by him to tenants. The contract is not a nullity; there is nothing in the statute to estop any court which may have to exercise jurisdiction in the matter from inquiring into and taking notice of the truth of the facts. All the acts done must be referred to the actual contract, which is the measure and test of their legal and equitable character and consequences.

If, therefore, in such a case a conveyance were refused, and an action of ejectment brought by the vendor or his heir against the purchaser, nothing could be done towards ascertaining and adjusting the legal and equitable rights and liabilities of the parties without taking the contract into account. The matter has advanced beyond the stage of contract; and the equities which arise out of the stage that it has reached cannot be administered unless the contract is regarded.

The choice is between undoing what has been done, which is not always possible, or, if possible, just, and completing what has been left undone. The line may not always be capable of being so clearly shown as in the case which I have supposed; but it is not arbitrary or unreasonable to hold that when the statute says that no action is to be brought to charge any person upon a contract concerning land, it has in view the simple case in which he is charged upon the contract only, and not that in which there are equities resulting from *res gestæ* subsequent to and arising out of the contract. So long as the connection of those *res gestæ* with the alleged contract does not depend upon mere parol testimony, but is reasonably to be inferred from the *res gestæ* themselves, justice seems to require some such limitation of the scope of the statute, which might otherwise interpose an obstacle even to the rectification of material errors, however clearly proved in an executed conveyance, founded upon an unsigned agreement.

It is not in England only that such a doctrine prevails; a similar, perhaps even a larger equity is also recognised in other countries, whose equitable jurisprudence is derived from the same original sources as our own. By the law of Scotland,

"written contracts in strict technical language are those of which authentic written evidence is required not merely in proof, but in solemnity; as obligations relative to land, or obligations agreed to be reduced to writing, or those required by statute to be in writing."

To constitute any such contract there must be a "final engagement"; and as a corollary to that rule a *locus pœnitentiæ* is given, i.e.,

"a power of resiling from an incomplete engagement, from an unaccepted offer, from a mutual contract to which all have not assented, from an obligation to which writing is requisite, and has not yet been adhibited in an authentic shape."

But to this

"*rei interventus* raises a personal exception, which excludes the plea of *locus pœnitentiæ*. It is inferred from any proceedings not unimportant, on the part of the obligee, known to and permitted by the obligor to take place on the faith of the contract, as if it were perfect; provided they are unequivocally referable to the contract and productive of alteration of circumstances, loss, or inconvenience, though not irretrievable":

see BELL'S PRINCIPLES OF THE LAW OF SCOTLAND, ss. 18, 25, 26. This must, I think, have been the principle on which the House of Lords proceeded in 1701, when it reversed the decree of LORD SOMERS in *Lester v. Foxcraft* (12).

LORD REDESDALE, in *Clinan v. Cooke* (13) and *Bond v. Hopkins* (14), referred to that case as if it had been the earliest decision on the subject. But there were in fact two prior cases before LORD GUILDFORD: *Hollis v. Edwards* (15) and *Butcher v. Stapely* (16) decided in 1683 and 1685, within the first ten years after the enactment of the Statute of Frauds, in the earlier of which he refused, and in the latter granted, relief. *Butcher v. Stapely* (16) was a strong case upon its circumstances, for the relief was there granted to a purchaser in possession of land under an unsigned agreement, against a subsequent purchaser with notice of the same land from the vendor, the defendant having paid his money under a signed agreement, and having obtained a conveyance of the legal estate. LORD GUILDFORD

"declared that, inasmuch as possession was delivered according to the agreement, he took the bargain to be executed."

Among later cases I may refer to *Pengall v. Lord Ross* (1) decided by LORD COWPER in 1709; *Lockey v. Lockey* (17), by LORD MACCLESFIELD in 1719; and *Potter v. Potter* (18), by STRANGE, M.R., in 1750. LORD COWPER said in *Pengall v. Lord Ross* (1) (2 Eq. Cas. Abr. at p. 46):

"There must be something more than a bare payment of money on the one part to induce the court to decree a specific performance on the other part.

A either by putting it out of the party's power to undo the thing, or where it would be a prejudice to the party performing his part, as beginning to build, or letting the other into possession, etc., in such case where the agreement hath proceeded so far on one part, the statute never intended to restrain this court from decreeing a performance of the other."

B LORD MACCLESFIELD said in *Lockey v. Lockey* (17) (Prec. Ch. at p. 519) that an unwritten agreement

"if executed on one part had been always looked upon as so far conclusive as to induce the court to decree an execution on the other part, not to destroy or avoid the agreement so far as it was already carried into execution."

STRANGE, M.R., said in *Potter v. Potter* (18) (1 Ves. Sen., at p. 441):

C "If confessed, or in part carried into execution, it will be binding on the parties, and carried into further execution as such in equity."

D The doctrine, however, so established has been confined by judges of the greatest authority within limits intended to prevent a recurrence of the mischief which the statute was passed to suppress. The present case, resting entirely upon the parol evidence of one of the parties to the transaction after the death of the other, forcibly illustrates the wisdom of the rule which requires some *evidentia rei* to connect the alleged part performance with the alleged agreement. There is not otherwise enough in the situation in which the parties are found to raise questions which may not be solved without recourse to equity. It is not enough that an act done should be a condition of, or good consideration for, a contract, unless it is, as between the parties, such a part execution as to change their relative positions as to the subject-matter of the contract. LORD HARDWICKE, L.C., in *Gunter v. Halsey* (19) said (West temp. Hard. at p. 681):

E "As to the acts done in performance they must be such as could be done with no other view or design than to perform the agreement."

He also said (*ibid.*) that

F "the terms of the agreement must be certainly proved."

He thought it, indeed, consistent with that rule to treat the payment of purchase-money, in whole or in part, as a sufficient part performance: (*Lacon v. Mertins* (20); *Owen v. Davies* (21). This LORD COWPER in *Pengall v. Ross* (1) and LORD MACCLESFIELD in *Seagood v. Meale and Leonard* (22) in 1721, had refused to do.

G On that point later authorities have overruled LORD HARDWICKE's opinion; and it may be taken as now settled that part payment of purchase-money is not enough; and judges of high authority have said the same even of payment in full: *Clinan v. Cooke* (13); *Hughes v. Morris* (23); *Britain v. Rossiter* (8). Some of the reasons which have been given for that conclusion are not satisfactory. The best explanation of it seems to be that the payment of money is an equivocal act in itself until the connection is established by parol testimony, indicative of a contract concerning land. I am not aware of any case in which the whole purchase money has been paid without delivery of possession, nor is such a case at all likely to happen. All the authorities show that the acts relied upon as part performance must be unequivocally, and in their own nature be referable to some such agreement as that alleged: *Cooth v. Jackson* (24); *Frame v. Dawson* (25); *Morphett v. Jones* (26), where PLUMER, M.R., said (1 Swan. at pp. 181, 182):

I "The acknowledged possession of a stranger in the land of another is not explicable, except on the supposition of an agreement, and has therefore constantly been received as evidence of an antecedent contract and as sufficient to authorise an inquiry into the terms, the court regarding what has been done as a consequence of contract or tenure."

WIGRAM, V.-C., said in *Dale v. Hamilton* (27) (5 Hare, at p. 381):

"It is in general of the essence of such an act that the court shall, by reason of the act itself, without knowing whether there was an agreement or not,

find the parties unequivocally in a position different from that which, according to their legal rights, they would be in if there were no contract. . . . But an act which, though in truth done in pursuance of a contract, admits of explanation without supposing a contract, is not in general admitted to constitute an act of part performance, taking the case out of the Statute of Frauds; as, for example, the payment of a sum of money alleged to be purchase money. The fraud, in a moral point of view, may be as great in the one case as in the other, but in the latter cases the court does not in general give relief."

(See also, *Britain v. Rossiter* (8) (11 Q.B.D. at p. 130), per COTTON, L.J.).

The acts of part performance exemplified in the long series of decided cases in which parol contracts concerning land have been enforced, have been almost, if not quite, universally relative to the possession, use, or tenure of the land. The law of equitable mortgage, by deposit of title deeds, depends upon the same principles. Examples of circumstances which have been held insufficient for this purpose are found in *Clerk v. Wright* (28) and *Whaley v. Bagnel* (29) where acts preparatory to the completion of a contract were held not to be part performance; in *Wills v. Stradling* (30), where the mere holding over by a tenant, unless qualified by the payment of a different rent, was held not to be enough "even to call for answer"; in *Lamas v. Bayly* (31) where the plaintiff, being engaged in a treaty for the purchase of land, desisted in order that the defendant might buy it, on an agreement that he should have a part of it when so bought at a proportionate price, but his "desisting from the prosecution of his purchase" was held to be no part performance; and in *O'Reilly v. Thompson* (32) where the agreement alleged, was that, upon the plaintiff obtaining from a third party a release of a right to a lease claimed by him, the defendant would grant to the plaintiff a release of the same premises on certain terms. The plaintiff did obtain a release from the party in question of the right claimed by him for valuable consideration; but nevertheless a plea of the Statute of Frauds was allowed, EYRE, C.B., saying (2 Cox, Eq. Cas. at p. 273):

"These circumstances are not a sufficient part performance, but they are a condition annexed, and necessary to be fulfilled by the plaintiff to entitle him to call for an execution of the contract."

meaning, as I presume, that they were a condition precedent to the contract, as distinguished from acts done after a concluded contract and in part performance of it.

The law deducible from these authorities is, in my opinion, fatal to the appellant's case. Her mere continuance in Thomas Alderson's service, though without any actual payment of wages, was not such an act as to be in itself evidence of a new contract, much less of a contract concerning her master's land. It was explicable without supposing any such new contract as easily as the continuance of a tenant in possession after the expiration of a lease. The relinquishment of any chance which she might have had of marriage was of no greater force than the relinquishment of the treaty for purchase in *Lamas v. Bayly* (31). The alleged acts of part performance preceded, and therefore could not be evidence of any contract on her part; their performance was, as in *O'Reilly v. Thompson* (32) a condition precedent, without the fulfilment of which the promise which the jury found to have been made by Thomas Alderson could not on his part become a binding contract.

Two cases on which I think it well to add some remarks, were cited by the counsel for the appellant as favourable to their argument *Walker v. Walker* (33) and *Parker v. Smith* (34).

In *Walker v. Walker* (33) LORD HARDWICKE did not execute any parol contract on the ground of part performance or otherwise; all that he did was to relieve the defendant from a liability which the plaintiff's contract had made it inequitable to enforce. There had been a good agreement between A. and B. that A. would surrender a copyhold belonging to him to C., charged with annuities in favour of B., if B. would surrender another copyhold of his own to C. A. surrendered his copyhold accordingly, charged with the annuities, and died; B. did not surrender.

A but he sought, nevertheless, by his bill to enforce payment of the annuities against C. LORD HARDWICKE dismissed the bill, saying "he was not clear" that the agreement might not have been established by cross bill, upon the principle of part performance. To such a dictum even the authority of so great a judge cannot give much weight. It does not appear how, if there had been a binding agreement, C., who was no party to it, could have claimed specific performance. The true equity was that which was actually administered, namely, to relieve A.'s copyhold in the hands of C. from the charge which B. unconscientiously sought to enforce.

B Of the other case, *Parker v. Smith* (34), before KNIGHT-BRUCE, V.-C., I think it enough to say that it was dealt with in an extraordinary manner, and it is difficult to reconcile it with *Cooth v. Jackson* (24). The acts to which the court gave the effect of part performance were done before any definite terms of agreement had been, even by parol, concluded between the parties. It might well have been held that there was an agreement duly signed according to the Statute of Frauds on Nov. 30, 1842, but the supposed acts of part performance were done before that time, and until then everything as to the terms of the intended new lease remained unsettled. I cannot, therefore, regard it as a satisfactory authority.

C I am sorry for the appellant's disappointment through the ignorance of her late master as to the attestation requisite for a valid testamentary act. But the law cannot be strained for the purpose of relieving her from the consequences of that misfortune. It would, in my opinion, be much strained, and the equitable doctrine of the part performance of parol contracts would be extended far beyond those salutary limits within which it has hitherto been confined, if your Lordships were to reverse the order of the Court of Appeal.

D I should have been glad if that court had dealt differently with the costs, as she has lost, not only the estate intended for her, but also her wages; but costs were within their discretion, and their decree cannot be altered in that respect, being otherwise correct. This House has also to exercise a discretion as to the costs of this appeal, and I humbly venture to recommend to your Lordships that it should be dismissed without costs.

E LORD O'HAGAN.—I have had the advantage of perusing the opinion of the Lord Chancellor, and, concurring as I do with his conclusions and the reasons on which they are grounded, I shall briefly indicate the grounds of my concurrence.

F It seems to me impossible to hold that without a dangerous extension of the principles on which the operation of the Statute of Frauds has been held to be avoided as to certain parol contracts, on the ground of part performance, your Lordships can refuse to affirm the unanimous decision of the Court of Appeal.

G There have been, I think, two errors in the conduct of the case, which have created difficulty and contradiction in the decision of it. In the first place, the reliance of the plaintiff on the ruling of STUART, V.-C., in *Loffus v. Maw* (2), and the consequent effort to shape the evidence so as to make that ruling applicable, tended to raise a false issue, and to place her contention on an untenable foundation. I quite agree that the authorities on which that ruling was based do not sufficiently sustain it. This case must be dealt with, not upon the ground of representation, but as one of contract, having relation to some binding engagement for future conduct, and not to a responsibility created by any misleading averment of existing facts. The result of the argument has made the mistake apparent, and it is now

H I confessed. Next, assuming that the action must be considered maintainable, if at all, for the purpose of enforcing a parol contract partly performed, the course of the argument appears to me to have been further erroneous in this, that, instead of seeking primarily to establish such a performance as must necessarily imply the existence of the contract, and then proceeding to ascertain its terms, it reversed the order of the contention. The court was asked from the findings of jury and the testimony supporting them, to say there was a contract, and then to discover in the conduct of the parties acts of performance sufficient to validate the bargain

so previously ascertained. Too much attention was bestowed upon the proof of the contract, and too little on the sufficiency of the performance, which was the more substantial part of the burden on the appellant in supporting her claim. The alleged agreement regarded an interest in lands, and the statute nullified it for the purposes of the action. Per se, it was of no account, and could have no value given to it unless, in the first instance, it was evidenced by acts to be accounted for only on the supposition of its existence. The allegation of it could not be made the subject of judicial consideration, as founding any right of suit, in the absence of such acts satisfactorily ascertained. A B

In this case STEPHEN, J., at the trial, and the judges of the Court of Appeal, seem all to have thought that an unwritten contract, capable of execution by a court of equity on the fulfilment of the proper conditions, was established by the verdict and the reported testimony. In my view, it is not necessary to decide the point, though it was the subject of ingenious argument at the Bar, on the one side and the other. For my own part, I have some hesitation in holding upon it with the appellant, from the want of definiteness in the supposed arrangement and the obscurity of the proof as to some of its material elements. If at any time, as I conceive, consistently with the proved agreement, during his life, Thomas Alderson might at his will have dismissed the appellant from his service; and if she, reciprocally, might have declined to serve him further, and so have prevented the fulfilment of the alleged condition of his promise, which could only have had effect on the continuance of her service until he died; and if, as the Lord Chancellor has, in my opinion, correctly stated, there is no evidence that she agreed to serve without the wages which she claimed and sued for after her master's death, I do not see that a bargain so obscure in its terms, so uncertain in its effect, and so doubtful in its intention, could have been properly enforced. I do not see that we have before us that "certain proof" of the agreement which the authorities appear to require. But I do not deem it necessary to discuss further the grounds of the view adopted by the learned judge. C D E

The previous question as to the sufficiency of the part performance must be settled before the construction and operation of the unwritten contract can be legitimately approached. SIR WILLIAM GRANT, M.R., said in *Frame v. Dawson* (25) (14 Ves. at pp. 387, 388): F

"The principle of the cases is that the act must be of such a nature that, if stated, it would of itself infer the existence of some agreement; and then parol evidence is admitted to show what the agreement is."

Then, but not till then. G

I confess I have found it hard to follow the reasoning of the judges in some of the cases to which the Lord Chancellor has referred, to reconcile the rulings in others of them, and to regard as entirely satisfactory the state of the law in which the taking of possession or receipt of rent is dealt with as an act of part performance; and the giving and acceptance of any amount of purchase money, confessedly in pursuance and affirmance of a contract of sale, is not. As to some of the judgments, prompted no doubt by a desire to defeat fraud and accomplish justice, I am inclined to concur with BRETT, L.J., in *Britain v. Rossiter* (8) when he called them "bold decisions." H

But there is no conflict of judicial opinion, and, in my mind, no ground for reasonable controversy as to the essential character of the act which shall amount to a part performance in one particular. It must be unequivocal. It must have relation to the one agreement relied upon, and to no other. It must be such, in LORD HARDWICKE's words in *Gunter v. Halsey* (19) (West temp. Hard. at p. 681): I

"as could be done with no other view or design than to perform that agreement."

It must be sufficient of itself, and without any other information or evidence, to satisfy a court, from the circumstances it has created and the relations it has formed, that they are only consistent with the assumption of the existence of a

A contract, the terms of which equity requires, if possible, to be ascertained and enforced.

The appellant's case fails in the fulfilment of this indispensable condition. It seems impossible to say that the mere statement of the acts on which she insists of necessity implies the existence of the agreement which she is bound to establish. Those acts are manifestly capable of an explanation in no degree involving the assumption that such an agreement ever was made. Briefly summarised in the way suggested by SIR WILLIAM GRANT, M.R., and most favourably for the appellant's contention, they may be taken to represent her service in Alderson's house, her abandonment of a purpose, as she describes it, "of making a home of my own," and her continuance to serve from 1860 until the death of her master without the wages she had theretofore claimed and partially received. But though her long service is consistent with her present case, it is not demonstrative of any contract to give her the life estate she claims. She might unquestionably have remained with her master in the enjoyment of some present comforts and the expectation of some future provision, though no such contract had ever been dreamt of. There have not been wanting recorded cases in which time and care have been bestowed by one person upon another, even from a vague anticipation that the affection and gratitude so created would in the long run ensure some indefinite reward. And legal tribunals have refused in those cases to turn courtesy into contract, and compel any payment, although such service had been performed. In such circumstances, and even where there may have been a general undertaking to afford a suitable acknowledgment, there would be no ground for inferring a contract for the conveyance or devise of landed estate to the person rendering the service, however valuable it might have been, and however clear might have been the right to remuneration for it in another way, the rendering of it not being necessarily referable to any such contract.

As to her service without wages, I repeat that there is no proof of any engagement so to serve, or anything to show that she might not have demanded and recovered them at any time in a court of law. But, even if the appellant had made such an engagement, she might have done so from motives and with hopes such as those I have indicated, or others of a like kind, strong enough and persuasive enough to induce her for the time to labour gratuitously and without any agreement to give her in return an interest in land, the fact that her master designed and strove to give her such an interest at the close of his life cannot be taken to establish the existence of such an agreement a dozen years before. As to her continuance in a state of celibacy, the evidence does not show that she ever had a real purpose to abandon it. She only "thought of making a home"; and that she failed to make it may be attributable to very many reasons, having no relation whatever to the contract on which she would now rely. She may have taken other views of life, or found such a connection as she had "thought of" undesirable or impossible. Her case does not appear to me to be helped by the suggestion that at one period she contemplated an arrangement of the kind. I have come very reluctantly to the conclusion that the judgment of the Court of Appeal was right and that the appeal must be dismissed.

LORD BLACKBURN.—I have great difficulty in understanding how STEPHEN, J., came to the conclusion that there was a contract between Thomas Alderson and the appellant to the effect alleged. It seems to me impossible to say that the jury found that there was such a contract by their answer to the question asked. I do not think that the course taken at the trial amounted to a reservation to the judge of a power to draw inferences of fact from the evidence; and, if it had amounted to such a reservation, I do not think that the evidence appearing on the notes would have justified such a finding. It is not merely that the sole witness is a person deeply interested, giving testimony as to what took place between herself and a person deceased, and that no judge, sitting in equity and deciding both the law and fact, would have acted on such evidence without confirmation; and that

the causing a draft will to be prepared in 1872 in favour of the appellant cannot be considered as confirmation of a promise alleged to have been made at least twelve years earlier. I do not think there is any rule of law which prevents such unconfirmed evidence from being admissible, or that would prevent a jury from believing and acting on such evidence, though it ought to be strongly pointed out to them how dangerous it would be to do so. The risk of a jury coming to such a decision and the consequent practical change in the doctrine of specific performance, is one of those things which the legislature in amalgamating law and equity did not, perhaps, sufficiently provide for. But it seems to me that in this case the evidence is evidence from which a contract would not have been found by a jury, if it had been explained to them that to make a contract there must be a bargain between both parties. I doubt, therefore, whether in any way the judgment in favour of the appellant could have stood, though perhaps it might have been necessary to have a new trial.

I do not decide this, for it is quite clear that the contract alleged is a contract for an interest in lands; and it is not denied that there was no note or memorandum of the contract signed by Thomas Alderson. I have come to the conclusion that this is not a case in which part performance gives an equitable right to have the contract, assuming that there was one, specifically performed, though I speak with diffidence, as I have not been able to discover to my satisfaction what is the principle which is involved in the numerous cases in equity on the subject.

I think it is now finally settled that the true construction of both ss. 4 and 17 of the Statute of Frauds is not to render the contracts within them void, still less illegal, but is to render the kind of evidence required indispensable when it is sought to enforce the contract. At first this was not universally accepted as the true construction; it was thought by many very high authorities that the statute did not apply when, from the nature of the proof, there could be no risk of perjury. Sales by auction and sales negotiated through brokers were by some thought, for this reason, not to be within the statute. LORD MANSFIELD intimates such an opinion in *Simon v. Motivos* (35). I do not think that it can be said to have been finally settled that such sales were within the statute till *Kenworthy v. Schofield* (36), as late as 1824.

And there are still indications that great equity judges, on a similar principle, thought that whenever acts had been done which were such as to be consistent only with the existence of a contract, the case was taken out of the mischief of the statute, and the only question was the sufficiency of the proof of what the contract was. I so understand some of LORD HARDWICKE's remarks in *Gunter v. Halsey* (19) and *Lacon v. Mertins* (20). This principle would apply whether the unequivocal act was a giving possession of the land or paying the price in whole or in part. As soon as it was established that the construction of the statute was not what had been supposed, and that a contract within s. 4 was not enforceable unless signed by or on behalf of the party to be charged, even though signed by the one party and accepted and kept by the other who was sought to be charged, or otherwise unexceptionally proved, I think this class of cases ought to have been considered overruled; but, though I speak with diffidence as to the effect of decisions in equity, it seems to me that to some extent at least they were not. Those which tended to show that payment in whole or in part would take the case out of the statute are overruled by the authorities cited by the Lord Chancellor, but there are cases which decide that, for the purpose of enforcing a specific performance of a contract for the purchase of an interest in land, a delivery of possession of the land will take the case out of the statute. This is, I think, in effect to construe s. 4 of the Statute of Frauds as if it contained the words "or unless possession of the land shall be given and accepted." Notwithstanding the very high authority of those who have decided those cases, I should not hesitate, if it were *res integra*, in refusing to interpolate such words, or put such a construction on the statute. But it is not *res integra*, and I think that the cases are so numerous that this anomaly—if, as I think, it is an anomaly—must be taken as

A at least to some extent established. If it was originally an error, it is now, I think, communis error, and so makes the law.

There are many rules laid down as to what should guide a judge, determining for himself what the facts are, in thinking the proof of a contract sufficient. I see great difficulty, now that equity is to be administered by a court which has the facts found by a jury, in applying these to a trial by jury, but that is a question B not raised now. But I do not think this anomaly should be extended; and it is not a little remarkable that there is no case—at least none was cited, and I have found none—in which there has not been a change in the possession of the land, or, in the case where the purchaser was a tenant already in possession, a change in the nature of his tenure, which, rightly or wrongly, was held equivalent to a change in the possession. The conduct of the parties may be such as to make C it inequitable to refuse to complete a contract partly performed. Wherever that is the case I agree that the contract may be enforced on the ground of an equity arising from the conduct of the party.

The moral justice of the case was completely with the appellant in *Lester v. Foxcraft* (12), and as that case was decided more than 180 years ago by this House, it is too late now to inquire whether the decision there overruled was not D more consistent with technical equity. If there was proof that the heir-at-law kept back the deeds from the dying man when he wished to execute them, it would seem that the reversal was quite right. In *Bond v. Hopkins* (14) LORD REDESDALE doubted whether the cases founded on it have been as well considered. But the cases where this is given as a ground of decision are all cases in which there has been a change of possession, and I do not think that, as far as they are anomalous, E they should be extended to a case where there has not been such a change.

I do not doubt that, without any such change, actual fraud might give a ground for equitable relief. But Alderson, whether he only held out hopes that he would make a will in the appellant's favour, or actually contracted so to make his will, did mean to make it. There can be no fraud on his part, therefore, unless it is said that in equity it amounts to fraud not to complete a contract when the F consideration is one that cannot be restored or compensated for. But this would go a great deal too far. Where a parol promise is in consideration of marriage, and the marriage actually takes place, the consideration can neither be restored nor compensated for; when a parol promise is to answer for the default of another and credit is given on the faith of such a parol guarantee to one who makes default, the consideration cannot be restored, and cannot be compensated for except by G fulfilling the contract of guarantee. In those cases, such a principle would render the statute a nullity, and it has been decided in *Britain v. Rossiter* (8) that this principle does not apply to contracts not to be performed within a year. It would, I think, be a strange construction to apply this principle to one of the four cases in the same section of the statute where it cannot be applied to the three others. It has never been done, and it is impossible not to see that if there is any case H in which the policy of the Statute of Frauds clearly applies it is such a case as this, where the promise set up is one not to come into force till after the death of the person who is alleged to have made it. I have, therefore, come to the conclusion that the judgment below should be affirmed.

The costs are entirely in the discretion of this House. I do not myself see any sufficient reason for departing from the usual rule as to costs, but if the rest of I your Lordships are of a different opinion I will not contest the point.

LORD FITZGERALD.—I entirely concur in the opinion pronounced by the Lord Chancellor, affirming the decision of the Court of Appeal. The decision of your Lordships' House is to rest on the ground that there is nothing in the case to take the supposed agreement out of the operation of s. 4 of the Statute of Frauds. I have had the advantage of reading the opinion of the Lord Chancellor on this question, and I adopt his reasons. He has well laid down that the acts relied on as performance to take the case out of the statute must be unequivocally and in their

own nature referable to some such agreement as that alleged, and, I may add, must necessarily relate to and affect the land, the subject of that agreement. I quite agree that the doctrine, whatever may have been its foundation, has been too long established to be now questioned. We are bound to follow, but should rather confine than enlarge its limits. A

There was no part performance in the case before us such as has been defined as necessary, and I may add that the peculiar character of the alleged agreement does not admit of such a part performance by the appellant as could affect the operation of the statute. If there was such an agreement as the appellant alleges, she has done all that was to be performed on her part—that is to say, she remained in the service of Alderson up to the time of his death, and there is no proof that she received any wages, or was paid the arrears due to her in 1860. STEPHEN, J., thus deals with this part of the case: B

“As it was a contract relating to land, it obviously falls within s. 4 of the Statute of Frauds. But, as it is obvious that it was completely performed on the part of the defendant [the present appellant], it is equally clear that, according to the well-known doctrine of equity, the application of the statute is barred.” C

But it is equally obvious that the acts of the appellant had no necessary reference to any contract such as is relied on, or indeed to any contract whatever, or to the land, and would be properly accounted for by some expectation of bounty from her master. D

At an early stage of the discussion I had satisfied my mind that there never had been any such agreement as that relied on, and that the jury did not find that there had been any such agreement. The case made by the appellant at the trial would not probably have lasted many minutes had it not been for the document called the will, which was supposed to afford confirmation of the appellant's story, but is not such in reality. There is not to be found in it any allusion to any agreement or promise or representation, nor is the intended devise for her benefit said to be as a reward for her services; and while she alleges a promise to leave her the Manor Farm, the will gives her a life estate in it, and in all other the intended testator's real estate, and in all his personal estate. The intended will does indicate a desire to benefit the appellant very largely, but contains not a word that is referable to such an agreement as is alleged. The agreement relied on by the appellant in her defence is thus put forward in para. 3: E

“and, it being inconvenient to him, or he being unable to pay the said arrears of her said wages, he, in order to induce her to continue to serve him, proposed to the defendant, and represented to her that if she would not press him for payment of her wages, and would continue to serve him, and remain with him while he lived, he would leave her a life estate in the property which he expected his uncle would leave him, and in any property of which he might die possessed.” F

and in para. 4, G

“that it was agreed between the said Thomas Alderson and the defendant, that in consideration of the defendant remaining and continuing so to serve him during his life, and of the defendant forbearing to press him for payment of the said arrears, and in lieu of wages for the future, the said Thomas Alderson, would, by his will leave to the defendant a life estate in his property, to take effect at his death, and that he would duly secure to her the said life estate.” H

It is obvious that these two paragraphs were taken from the dispositions found in the intended will, and that there was no evidence to sustain either; but, without intending to confine the appellant to the technical statement put forward by the pleader, and giving her the full benefit of her evidence and of the verdict of the jury, it seems to me that the correct view is that, although Alderson probably made I

A representations to her of the benefits he intended to confer on her if she remained with him during his life, there never was any agreement binding on him to do so. I concur in the observations which have been made in the course of the case as to the inexpediency of giving effect to an agreement of the character in question, alleged by the appellant to have been entered into verbally, more than twenty years ago, not binding on her, and not to come into effect, so far as Alderson was
B concerned, until after his death, and resting on the unaided testimony of the appellant. If an instance was wanted to justify the wise provisions of the Statute of Frauds, and of the Wills Act, we find it in the case now before us.

On the question of costs I confess that I have some difficulty. My view at the commencement was that the costs should follow the event; but, on reflection, considering that the appellant succeeded in obtaining the judgment of the primary
C court, and that she has lost everything, not only the intended provision made for her by the imperfect will, and the benefit conferred upon her by it, but also her wages; and, further, taking into account that the Court of Appeal has, in the exercise of its discretion, with which we cannot interfere, given against her the costs in the primary court and in the Court of Appeal, I think that here we may, under these circumstances, exercise our discretion in favour of the appellant in
D the manner indicated by the Lord Chancellor.

Appeal dismissed.

Solicitors: *Harvey, Oliver & Capron*, for *J. Proud*, Bishop Auckland; *Ridsdale & Son*, for *W. W. & W. J. Watson*, Barnard Castle.

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

E

F

TITTERTON v. COOPER

[COURT OF APPEAL (Lord Coleridge, C.J., Brett and Cotton, L.JJ.), June 29, 30, 1882]

[*Reported* 9 Q.B.D. 473; 51 L.J.Q.B. 472; 46 L.T. 870;
30 W.R. 866]

G

Bankruptcy—Trustee in bankruptcy—Liability—Rent—Rent becoming due after appointment.

H

A trustee in bankruptcy, who has not disclaimed a lease held by the liquidating debtor, is personally liable for rent reserved by the lease which becomes due after his appointment as trustee. To establish such liability it is not necessary to prove any acceptance of the lease by the trustee, express or to be implied from his conduct.

I

Per LORD COLERIDGE, C.J.: If a lease is onerous the trustee is entitled to disclaim after having taken a reasonable time to decide what course is best to adopt, and the disclaimer sets him free from the burden of the covenants and liabilities of the lease, but, if he does not disclaim, he has the property and with it the burdens which would have entitled him to disclaim.

Notes. The Bankruptcy Act, 1869, was repealed by the Bankruptcy Act, 1883. The present statute governing bankruptcy matters is the Bankruptcy Act, 1914 (2 HALSBURY'S STATUTES (2nd Edn.) 321), of which s. 18 vests the property of the bankrupt in the trustee, and s. 54 empowers the trustee to disclaim onerous property.

Distinguished: *Re Zappert, Ex parte Trustee* (1884), 1 Morr. 72. Referred to: *Alloway v. Steere*, ante p. 164; *Hopkinson v. Lovering* (1883), 11 Q.B.D. 92;

Rendall v. Andreae (1892), 61 L.J.Q.B. 630; *Stein v. Pope*, [1902] 1 K.B. 595; *A Hole v. Cuzen*, [1953] 1 All E.R. 87.

As to the vesting in the trustee of the bankrupt's property and as to the trustee's right to disclaim, see 2 HALSBURY'S LAWS (3rd Edn.) 382-390, 457-463. For cases see 4 DIGEST (Repl.) 286 et seq., 5 DIGEST (Repl.) 1006 et seq.

Cases referred to :

- (1) *Goodwin v. Noble* (1857), 8 E. & B. 587; 27 L.J.Q.B. 204; 4 Jur.N.S. 208; 120 E.R. 219; 5 Digest (Repl.) 1003, 8079.
- (2) *Turner v. Richardson* (1806), 7 East, 335; 3 Smith, K.B. 330; 103 E.R. 129; 5 Digest (Repl.) 1003, 8085.
- (3) *Hastings v. Wilson* (1816), Holt, N.P. 290; 5 Digest (Repl.) 1003, 8084.
- (4) *Re Sneezum, Ex parte Davis* (1876), 3 Ch.D. 463; 45 L.J.Bey. 137; 35 L.T. 389; 25 W.R. 49, C.A.; 5 Digest (Repl.) 1005, 8102.
- (5) *Re Solomon, Ex parte Dressler* (1878), 9 Ch.D. 252; 48 L.J.Bey. 20; 39 L.T. 377; 43 J.P. 23; 27 W.R. 144, C.A.; 5 Digest (Repl.) 1021, 8262.
- (6) *Wilson v. Wallani* (1880), 5 Ex.D. 155; 49 L.J.Q.B. 437; 42 L.T. 375; 44 J.P. 475; 28 W.R. 597; 5 Digest (Repl.) 1007, 8122.

Also referred to in argument :

- Cartwright v. Glover* (1861), 2 Giff. 620; 30 L.J.Ch. 324; 3 L.T. 880; 7 Jur.N.S. 857; 9 W.R. 408; 66 E.R. 260; 5 Digest (Repl.) 1006, 8113.
- Mackley v. Pattenden* (1861), 1 B. & S. 178; 30 L.J.Q.B. 225; 4 L.T. 285; 25 J.P. 517; 7 Jur.N.S. 1056; 9 W.R. 601; 121 E.R. 681; 5 Digest (Repl.) 1004, 8093.
- Re Roberts, Ex parte Brook* (1878), 10 Ch.D. 100; 48 L.J.Bey. 22; 39 L.T. 458; 43 J.P. 53, 286; 27 W.R. 255, C.A.; 5 Digest (Repl.) 1006, 8108.
- Lowry v. Barker* (1880), 5 Ex.D. 170; 49 L.J.Q.B. 433; 42 L.T. 215; 28 W.R. 559, C.A.; 5 Digest (Repl.) 1015, 8212.
- Mills v. East London Union* (1872), L.R. 8 C.P. 79; 42 L.J.C.P. 46; 27 L.T. 557; 37 J.P. 6; 21 W.R. 142; 31 Digest (Repl.) 370, 5012.
- Re Hawkins, Hawkins v. Hawkins* (1880), 13 Ch.D. 470; 42 L.T. 306; 44 J.P. 329; 28 W.R. 526, C.A.; 23 Digest (Repl.) 486, 5530.
- Re Foster, Ex parte Blandy* (1835), 1 Deac. 286, Ct. of R.; 5 Digest (Repl.) 1023, 8274.
- Lindsay v. Limbert* (1827), 12 Moore, C.P. 209; 5 L.J.O.S.C.P. 52; 5 Digest (Repl.) 1004, 8090.
- Copeland v. Stephens* (1818), 1 B. & Ald. 593; 106 E.R. 218; 30 Digest (Repl.) 479, 1217.

Appeal from a decision of HUDDLESTON, B., in an action by a lessor for rent brought against the trustee in bankruptcy of the lessee.

The plaintiff sued the defendant, who was trustee in liquidation of one Morrison, to recover rent payable under a lease by which Morrison had held a wharf as tenant to the plaintiff. The petition for liquidation was filed on Dec. 8, 1880. On Dec. 30, 1880, the defendant was appointed trustee under the liquidation. The registrar's certificate of his appointment was dated Jan. 3, 1881. On Jan. 5 notice was given to the defendant requiring him to decide whether he would disclaim the lease or not. On Feb. 4 notice was given to the plaintiff of an application to the court by the defendant for an extension of time within which to decide. A fortnight's further time from Feb. 7 was given. On Feb. 18 another application for further time was made and refused. Shortly afterwards the defendant entered into negotiations for the sale of the lease to a third party, but these negotiations ultimately went off, and the proposed sale was never carried out. The defendant had never entered upon or taken possession of the premises comprised in the lease, but he did not disclaim. The first quarter's rent claimed in the action became due at Christmas, 1880, before the appointment of the defendant as trustee. At the trial, which took place before HUDDLESTON, B., without a jury, judgment was given for the plaintiff for the whole amount of rent claimed. The trustee appealed.

A By the Bankruptcy Act, 1869, s. 17 :

"Until a trustee is appointed the registrar shall be the trustee for the purposes of this Act, and immediately upon the order of adjudication being made the property of the bankrupt shall vest in the registrar. On the appointment of a trustee the property shall forthwith pass to and vest in the trustee appointed . . ."

B By s. 23 :

"When any property of the bankrupt acquired by the trustee under this Act consists of land of any tenure burdened with onerous covenants, of unmarketable shares in companies, of unprofitable contracts, or of any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money, the trustee, notwithstanding he has endeavoured to sell, or has taken possession of such property, or exercised any act of ownership in relation thereto, may by writing under his hand disclaim such property, and upon the execution of such disclaimer the property disclaimed shall, if the same is a contract, be deemed to be determined from the date of the order of adjudication, and if the same is a lease be deemed to have been surrendered on the same date, and if the same be shares in any company be deemed to be forfeited from that date, and if any other species of property it shall revert to the person entitled on the determination of the estate or interest of the bankrupt; but if there shall be no person in existence so entitled, then in no case shall any estate or interest therein remain in the bankrupt. Any person interested in any disclaimed property may apply to the court, and the court may, upon such application, order possession of the disclaimed property to be delivered up to him, or make such other order as to the possession thereof as may be just."

By s. 24 :

"The trustee shall not be entitled to disclaim any property in pursuance of this Act in cases where an application in writing has been made to him by any person interested in such property, requiring such trustee to decide whether he will disclaim or not, and the trustee has for a period of not less than twenty-eight days after the receipt of such application, or such further time as may be allowed by the court, declined or neglected to give notice whether he disclaims the same or not."

G *Cohen, Q.C.*, and *Peile* for the trustee.
Cock (Kemp, Q.C.), with him) for the plaintiff.

H LORD COLERIDGE, C.J.—We have to put a construction on ss. 17 and 23 of the Bankruptcy Act, 1869. The action is brought against the trustee of a bankrupt to recover the rent of certain premises, of the lease of which it is said he became assignee by the operation of the Bankruptcy Act. The case on behalf of the trustee was argued on two grounds. First, it was said that ss. 17 and 23 of the Bankruptcy Act, 1869, do not make any alteration in the law as it stood under the Bankruptcy Law Consolidation Act, 1849, except so far as the words of s. 23 expressly change the law; and, secondly, it was said, assuming that the law remains as it was before the statute of 1869, and that something must be done I by the trustee in order to give rise to liability, here the necessary acts have not been done, and, therefore, the trustee is not liable.

My opinion on both points is against the trustee. In the first place, the Act of 1849 differs materially from the Act of 1869; the latter Act was passed to change the law, and get rid of the provisions of the Act of 1849. According to the earlier law leases passed by the appointment of the assignee; the word "vest" occurs in ss. 141 and 142 of the Act of 1869. The argument on behalf of the trustee is, that because the word "vest" occurs in both Acts it must be construed in the later Act as it was in the former, and some such conduct is still required as was

necessary under the old Act in order to make the expression "vest" have any practical effect. It is said that, although the property vested, still the trustee must do some unequivocal act, as was said in *Goodwin v. Noble* (1), The two Acts, however, are in very different terms. I rely not so much on the enacting part of the Act of 1869 (s. 17), as on the qualification introduced by the subsequent section, s. 23. Three cases were dealt with by s. 145 of the Act of 1849—first, where the assignees elected to take the lease; secondly, where the assignees declined to take the lease and, thirdly, where they remained passive. In this last case something might be done by the holder of the property which would have the effect of compelling the assignees to make an election. That being the scheme, s. 145 showed the law to have been that, although under certain circumstances the property vested in the assignees, still to make them liable for the rent it was contemplated that something must be done. The decisions on the old Act which have been cited are determinations as to what was the meaning of these sections in that Act; as such they carry conviction to my mind, but in the later statute we find a very different set of provisions.

In the first place the words of s. 17 of the Act of 1869 are very different from the provisions contained in the former Act. The provision that

"immediately upon the order of adjudication being made the property of the bankrupt shall vest in the registrar"

was not in the earlier Act. There was no immediate passing of the property out of the bankrupt, through the conduit-pipe of the registrar, on to the trustee when appointed. The provision

"on the appointment of a trustee the property shall forthwith pass to and vest in the trustee appointed,"

was also absent from the earlier Act. Therefore, the Acts are very different from one another on the construction of the vesting sections, if we give full effect and a reasonable construction to the words "immediately" and "forthwith" in s. 17 of the Act of 1869. Again, s. 23 of the Act of 1869 is very different from the correlative section (s. 145) in the Act of 1849. Section 23 enacts, in very different language from that used in the old Act, that:

"When any property of the bankrupt acquired by the trustee under this Act consists of land of any tenure burdened with onerous covenants . . . [or] of unprofitable contracts, . . . the trustee, notwithstanding he has endeavoured to sell, or has taken possession of such property, or exercised any act of ownership in relation thereto, may by writing under his hand disclaim such property . . ."

whereupon the contract shall be determined, or lease surrendered from the date of the order of adjudication—that is, the act of disclaimer relates back to the date of the order of adjudication. The mere statement of these provisions shows how very different this language is from that which was contained in s. 145 of the earlier Act.

In my opinion, the reasonable interpretation is that Parliament meant what it said, and that the lease vests in the trustee on his appointment. If the lease is onerous or unprofitable he is entitled to disclaim after having taken a reasonable time to decide what course is best to adopt, and the disclaimer sets him free from the burden of the covenants and liabilities of the lease, and relates back to the date of the order of adjudication. Therefore, it relieves him altogether. If the trustee has acquired property, that property has vested in him. The Act says, in providing for the right of disclaimer, "when any property of the bankrupt acquired by the trustee . . ." The reasonable inference seems to be that if the trustee does not disclaim he has the property, and he has it with the burdens which would have entitled him to disclaim. He may disclaim, but if he does not do so he must accept the property and bear the burdens which are incidental to it. By s. 24 of the Act of 1869, if the trustee allows twenty-eight days to elapse without disclaiming after a written application has been made to him requiring him to

A decide whether he will disclaim or not, he loses the right to disclaim unless by special leave of the court. Putting the two sections together, I think the fair result is that the property passes to the trustee on his appointment, and he might disclaim. If he does not do so within twenty-eight days after being applied to, that is the limit of time fixed, and his right to disclaim is gone unless the court extends the time. I think also that this is the proper interpretation in the case of
B the registrar before a trustee is appointed, and also in case of the devolution of the property from one trustee to another if there is any interval between the date at which the person first appointed ceases to be trustee and the appointment of a second trustee.

I admit that what I say of the trustee is true also of the registrar [see now Bankruptcy Act, 1914, s. 74 (1)], but generally the property would only be in the
C registrar for a very short time, for by s. 14 the first thing to be done after the order of adjudication is to call a meeting of the creditors, who shall appoint a trustee. It is imperative. Therefore, only a short period can elapse between the order of adjudication and the appointment of a trustee, and, therefore, the question of the liability of the registrar to such a claim as the present is not practically very important or likely often to arise.

D For the reasons which I have given, I think it is immaterial whether anything has been done by the trustee in the present case which would have been sufficient to show under the old law that he had elected to accept the lease. I am of opinion that it is not necessary that he should accept, but that by the Act the lease vests in him, and he can only get rid of it by disclaimer, and, therefore, on that ground the trustee fails. I think further that the facts of the present case would be
E sufficient to fix the trustee with liability if it were within the old cases which have been referred to. Having attempted to sell, and negotiated with the intending purchaser, and insisted on his right to enforce the contract, I think the trustee has done enough to bind him, so that, even if an unequivocal act showing an intention to accept the lease were necessary in order to make him liable, he has
F done enough for that purpose. I think that *Turner v. Richardson* (2) and *Hastings v. Wilson* (3) show that what has been done here would under the old law have been sufficient. Where nothing more was done by the assignee than to get materials on which to exercise his judgment, that was held to be only preliminary to the exercise of his judgment by way of election. In *Turner v. Richardson* (2) the assignee only put up the term to auction to see whether anyone would give
G a sufficient sum for it to make it worth while to take to the term and sell it, and it was held that this was not electing to accept the term, because it was preliminary to electing whether or not he would accept. *Turner v. Richardson* (2) was referred to in *Hastings v. Wilson* (3) and GIBBS, C.J., distinguished the former case on the ground that more had been done in the case then before him than had been done in *Turner v. Richardson* (2). In *Hastings v. Wilson* (3) there had been actual
H negotiation between the assignees who put up the premises to auction and a purchaser who had paid a deposit as to the completion of the contract.

As to the case now before us, I can scarcely conceive anything which would have come more within the Act than what the trustee has done in dealing with this lease. Therefore, on the true construction of ss. 17 and 23 of the Act of 1869, irrespectively of what the trustee has done, he is liable, because of the difference between the terms contained in the present Act and the terms of the former
I Act, and, even if an unequivocal act were necessary, enough has been done here to make an election and fix the trustee. There is a lesser point, on which I think the trustee is entitled to succeed, and that is that, as the lease only vests in the trustee from the date of his appointment, and as the rent became due on the quarter-day before the trustee was appointed, he is not liable for the first quarter's rent claimed. Therefore, as to that one quarter, the trustee is released from personal liability, but the bankrupt's estate remains liable. I am of opinion that the appeal ought to be allowed as to the first quarter's rent only.

BRETT, L.J.—This is an action against the trustee of a bankrupt to recover A
rent payable under a lease. The action is against him personally, and the question
which we have to decide is whether the trustee is personally liable for all or any of
the quarterly payments claimed. The question is raised whether the lease vested
in the trustee. It is not denied that, if it did vest in him, he is personally liable.
If the lease vested in him as assignee of the lease, then by common law he would
be liable for rent. It is admitted that he has not disclaimed.

The gist of the argument on behalf of the trustee is that the lease had not
vested. It was said that a lease cannot vest in the trustee of a bankrupt unless the
trustee accepts the lease, and it is said that the trustee in the present case has
done no act which can amount to an unequivocal act of acceptance. It is said that
a mere omission to disclaim, although the trustee has received notice requiring him
to decide whether he will disclaim or not, is no evidence of acceptance. This
argument admits that, if the trustee did any act amounting to an acceptance, the
lease vested in him. If the trustee must do some personal positive act amounting
to an acceptance, what sort of act is necessary? It is said that the act must be
unequivocal. If this were necessary, I must say that I think the trustee did an
unequivocal act in the present case. There are many such acts, but the most
common are taking possession or exercising some unequivocal act of ownership.
Here there was an attempt to sell the lease. It has been held in *Turner v.*
Richardson (2) that a mere putting up for sale by an assignee in bankruptcy, not
describing himself as the vendor, is not a sufficient act of ownership; it is a nice
point, but it was so held, the act done being considered to have been preliminary
to determining whether the assignee should exercise acts of ownership or not; but
in *Turner v. Richardson* (2) it was said that, if the assignee puts the lease up for
sale as owner, that is an act of ownership, for he cannot assert that he, as owner,
is willing to sell, and afterwards say that he never was owner. This would fix the
trustee here with liability, even if his argument on the construction of the Act
were correct.

I am, however, of opinion that the true construction of the Act is not that
contended for on behalf of the trustee, but that the lease vests in the trustee on
his appointment without any act of acceptance on his part. The question turns
entirely on the true construction of the vesting section of the Act of 1869, s. 17.
Section 23 enables the trustee who has acquired the property afterwards to disclaim
it. Section 23 can only be used to help to the true construction of s. 17. It is said
for the trustee that s. 23 cannot be called in to explain s. 17, because the lease had
never vested under s. 17. A true canon of construction is that in seeking to ascer-
tain the meaning of an Act of Parliament one may consider what the law was
when the Act passed. Therefore, in the present case we may look back to the
Act of 1849. The vesting section in that Act was s. 142. If that section had
stood alone it would have vested the property in the trustee without any positive
act on his part. But s. 145 of that Act was used to construe the vesting section,
just as in the present case s. 23 of the Act of 1869 was attempted to be used to
construe s. 17. The courts held that s. 145 threw light on the meaning of s. 142,
and obliged them to construe s. 142 in such a way as to say that the lease did not
vest without an act of acceptance. The difficulty was caused by the presence of
s. 145 of the Act.

If we look at the vesting section in the Act of 1869 (s. 17), we find that the words
are different, and the proper conclusion is that they differ for some reason. The
words of s. 17 of the Act of 1869, if read grammatically, are as strong as they
can be. That a lease is "property" within the meaning of s. 17 there can be no
doubt, for it clearly comes within the definition given in s. 4, and if we look at
s. 23 it is obvious that land and a lease are treated as property in s. 17, by which
the property of the bankrupt is to vest in the registrar immediately upon the
order of adjudication being made, and on the appointment of a trustee it forthwith
vests in the trustee. If, then, the property vests in the trustee at the moment of
his appointment, it follows that to say that he may make tentative inquiries before

A accepting such property is to do away with the word "forthwith," and to keep alive the difficulty which arose on the old Act. It was clearly intended that on his appointment the property should vest in the trustee. It is said that the words of s. 23 do away with s. 17 by means of the provision that the trustee may disclaim

B "notwithstanding he has endeavoured to sell, or has taken possession of such property, or exercised any act of ownership in relation thereto."

The argument is that on the interpretation contended for on behalf of the plaintiff those words would be immaterial; but if those words were not there it might be argued that, if the trustee had done any positive act which showed he treated himself as owner, he could not disclaim. Such an argument had been used in

C the cases before the Act of 1869, and these words were put in to get rid of the doubt which had been raised. I think there is nothing in s. 23 to militate with the construction of s. 17, looking at the then state of the law. I think there is nothing in s. 24 to help either side. Counsel for the trustee relied on ss. 89, 90, but they do not help him. What is dealt with in those sections is not property which would pass by s. 17; they are not limiting, but enabling, clauses, empowering

D the court to put in the trustee's hands certain moneys which could not otherwise have been made available.

I think, therefore, no act of acceptance was necessary. But it is contended that we are prevented from giving this construction to the Act by the cases which have been referred to. *Re Sneezum, Ex parte Davis* (4), does not govern this case. There certain matters were decided, not in an action against the trustees,

E but in proceedings in which the question of the trustees' personal liability arose. The liquidating debtor had entered into a mercantile executory contract, which the trustees at first went on with. After a time they ceased to fulfil the terms of the contract. Therefore, there was a non-fulfilment of the contract for which it was sought to establish a claim, and the question was: Could the trustees be personally liable for such non-fulfilment? It was answered that they could not under any

F circumstances. I take it the ground of that decision was that, whether the trustees took the contract or not, at the most they could only be assignees of the contract, and as such could not be sued, because there was no privity of contract. But the assignee of a lease is personally liable, because there is privity of estate.

Then it is said that in *Re Solomon, Ex parte Dressler* (5), the court relied upon the affirmative acts of the trustees, as showing that they had accepted the lease.

G I admit that in that case I did state those facts, and I think JAMES, L.J., did the same; but, if there are facts which make the case before the court an a fortiori case, judges usually do state them. I did not say in that case that, if there had not been those facts, the decision would have been otherwise, and there is nothing in that case inconsistent with the view which I now adopt. On the interpretation of the statute, I agree with the judgment of HUDDLESTON, B., in the court below, and

H with that of STEPHEN, J., in *Wilson v. Wallani* (6). Therefore, so far, I think the decision appealed from is right, but as to the first quarter (a point which was rather reserved for argument here than decided on argument in the court below), I think the trustee is not personally liable. The question is one of personal liability, and a man cannot be personally liable as assignee of a lease for rent which became due before he was assignee. As to this a difficulty arose from the case

I being one of bankruptcy. It was suggested that, as the lease was vested in the trustee by a bankruptcy statute, it vested from the date of the adjudication or of the act of bankruptcy. The question being whether personal liability vested, I cannot see how, on any principle of law, the doctrine of relation could be applicable. The time fixed by s. 17 is the appointment of the trustee, and nothing vests in the trustee before that date. If he becomes assignee of a lease in the middle of a quarter so that the quarter-day is after he becomes assignee, he would be liable for the whole quarter's rent. Here the quarter-day in question was before the trustee became assignee of the lease, and, therefore, he is not personally liable.

I am of opinion that the appeal ought to be dismissed, except as to the first A
quarter's rent.

COTTON, L.J.—In this case the trustee has been held liable for the rent, not on the ground of any special provision in the Bankruptcy Act declaring that he shall be so liable, but on the ground that under the Act he was assignee of the lease. In the decided cases under the earlier Bankruptcy Acts it was held that, when B
assignees in bankruptcy became entitled to a lease, in order to make them liable for the rent it must be shown that they had done something amounting to an acceptance. It was attempted to be established that to make them liable they must have a beneficial occupation. It was held that this was not so, but the question was whether facts had occurred which showed that they had accepted the lease. Not possession, but whether the assignees had consented to accept the C
lease, was the true test. Under the former Acts it was held that acceptance was necessary in order to create the liability to pay rent, even where a conveyance was not necessary in order to vest the lease in the assignees in bankruptcy, just as in an ordinary case of transfer what is transferred must be accepted by the transferee. If it were necessary in the present case that there should be an acceptance, I am of opinion that enough was done to amount to a sufficient acceptance of the D
lease. With full knowledge of the facts, the trustee took upon himself, as owner, to dispose of the property.

A case has been referred to where it was held that putting up a lease for sale by auction was not an acceptance (*Turner v. Richardson* (2)), but there the putting up for sale was done as a mere test, in order to ascertain the value of the lease for the purpose of deciding whether it ought to be accepted or not. E

That would dispose of the case, but I wish to say further that I do not differ from the other members of the court on the construction of the statute. We have been referred to the cases decided on the old Acts, in which it was held that an acceptance was necessary; but when the question arises on this Act we have to consider provisions which differ materially from those contained in the previous statutes. The principal section of the Act of 1869 relating to the case is s. 17, F
which differs from the previous statutes in providing that on the appointment of a trustee the property shall forthwith pass to and vest in him. That is an enactment that the property shall vest in the trustee without any further act done by him. It is said that this is hard on the trustee, but he has a right to be indemnified out of the bankrupt's estate. Moreover, s. 23 provides an effectual remedy by means of disclaimer, the effect of which on the lease is the same as if it had been G
surrendered at the date of the adjudication. The section is in very general terms. To prevent the argument, which otherwise might be raised, that the trustee could not disclaim after having dealt with the property, it introduces the words,

"notwithstanding he has endeavoured to sell, or has taken possession of such property, or exercised any act of ownership in relation thereto."

Then s. 83 (6), provides:

"The property of the bankrupt shall pass from trustee to trustee, including, under that term, the registrar when he fills the office of trustee, and shall vest in the trustee for the time being during his continuance in office, without any conveyance, assignment, or transfer whatever." H

I
That points to this, that there need be no acceptance of any of the property of the bankrupt in order to make it become the property of the trustee. The Act proceeds on the footing that the property at once vests in the registrar, and then in the trustee as soon as he is appointed. Our attention has been called to ss. 89 and 90; but those sections relate to property which is not assignable, and is not affected by s. 17. There is also s. 88 enabling the trustee to apply for sequestration of the profits of a benefice, but that, in my opinion, does not prevent a fair interpretation being given to s. 17.

A Reliance was also placed on the decisions on the Act of 1849, but I do not think they can govern the present case, for s. 145 of that Act was in different terms from those of s. 23 of the Act now in force. Section 145 empowered the assignees to decline to accept the lease, and gave a remedy to the person entitled to the rent if the act of the assignees, with regard to the lease, was equivocal, whereas s. 23 of the present Act says nothing about accepting or declining, but provides for the disclaimer of property already acquired. This difference justifies a different interpretation of similar words in s. 142 of the Act of 1849 from that placed on the words of s. 17 of the Act of 1869.

B It is said that the cases decided on the present Act are favourable to the contention put forward on behalf of the defendant. The first of these cases referred to is *Re Sneezum, Ex parte Davis* (4). All that case decided was that where trustees at first carried on a continuing contract entered into by the bankrupt, and afterwards ceased to carry it on, ss. 23 and 24 and s. 25 (2) did not make them personally liable for damages occasioned by the breach of the contract. MELLISH, L.J., after referring to the words of s. 25 (2), which empower the trustee to carry on the business of the bankrupt, says (3 Ch.D. at p. 475):

D "Are those words sufficient to make the trustee personally liable for any damage the other party to the contract may have sustained by reason of the trustee throwing up a contract of the bankrupt after he had carried it on for a time, and after he had neglected to disclaim it; or are they sufficient to make the trustee liable to pay out of the estate the full amount of the damages occasioned by the breach? In my opinion, those words are wholly insufficient for that purpose."

E In that case the trustees disclaimed, and the question was whether the estate or the trustees should be held liable for damages for the breach of contract. If the trustees had been assignees of the contract without the statute, there would have been no liability, because there would have been no privity of contract. The assignee of a contract would not be personally liable, and there is nothing in the Act to make him so. So here the assignee of a lease is left in the same position as an assignee of a lease would have been in before the Act, being liable by reason of privity of estate.

F As to *Re Solomon, Ex parte Dressler* (5), I agree with what has been said by BRETT, L.J. There the trustees had taken possession, so there was an acceptance of the lease, whether on the true construction of the Act it was necessary or not, and, therefore, this question did not arise. No doubt JAMES, L.J., said the trustees need not have taken possession, but that was an observation thrown out during the course of the case in answer to the argument of hardship. For these reasons my opinion is that on the true construction of the statute, without acceptance, on the appointment of a trustee, s. 17 makes him assignee of the lease and liable on the covenants. I think the defendant is not liable for the quarter's rent which became due before he was appointed trustee.

H *Appeal dismissed.*

Solicitors: W. A. Downing; Keen & Rogers.

[Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.]

CLARK v. REGINAM

[QUEEN'S BENCH DIVISION (Grove and Hawkins, J.J.), November 24, December 1, 1884]

[Reported 14 Q.B.D. 92; 54 L.J.M.C. 66; 52 L.T. 186;
49 J.P. 246; 33 W.R. 226; 1 T.L.R. 109; 15 Cox, C.C. 666]

Criminal Law—Vagrancy—Rogue and vagabond—Frequenting street with intent to commit felony—"Frequenting"—Need to prove more than one visit to street.

By s. 4 of the Vagrancy Act, 1824, as amended by s. 15 of the Prevention of Crimes Act, 1871, every suspected person or reputed thief frequenting any street, or any highway, or any place adjacent to a street or highway, with intent to commit felony, shall be deemed a rogue and vagabond.

What amounts to "frequenting" a street within the meaning of s. 4 of the Act of 1824 must depend on the circumstances of each particular case. One visit (or per GROVE, J., two visits) to a street, highway, or adjacent place, with or without an intent to commit a felony, does not amount to "frequenting."

Criminal Law—Vagrancy—Rogue and vagabond—Frequenting street with intent to commit felony—No opportunity to commit offence—Need to prove overt act or attempt.

Per HAWKINS, J.: A man who frequents a public street having in his mind the intent to commit a felony when and wheresoever opportunity arises is liable to the penalties of the Vagrancy Act, 1824, even though no opportunity to commit the offence arises. The overt act or the attempt to carry out the intent is not an essential part of the offence against s. 4 of the Act.

Notes. Considered: *Clark v. Taylor* (1948), 92 Sol. Jo. 634. Referred to: *Apothecaries Co. v. Jones*, [1893] 1 Q.B. 89.

As to offences by vagrants, see 10 HALSBURY'S LAWS (3rd Edn.) 697-703; and for cases see 15 DIGEST (Repl.) 921 et seq. For the Vagrancy Act, 1824, s. 4, as amended by s. 15 of the Prevention of Crimes Act, 1871, see 18 HALSBURY'S STATUTES (2nd Edn.) 203 et seq.

Cases referred to:

- (1) *Re Cross* (1857), 1 H. & N. 651; 26 L.J.M.C. 28; 28 L.T.O.S. 257; 21 J.P. 87; 5 W.R. 307; sub nom. *Ex parte Cross*, 3 Jur.N.S. 320; 15 Digest (Repl.) 926, 8878.
- (2) *Anon.* (1850), 17 Q.B. 834, n.
- (3) *R. v. Brown* (1852), 17 Q.B. 833; 16 Jur. 101; 117 E.R. 1500; sub nom. *Ex parte Brown*, 21 L.J.M.C. 113; 16 J.P. 69; sub nom. *Re Brown*, 18 L.T.O.S. 238; 15 Digest (Repl.) 926, 8871.
- (4) *Re Jones* (1852), 7 Exch. 586; 16 Jur. 801; sub nom. *Ex parte Jones*, 21 L.J.M.C. 116; 16 J.P. 298; sub nom. *R. v. Jones*, 19 L.T.O.S. 94; 15 Digest (Repl.) 926, 8872.
- (5) *Re Timson* (1870), L.R. 5 Exch. 257; sub nom. *Ex parte Timson*, 39 L.J.M.C. 129; 18 W.R. 840; sub nom. *Timson's Case*, 22 L.T. 614; 15 Digest (Repl.) 926, 8873.

Case Stated by justices of South Shields.

The appellant was found in Victoria Road, South Shields, by two constables at about 1.50 a.m. on Mar. 5, 1884, having in his possession part of a brass pump—the chamber part, or that portion which is usually exposed above the ground for use. It appeared as if it had been torn or wrenched off from a continuation pipe. The appellant was stopped on the suspicion of the constables, and was asked to give an account of how he became possessed of it, and where he was taking it to. The appellant stated that he had got it from a Mr. Johnstone, an engineer, who

A resided at No. 40, Meldon Terrace, South Shields; that he had just left Johnstone, who was well known to him, at the door of that place; and that he was taking the metal to a Mr. Hepple, an engineer, to be repaired. He also stated that his name was George Wilson, and that he resided at 52, Adelaide Street. The appellant was not known to the two officers, but the latter, having their suspicions aroused, took him to the police station, and on their way they met other constables to whom
B the prisoner was known as a convicted thief, and that his name was not George Wilson but William Clark. The prisoner was locked up and inquiries made, but no such person as Mr. Johnstone could be found at No. 40, Meldon Terrace or at any other place. The appellant was informed of the inquiries made by the police, and of their inability to verify his statement as to the ownership of the pump by Mr. Johnstone, and that no such number existed in Meldon Terrace and no such
C person lived there, and that an owner for the pump had not been found. It was further discovered, and the appellant was informed of it, that Mr. Hepple had removed some time ago to North Shields. The appellant was reminded that he, having been a constable in the South Shields police force, well knew what his duty was, and what it was requisite he should do to satisfy the police, but this he refused to do. The appellant was then charged by the police under the Vagrancy
D Act, 1824, s. 4, as amended by the Prevention of Crimes Act, 1871, s. 15, with frequenting Victoria Road with intent to commit a felony. To this charge he pleaded Not Guilty. In addition to the facts above stated, it was proved on the evidence of two constables that the appellant was tried and convicted at the Durham Quarter Sessions on Feb. 25, 1876, for stealing rope, and by that court sentenced to six months' imprisonment with hard labour, and that since then he had been
E seen in the company of convicted thieves, and was known to the police as an associate of thieves. The justices convicted the appellant and sentenced him to one month's hard labour.

By s. 4 of the Vagrancy Act, 1824 :

F "... every suspected person or reputed thief, frequenting . . . any street, highway, or avenue leading thereto, or any place of public resort, or any avenue leading thereto, or any street, highway, or place adjacent, with intent to commit felony . . . shall be deemed a rogue and vagabond within the true intent and meaning of this Act; and it shall be lawful for any justice of the peace to commit such offender (being thereof convicted before him by the confession of such offender, or by the evidence on oath of one or more credible witness or witnesses) to the house of correction, there to be kept to hard labour for any time not exceeding three calendar months . . ."

G By the Prevention of Crimes Act, 1871, s. 15 :

H "Whereas doubts are entertained as to the construction of the said provision, and as to the nature of the evidence required to prove the intent to commit a felony : Be it enacted, firstly, the said section shall be construed as if instead of the words 'highway or place adjacent,' there were inserted the words 'highway or any place adjacent to a street or highway,' and secondly that in proving the intent to commit a felony it shall not be necessary to show that the person suspected was guilty of any particular act or acts tending to show his purpose or intent, and he may be convicted if from the circumstances of the case, and from his known character as proved to the justice of the peace or court before whom or which he is brought, it appears to such justice or court that his intent
I was to commit a felony . . ."

John Edge for the appellant.

Walton for the prosecution.

Cur. adv. vult.

Dec. 1, 1884. The following judgments were read.

GROVE, J., referred to the evidence and continued : There was, therefore, more than suspicion against the appellant since, first of all, he was a convicted thief,

and, secondly, the portion of the pump was presumably stolen. The facts, however, did not show that the man had ever been found in the street before. On this evidence the prisoner was convicted, under the Vagrancy Act, 1824, s. 4, and the Prevention of Crimes Act, 1871, s. 15, for that he, being a suspected person and reputed thief, unlawfully did frequent a certain street in the borough of South Shields, called Victoria Road, for a certain unlawful purpose, to wit, with intent to commit a felony. The appellant, however, contends before us, in the first place, that there is not any sufficient evidence from which the magistrates could rightly conclude that he intended to commit a felony; and, secondly, that, even if they could have rightly come to this conclusion, there is no evidence that he frequented the street in question.

As to the first point, I cannot say that the magistrates were wrong in assuming that a man found at that time in the morning, and giving a false account as to who he was and from where he got the article that was found in his possession, might be not unreasonably supposed to be looking about for anything else worth stealing, and I should not be inclined to question the decision of the justices on this ground.

Then comes the real difficulty. The words of the Act of 1824, s. 4, provide :

"... suspected person or reputed thief, frequenting any river, canal, or navigable stream, dock, or basin, or any quay, wharf, or warehouse, near or adjoining thereto, or any street, highway, or avenue leading thereto, or any place of public resort, or any avenue leading thereto, or any street, highway, or place adjacent, with intent to commit felony . . . shall be deemed a rogue and vagabond . . ."

Section 15 of the Act of 1871 enacts that, whereas doubts were entertained as to the construction of that section, it is to be construed as if, instead of the words "highway, or place adjacent," there were inserted the words "any highway or any place adjacent to a street or highway." The whole difficulty, therefore, in this case arises from the question what interpretation we are to put on the word "frequenting." I certainly, as far as the present case is concerned, am not surprised that the justices came to the conclusion they did, but I am unable myself to come to the same conclusion, and to decide that the prisoner frequented the street in question or the neighbourhood of the street, there being no evidence that he had ever before been seen there, or in the neighbourhood. To bring him, therefore, within the section, we must apply a different meaning to the words "frequenting" from any which I have ever heard applied to it before. However much we may think the man deserved the conviction, and the consequent imprisonment, we must not extend the Act of Parliament, and give it a different meaning from that found in any dictionary or book of interpretation. I think it would be too dangerous a doctrine to lay down that any man walking about, who can reasonably be supposed to be going to commit a felony comes within the provisions of this section. To do this would, I think, be to do more than construe the statute—nay, in my opinion, it would be an actual departure from it. Besides, in different parts of the section, two separate forms of words are used. In one place it is said that "every person being found in or upon any dwelling-house, warehouse, coach-house, stable, or outhouse" is to be deemed a rogue and vagabond, and in the other that "every suspected person or reputed thief frequenting any street, highway, or place adjacent thereto," is to be so dealt with. It is to be observed that the word "found" is used with respect to dwelling-houses and their precincts, whereas this word "found" is not repeated when we come to the part of the section dealing with streets, highways, and places adjacent thereto, but the word "frequenting" is used instead.

There is, therefore, I think, a difference between the two parts of the section made by the legislature itself. If a person is found in any of the places mentioned in the first part of the section, he must give a reasonable explanation of his presence there, or otherwise may be rightly convicted of an offence against the

A section; but, when we come to streets and highways over which the public have the right to walk at all times, the statute, I think, intended by the use of the word "frequenting" that a person was to be found there more than once before he could be brought within the provisions of the section; and this, in my opinion, is the construction to be placed upon the words of the Act. There is an absolute want of all evidence in this case that the appellant had ever been seen in the street in question before. I do not indeed think that the bare fact of his having been seen there once before would bring any man within the section, although it is unnecessary to say so now, as at present I am only adjudicating on this particular case. The statute uses the word "frequent," and no one would say that a man frequents a public-house, for instance, because he has been seen there once. The use of that word would mean that he has been sitting there frequently, or, as my brother HAWKINS said in the course of the argument, no one would say that a man frequents a house to which he goes once to inquire whether the occupier is at home. A convicted thief has just as much right when once he has performed his sentence to walk through the public streets as any other person. There are, therefore, ample reasons for the use of the word "frequenting" in the latter part of the section by the legislature instead of the word "found"; and I must interpret the words of the statute in their plain and literal meaning, unless, as is not the case here, such an interpretation, taken in conjunction with the context, would lead to a manifest absurdity. I am, therefore, reluctantly compelled to come to the conclusion that this conviction is wrong, and must be quashed.

There were certain cases cited to us in the course of the argument, but I do not think that there is anything in them to affect my decision in the present case, since it appears to me that the learned counsel for the prosecution relied more upon the dicta contained in the judgments than on the points really decided in them. In one case (*Re Cross* (1)) the question raised was whether a man could be said to frequent a street if he frequented the neighbourhood, and the judges very rightly decided that a person came within the statute who frequented a certain street and was found in an adjacent place with intent to commit a felony, for otherwise a man who frequented a street and was found in an alley down which he had followed some person with intent to rob him would not be within the section. The court, therefore, decided that the commitment in that case was not bad, because it alleged that the prisoner was "found" in a public thoroughfare with intent feloniously to steal; but the court did not say that the word frequent was the same thing as the word "found," which we should have to do if we decided this case differently, for there was also an averment that the prisoner frequented the public streets of the city, which "frequenting" the court considered to be sufficient to bring the prisoner within the section.

I think, therefore, that the legislature purposely used two different words with different meanings to apply to two different subject-matters; and in this case I see no reasonable evidence that the appellant frequented any street or highway at all. I think, therefore, that I should be straining the statute if I said that he came within it, and for these reasons I am of opinion that this conviction must be quashed.

HAWKINS, J.—I am of opinion that this conviction cannot stand. Upon the construction of s. 4 of the Act of 1824 grave doubts for a considerable time existed whether it justified the commitment of a person frequenting a public street or highway with intent to commit felony, unless such street or highway led to a river, etc., or a place of public resort, or was adjacent thereto. In 1850 PATTESON, J., on habeas corpus discharged two reputed thieves frequenting a street in the West End of London, with intent, etc., on the ground that the street was not shown to lead to a river, etc., or place of public resort: *Anon* (2). In a subsequent case, *R. v. Brown* (3), in 1852 the Court of Queen's Bench (PATTESON, J., dissenting) held the contrary view, and that the section applied to any street or place adjacent to a street. In the same year in *Re Jones* (4) the Court of Exchequer dissented from

this judgment of the Queen's Bench, and discharged a suspected person charged with frequenting Regent Street with intent to commit a felony on the ground that the commitment did not state that the street frequented by the prisoner was a street leading to a river, etc., or a place of public resort, or a street adjacent to a place of public resort, and this view was adhered to by the Court of Exchequer in *Re Timson* (5) in 1870. To remedy the inconvenience arising from these conflicting interpretations of the law, s. 15 of the Prevention of Crimes Act, 1871, enacts that s. 4 of the Act of 1824 shall be construed as if instead of the words "highway or place adjacent" there were inserted the words "or any highway or any place adjacent to a street or highway." The effect of this enactment is to render every suspected person or reputed thief frequenting any street or highway, or any place adjacent to a street or highway with intent to commit felony, liable to be dealt with as a rogue and vagabond.

Under these two statutes the appellant was convicted by the magistrates of South Shields for that he being a suspected person and reputed thief unlawfully did frequent a certain street there called Victoria Road for a certain unlawful purpose, to wit with intent to commit a felony, etc.; and we are now asked to say whether upon the evidence that conviction was justified in law. Several objections were raised by the appellant—first, that there was no evidence of his being a suspected person or reputed thief. As to this one has only to read the statement of fact on the case to see that it is unarguable. Equally unarguable, in my opinion, is the objection that there is no evidence of an intent by the appellant to commit a felony, when the facts proved are taken in conjunction with that part of s. 15 of the Act of 1871, which enacts that

"in proving the intent to commit a felony it shall not be necessary to show that the person suspected was guilty of any particular act or acts tending to show his purpose or intent, and he may be convicted if from the circumstances of the case, or from his known character as proved to the justice of the peace or court before whom or which he is brought, it appears to such justice or court that his intent was to commit a felony."

To the objection that the circumstances show, if anything, that a felony had been committed, and that the lesser offence of vagrancy merged in the greater charge of felony, I have only to observe that the evidence was not such as conclusively to establish that a felony had been committed by the appellant, and certainly the magistrates did not so find; and even if it had been proved that the appellant had committed one felony, it does not follow that he had not an intent to commit another.

The objection that there was no evidence to justify the justices in finding that the appellant "frequented" the street called Victoria Road, as alleged, is of a much more serious character, and I am of opinion that it must prevail. The only evidence on this point was that at ten minutes before two o'clock on the morning of Mar. 5, 1884, the appellant was found by two constables in Victoria Road, South Shields, having then in his possession part of a brass pump, which they had every reason to suspect had been stolen by him. There was no evidence of the appellant having been in the street on any other occasion with intent to commit a felony—or indeed at all. Can the appellant then by any reasonable interpretation of the word be said to have been a person "frequencing" the street with the intent, etc.? I think not. In WEBSTER'S DICTIONARY the verb "frequent" is defined as "to visit often; to resort to often, or habitually." This is also the popular understanding of the word. In this sense I think the legislature used it, for in the same s. 4 of the Act of 1824, I find a variety of acts which, once (that is to say, on one single occasion) committed, create offences punishable as acts of vagrancy, e.g., to tell fortunes, to wander abroad and lodge in a barn, etc., having no visible means of subsistence, to wander about and endeavour by exposure of wounds, etc., to gather alms, to run away and leave a wife, etc., chargeable to the parish, to play or bet in the streets with a table, etc., to have possession of a picklock, with intent feloniously

A to employ it; to be found in or upon any dwelling-house, etc., for any unlawful purpose—all these are punishable as acts of vagrancy, though they be committed on one occasion only, whereas the word “frequenting” was used when the offence of which the appellant was convicted was created.

Re Cross (1) was cited in support of this conviction. In that case the court supported a commitment which alleged that the prisoner,

B “being a suspected person and reputed thief frequenting the public streets and places of and in the said city [of London], then and there was found in Railway Place, being a public thoroughfare, and one of the places of public resort of and in the said city, with intent feloniously to steal the moneys, goods, and chattels of Sarah Seymour from her person.”

C According to the report in HURLSTONE and NORMAN'S REPORTS the only point taken for the prisoner was that it did not appear that the prisoner frequented the spot where the prisoner intended to put his felonious intent into execution, viz., Railway Place, and the court held that this was unnecessary, MARTIN, B., saying (1 H. & N. at p. 652):

D “a reputed thief frequenting Fleet Street cannot escape by going down Inner Temple Lane to commit a felony,”

meaning, as shown by the LAW JOURNAL REPORT (26 L.J.M.C. at p. 29):

“If a man frequents Fleet Street, and attempts to pick a pocket in Inner Temple Lane, that is within the Act of Parliament.”

E The case is very unsatisfactorily reported, and the real objection to the commitment does not appear to have been taken, viz., that it did not state that the prisoner frequented the public streets, etc., with intent to commit a felony, but only that the felonious intent existed in Railway Place, where he was only shown to have been once, and it was quite consistent with the averment that he frequented the public streets with an innocent or lawful intent. In discussing and deciding that case it seems, by both counsel and court to have been assumed, though
F there was in fact no averment to that effect, that the frequenting the public streets was with the felonious intent charged. On this assumption (but only on this assumption) I entirely agree in the decision, for I am clearly of opinion that a man who frequents a public street, having in his mind the intent to commit a felony when and wheresoever opportunity arises, is liable to the penalties of the Vagrancy Act, even though no opportunity arises, and may be committed as a
G rogue and vagabond, if the justices are satisfied, on sufficient evidence, first, that he frequented the street; secondly, that he did so with intent to commit felony. The overt act or the attempt to carry out the intent is not an essential part of the offence against the Vagrancy Act, and it was decided in *R. v. Brown* (3), and *Re Jones* (4) that it is not necessary that the intent should be to commit a felony “there”—that is, in the street frequented. Read in this light, *Cross's Case* (1) is
H no authority either against or in favour of the present appellant.

I I am, then, in the absence of any authority to the contrary, and for the reasons I have endeavoured to express, reluctantly compelled to come to the conclusion that this commitment ought not to stand, because there is no evidence of a “frequenting” any public street with a felonious intent, and that the mere finding upon one occasion of a man in a public street, under circumstances leading to the conclusion that he intended to commit a felony, is not sufficient to satisfy the statute. What amounts to a “frequenting” a street must depend upon the circumstances of each particular case. I only say one visit to it does not, and that is all that is proved by the evidence before us. This conviction must, for the reasons I have given, be quashed.

Conviction quashed.

Solicitors: *Gregory, Rowcliffes & Co.*, for C. W. Newlands, South Shields; *Clarke, Rawlins & Co.*, for J. M. Moore, Town Clerk, South Shields.

[Reported by J. SMITH, Esq., Barrister-at-Law.]

A

Re TAURINE CO., LTD. BECKWITH AND ROBINSON'S CASE

[COURT OF APPEAL (Cotton, Lindley and Fry, L.JJ.), November 26, 27, 1883]

[Reported 25 Ch.D. 118; 53 L.J.Ch. 271; 49 L.T. 514; 32 W.R. 129]

Company—Directors—Delegation of powers—Delegation to "committee" of one director.

B

By an article of association of a company the board had power to delegate to a "committee" all or any of the powers of the board. By a resolution of the board a director was "appointed a committee, with all the powers of the board."

Held: there was nothing to prevent a committee of one being appointed, and the appointment was valid.

C

Company—Shares—Transfer—Invalidity—Transfer not signed by transferee—Lapse of time—Transferee registered and treated as shareholder.

By an article of association transfers of shares of a company were to be effected "by instrument in writing, signed by the transferor and transferee." It was alleged that certain transfers, purported to be made some nine years previously, had not been signed by the transferees. The transferees were registered as shareholders in the company on the faith of those transfers, calls were made on them, and they attended meetings of the company.

D

Held: in view of the circumstances, even if the transfers were irregular they could not be impeached.

Company—Shares—Transfer—Power to transfer after notice of meeting to consider voluntary winding-up.

E

Power to transfer shares in a company **held** not to have been terminated on notice being given of an extraordinary general meeting of the company to consider a resolution for the voluntary winding-up of the company.

Notes. The main decision of the majority of the court (LINDLEY, L.J., and FRY, L.J.) in this case was that where a company had been in course of liquidation pursuant to a resolution for voluntary winding-up and an order for compulsory winding-up was afterwards made "the commencement of the winding-up" within s. 38 (1) of the Companies Act, 1862 [see now Companies Act, 1948, s. 212 (1) (a)], referred to the presentation of the winding-up petition, and not the passing of the resolution for voluntary winding-up, and, therefore, that persons who had ceased to be members for more than a year prior to the petition, but not a year prior to the resolution, were not liable to contribute to the assets of the company. COTTON, L.J., took the opposite view which was later embodied in the Companies Acts and is now expressed in s. 229 (1) of the Act of 1948 which provides: "Where, before the presentation of a petition for the winding-up of a company by the court, a resolution has been passed by the company for voluntary winding-up, the winding-up of the company shall be deemed to have commenced at the time of the passing of the resolution. . . ." The case is included in these reports in view of the decisions on the matters mentioned in the headnote.

F

G

H

Referred to: *Re Russell Hunting Record Co.*, [1910] 2 Ch. 78; *Re Havana Exploration Co., Ltd., Nathan's Claim*, [1914-15] All E.R. Rep. 1086.

As to committees of directors and transfer of shares, see 6 HALSBURY'S LAWS (3rd Edn.) 58, 248 et seq.; and for cases see 9 DIGEST (Repl.) 505, 506, 358 et seq. For the Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 452.

I

Cases referred to:

- (1) *Re Accidental Death Insurance Co., Chappell's Case* (1871), 6 Ch. App. 902; 25 L.T. 438; 20 W.R. 9, L.JJ.; 9 Digest (Repl.) 393, 2526.
- (2) *Re Accidental Death Insurance Co., Allin's Case* (1873), L.R. 16 Eq. 449; 43 L.J.Ch. 116; 21 W.R. 900; 9 Digest (Repl.) 387, 2498.
- (3) *Tennent v. City of Glasgow Bank* (1879), 4 App. Cas. 615; 40 L.T. 694; 27 W.R. 649, H.L.; 9 Digest (Repl.) 266, 1683.

- A (4) *Re East India Cotton Agency, Ltd., Sand's Case* (1875), 32 L.T. 299; 9 Digest (Repl.) 212, 1346.

Also referred to in argument :

Sharp v. Dawes (1876), 2 Q.B.D. 26; 46 L.J.Q.B. 104; 36 L.T. 188; 25 W.R. 66, C.A.; 10 Digest (Repl.) 1196, 8371.

Thomas v. Patent Lionite Co. (1881), 17 Ch.D. 250; 50 L.J.Ch. 544; 44 L.T. 392; 29 W.R. 596, C.A.; 10 Digest (Repl.) 1022, 7037.

Re United Service Co. (1868), L.R. 7 Eq. 76; 10 Digest (Repl.) 902, 6126.

Re Electric Telegraph Co. of Ireland, Bunn's Case (1860), 2 De G.F. & J. 275; 9 W.R. 43; 45 E.R. 627; sub nom. *Re Electric Telegraph Co. of Ireland, Ex parte Bunn*, 3 L.T. 567; sub nom. *Electric Telegraph Co. of Ireland v. Bunn*, 29 L.J.Ch. 913; 6 Jur.N.S. 1223, L.JJ.; 9 Digest (Repl.) 210, 1329.

Murray v. Blair (1873), L.R. 6 H.L. 37; 42 L.J.Ch. 586; 29 L.T. 217; 22 W.R. 280, H.L.; 9 Digest (Repl.) 375, 2417.

Re European Bank, Master's Case (1872), 7 Ch. App. 292; 41 L.J.Ch. 501; 26 L.T. 269; 20 W.R. 499, L.JJ.; 9 Digest (Repl.) 409, 2619.

Totterdell v. Fareham Blue Brick and Tile Co., Ltd. (1866), L.R. 1 C.P. 674; 35 L.J.C.P. 278; 12 Jur.N.S. 901; 14 W.R. 919; 9 Digest (Repl.) 559, 3701.

- D **Appeal** from an order of BACON, V.-C., on a summons in the winding-up of the Taurine Co., Ltd., that the names of shareholders should be included in a list of contributories.

By art. 39 of the company's articles :

"The Board may appoint and remove such committees of their own number as they think fit, and may determine and regulate their quorum, powers, duties, and procedure."

By art. 43 :

"The Board may from time to time delegate to any such local or other committee, managing director, manager, agent, or representative all or any of the powers, authorities, and discretion of the board."

- F By art. 108 :

"Transfers of registered shares shall be effected only by instrument in writing, signed by the transferor and transferee, and lodged at the office for registration."

- G In November, 1874, shares in the company were transferred to Messrs. John Beckwith, Arthur Robinson, and Peter Martin, jointly. They were afterwards duly registered as shareholders. On Nov. 2, 1874, at a board meeting, a resolution was passed that Mr. H. Beckwith, who was already a director, "be and is hereby appointed a committee, with all the powers of the board." On Dec. 23, 1874, John Beckwith, Robinson, and Martin executed transfers of the above-named shares to other persons. These transfers were not to be found after the institution of the present proceedings, and it was suggested, but not proved, that they had never been executed by the transferees as required by the articles. At a board meeting held on Dec. 24, at which only Mr. H. Beckwith, the committee, and the secretary of the company were present, the transfers executed by J. Beckwith, Robinson, and Martin were approved and ordered to be registered. The transfers were immediately entered in the register of transfers, and the names of the transferees in the register of shareholders and the share ledger. At an extraordinary
I general meeting of the company, held on Dec. 24, 1874, after the transfers had been approved and the above entries made, a resolution was passed that the company should be wound-up voluntarily, and the assets of the company assigned to a new company, and this resolution was confirmed at another meeting held on Jan. 15, 1875. On March 17, 1877, a compulsory winding-up order was made on a creditor's petition filed on Mar. 7. In the compulsory winding-up the transferees from J. Beckwith, Robinson, and Martin were settled on the A. list of contributories, and a call of £5 a share was made on them and the other shareholders on the same list. This call being insufficient to pay the costs of the liquidation and the debt

of the petitioning creditors, they applied to the official liquidator to carry in a B. list of contributories; but he refused to do so, on the ground that, as all the transfers of shares had been made more than a year before the filing of the petition, there could be no B. list, and in this contention he was supported by the chief clerk. BACON, V.-C., however, gave leave to the petitioning creditors, upon their indemnifying the liquidator, to use his name in proceedings to test other persons' liabilities, and directed the liquidator to concur in any steps for that purpose. A summons was accordingly taken out in the name of the liquidator asking that J. Beckwith and Robinson (Martin had died in the meantime) should be settled on a supplemental A. list of contributories, and that, if necessary, the names of the transferees from them and Martin might be struck out of the A. list, or that the supplemental A. list might be treated as a B. list, and the names of J. Beckwith and Robinson placed thereon; that for the purposes aforesaid the register of members might, if necessary, be rectified; and that, if necessary, the proceedings in the voluntary winding-up might be adopted. BACON, V.-C., dismissed the summons and the applicants appealed.

Hemming, Q.C., and H. B. Buckley for the applicants.

A. G. Marten, Q.C., and A. Terrell for J. Beckwith and Robinson.

COTTON, L.J.—This is an appeal from the decision of BACON, V.-C., refusing to put on the list of contributories two gentlemen who are already there for fifty shares, but whom the liquidator seeks to put on for a much larger number of shares which are alleged to be still properly in their joint names.

There are two points on which the decision of the court below is complained of. The liquidator sought to put these gentlemen on the A. list, as holding shares at the present time. If that failed, he sought to put them, as past members, on what is usually called the B. list. But the two cases are, of course, different. I will first deal with the argument urged on us on behalf of the liquidator because that depends not on the facts of the case, but on what he considered a point of law. These transfers were executed on Dec. 23, 1874, by the transferors, and registered on Dec. 24, which was the very day on which a resolution was passed for winding-up the company voluntarily. It had been known long before Dec. 23 that such a meeting would be called, and it was apparent that the resolution was the only thing that could be done—not because the company was in such a state of indebtedness that it could not go on, but because for various reasons it was desirable to form a new company out of the old company. But the argument urged was that when it was apparent the company would be wound-up, for whatever reason, then the power of transfer given by the articles or the Act was at an end and paralysed, and could not be exercised at all. If that is so, there was no power of transfer, because the transfer of shares depends on a right given by the articles, and does not exist independently of the right given by the articles as confirmed by the statute. We were referred to two cases in one winding-up (*Re Accidental Death Insurance Co., Chappell's Case* (1) and *Re Accidental Death Insurance Co., Allin's Case* (2)), and to what was not a decision, but only what was said by LORD CAIRNS in the House of Lords in *Tennent v. City of Glasgow Bank* (3).

In my opinion it cannot be held in this case that the power of transfer given by the articles, and allowed by the Act of Parliament, was at an end when notice was given that there would be a meeting. The time after which transfers cannot be made is fixed by the Act to be the commencement of the winding-up, and in the case of a voluntary winding-up even then transfers are not impossible—that is, they may be allowed by the liquidator. That is not consistent with the view urged on us by counsel for the applicants. He argued that the powers of transfer were given with reference to the company as a going and working concern, and not with reference to the company which showed that it was coming to an end and must be wound-up. One need not go through the books to show how constantly there have been cases where transfers have been allowed, although it

A must have been known at the time of transfer that the company could not go on. Where there has been an honest transfer and registration before the commencement of the winding-up, the transfer has been held to be effectual so far as regards the transferor not being on the list.

In *Allin's Case* (2), which was a decision of LORD SELBORNE, and in *Chappell's Case* (1), in which JAMES, L.J., differed from MELLISH, L.J., the company was B entirely at an end by transfer of its business and of all its property to another company which was to undertake it. There it was held there was no company; that the company, so far as the existence of shares was concerned, might be considered at an end, and that after the company had ceased to have property or shares, it could not be said to be a company in which the shareholders could transfer so as to enable themselves to say they were no longer shareholders in the company.

C *Tennent v. City of Glasgow Bank* (3) was a different case. The question there was whether one who was on the register at the time he claimed his right to repudiate and avoid the contract was not too late. There the observations of LORD CAIRNS when moving the judgment in the House of Lords—they were observations only, and he did not decide the point—only amounted to this, that after the bank was in the state in which it was when the shareholder attempted to exercise his option, D it was too late for him to exercise his option and to avoid the contract. That does not bear on the present case, where, although a transfer was intended, it is not a question whether the shareholder had been induced by fraud to take the shares and was in a position to exercise his option of repudiating it, but whether the power of transfer given by the articles and sanctioned by the Act of Parliament was at an end. In my opinion, the argument on behalf of the applicants cannot prevail.

E Then comes the question whether the board had delegated to Mr. Henry Beckwith, as a committee, the power of the directors for recognising transfers. There is nothing, in my opinion, in the articles to prevent a committee of one being appointed. It is very unusual, but still it may be done. As was pointed out by the respondents' counsel, Table A. does recognise the fact that one person may be appointed a committee [see art. 102 of Table A in Sched. 1 to Companies Act, 1948].

F "Committee" only means the person or persons to whom powers are committed which would otherwise be exercised by another body. There was, in my opinion, no irregularity as regards the approval by the committee of the board of the transfers which were brought before the committee.

There was another point which was argued very fully. It was said that the articles required the transfers to be executed, not only by the transferors but by G the transferees, and that on the evidence we ought to come to the conclusion that these transfers were not executed by the transferees. Assuming that the transfers were not executed by the transferees, but the transferees accepted the transfers and the company recognised the transferees as accepting and acting on the transfers, in my opinion that, although an irregular transaction, was one that could not be said to be an absolute nullity, but one which, unless acted on, would not be effectual.

H The object of requiring the transferee to execute was to satisfy the company that he did agree to the transfer, and so bind him as having agreed to take the shares. On the evidence it was apparent that the transferees did accept and act on the transfer, and the company has been willing to act on that and receive them as shareholders. In my opinion, this transaction is to be considered as an irregularity but not as a null transfer. What is the state of circumstances that took place in

I 1874? There was a voluntary winding-up. The voluntary liquidator was Mr. Henry Beckwith; he treated the transferees as the persons who were to be considered as the owners of the shares; and they appeared and acted at the meetings which passed the resolution for a voluntary winding-up. That is not all. The compulsory order was made in 1877, and the petition on which that order was made—and we are acting under the order now—was presented by two of the persons who had become transferees on Dec. 23 and 24, 1874, and had no title to be considered as shareholders unless they could act under those transfers. They came before the court as transferees, and the order was made on their petition.

They were recognised as shareholders then, and how we are to proceed in this winding-up on their petition without recognising them as shareholders it is difficult to say. If they are shareholders it cannot be said that the shares which they hold are those which were ineffectually transferred. That is not all. Some time in 1881 an attempt was made to suppose that these transfers were ineffectual, and that the persons who ought to be on the register in respect of the shares were the two gentlemen whom the liquidator now seeks to put on the list. In my opinion, when no fresh facts have been discovered by the liquidator, and all the facts which raised the suggestion that these transfers were ineffectual were known, the lapse of time that has occurred must be considered as barring an application like this. Even if there had not been that lapse of time, I do not say that the transfers could have been successfully questioned. The irregularity complained of originally entitled the company to say: "We will not take the transfers," but the right to say that has been got rid of by the fact that the company, and successive liquidators who have represented the company and acted for them, have confirmed the transaction by treating these transferees as what they claimed to be, that is, the holders of the shares parted with by these two gentlemen.

It is said it is contrary to the decisions, especially *Re East India Cotton Agency, Ltd., Sand's Case* (4), which was much relied on by counsel for the liquidator. In my opinion, that case has no bearing on the present. There the question was whether the liquidator, who had only put on the list the English shareholders, could, in order to make the Indian shareholders contribute rateably towards the claims paid by the English shareholders, put the Indian shareholders on the list. In that case there was no voidable transaction which could be said to be confirmed by his delay. The delay had simply been in not putting on the register of shareholders persons who had not attempted to get rid of their shares, but whom the liquidator had omitted to put on the list, for some reason, at the time when the English shareholders were put on. They were persons liable and persons who had not attempted to get rid of liability, or done anything capable of confirmation which could get rid of their liability, in which the liquidator had acquiesced. That case is no authority against the view I have arrived at, and, in my opinion, the Vice-Chancellor was right in refusing to put these gentlemen on the A. list of contributors.

HIS LORDSHIP then dealt with the question of the date of the commencement of the winding-up (see Notes supra).

LINDLEY, L.J.—In this case there are two questions for us to consider, the first being whether these gentlemen ought to be put on the A. list of contributors in respect of the shares which have been mentioned. The first point to be considered with reference to that is whether the transfer from them was void, for, if it was, there is an end of it. That turns upon the true construction of the articles of association, and upon what was done.

In my opinion, we cannot say that this was an absolutely void transaction. I do not forget the point that the power to transfer had gone because the company was about to be wound-up. As to counsel's observations regarding *Chappell's Case* (1), when you look at *Chappell's Case* (1) you can see the reason for the decision. The view taken by JAMES, L.J., in that case was confirmed by LORD SELBORNE in *Allin's Case* (2) as being preferable to that of MELLISH, L.J., and one can see why—because the transfer was inconsistent with the scheme resolved upon. That was the real reason why MELLISH, L.J., did not think the transfer was inconsistent. There was a difference of opinion, but having got so far, one can see how the consequence followed. It appears to me that this case is not like that. I will, in the first place, treat the supposed non-execution by the transfers as a mere irregularity, though I am not satisfied there was an irregularity. The people who know about it have not been cross-examined, but the ground for supposing there was some irregularity about the non-execution by the transferees is a clause in an affidavit to the effect that all irregularities were waived, or something of

A that kind. It may refer to one of the articles. I do not know that it does, but I do not think we can assume upon the materials before us, which are hazy and unsatisfactory, that the transfers were not executed. I do not know whether they were or not, but I should myself be slow to infer that they were not.

Let us assume that they were not. The transferees having been put on the list, that irregularity cannot be considered as of any importance. Having regard to the
B course of the decisions on such points as those I have mentioned, it appears to me that we cannot disturb the Vice-Chancellor's decision that the transferors must not be put back on the A. list. They have been off for years; the transferees have been on for years; the transferees have been treated as the shareholders for more purposes than one, and it is impossible to say that the transferors ought now to be on the A. list. But as regards the B. list there is more difficulty. [His
C LORDSHIP dealt with the question of the date of the commencement of the winding-up (see Notes supra).]

FRY, L.J.—There are two questions for decision in this case, one as to list A., and the other as to list B. It is contended that the transferors ought to be put on list A. because it is said that the transfers, which are in question, were bad, and
D bad for several reasons. The articles of association require a transfer to be executed by the transferee, and it is said that in this case the transfers were not so executed. Considering that the transfers had been acted upon for more than seven years when the proceedings were taken, it appears to me it is incumbent on those who desire to show that the transfers were void to make out the case with distinctness. Instead of calling the attention of any witness to the question,
E they have thought fit to rely upon the absence of any specific statement in the affidavits with regard to the execution by the transferees. In my opinion, nothing is more dangerous than to say that a thing does not exist because it is not mentioned, except in cases where the thing would inevitably be mentioned if it existed. Long ago it was said by a writer of eminence that that argument would lead to the conclusion that Tobit's dog had no tail, because the tail was not mentioned in the
F Book of Tobit. That is precisely the line of argument which is addressed to us in this case.

The second objection is this. It is said that the transfer was approved by Mr. Henry Beckwith acting under the delegation of authority from the board, and it is said that delegation of authority was invalid; but it appears to me to be plain that art. 43 of the articles of association justifies the delegation of the power of the
G board to a single individual. In the present case that delegation was made to Mr. Henry Beckwith. No doubt it is an extraordinary thing to suggest that the shareholders were content that such a power should exist, but no creditor can complain if it was exercised.

The last objection which was urged to this transfer was that which Mr. Buckley stated with great clearness. He said that when the resolution for voluntary
H liquidation was in contemplation, to which the transferors were parties, no transfers could be executed. In my judgment there is no authority for such a proposition. The cases relied upon were in substance two—I say two because *Allin's Case* (2) and *Chappell's Case* (1) occurred in the same winding-up. *Tennent v. City of Glasgow Bank* (3), in the House of Lords, only showed what the views of LORD CAIRNS were on the point. The company there was actually insolvent, and had actually
I stopped payment, and that day the power of presenting the transfers came to an end. The other two cases, *Chappell's Case* (1) and *Allin's Case* (2), only show a similar result, where the company had agreed to assign the whole of its undertaking to another company, and there was a subsisting and valid bargain for a change from the old company to a share in the new. Neither of those cases is any authority for the proposition urged before us. Before passing from these transfers I desire to make this observation, that it is by no means clear to my mind that the transfers were fraudulent. Certainly the allegation, which has been frequently

repeated, that the whole matter was plainly fraudulent has not in my judgment been sustained. A

Even assuming the matter to have been as alleged, and that the transfers were not such as could originally have been insisted on, it appears plain by what took place in the winding-up that the official liquidator has precluded himself from this appeal, because it is to be borne in mind that these transfers were acted upon as far back as the year 1874, that the transferees became shareholders in the new company on the faith of those transfers, that the transferees were put on the list of contributories of the new company, that the winding-up meetings were attended by the transferees, and the resolution for a voluntary winding-up was passed in their presence, that they were put on the list of contributories in the old company when that was wound-up, that calls were made upon them in that character, that for anything that appears they have made payments in respect of those calls, and that the whole of this matter took place as long ago as 1874. I think, under those circumstances, it is impossible for us to accede to the contention that these transfers were irregular at the time they were registered. It would be another thing if that contention could be made out, which, in my judgment, it has not been. The second question arises with regard to the B. list [His LORDSHIP dealt with the question of the date of the commencement of the winding-up (see Notes supra)]. D

Appeal dismissed.

Solicitors : *Ingle, Cooper & Holmes; G. A. Sedgwick.*

[*Reported by FRANK EVANS, Esq., Barrister-at-Law.*] E

FEARON v. EARL OF AYLESFORD F

[COURT OF APPEAL (Sir Baliol Brett, M.R., Cotton and Lindley, L.JJ.), November 18, 1884]

[*Reported 14 Q.B.D. 792; 54 L.J.Q.B. 33; 52 L.T. 954; 49 J.P. 596; 33 W.R. 331; 1 T.L.R. 68*] G

Husband and Wife—Separation agreement—Annuity payable by husband to wife—Liability of husband—Commission of adultery by wife—Interdependence of covenants—No dum casta clause in agreement—Molestation by wife.

By a separation deed dated May 22, 1877, the husband covenanted with the plaintiff as trustee to pay an annuity to his wife during the joint lives of himself and his wife, and the plaintiff covenanted with the husband that his wife should not at any time molest him. In an action by the plaintiff as trustee to enforce payment of arrears of the annuity, the husband denied liability on the ground that his wife was in breach of the covenant not to molest, and counterclaimed for damages caused by the molestation. The separation deed contained no *dum casta* clause. The molestation alleged was the living of the wife in adultery, the birth of a bastard child as the result of that adultery, and the holding out by the wife of that child as the legitimate offspring of her marriage with the husband. H

Held: (i) it was not against public policy that a separation deed should be allowed to stand otherwise than on the footing that, if the wife committed adultery, the deed from that time became invalid, and, therefore, the deed in the present case was not invalidated by the adultery of the wife; (ii) the mere fact of the commission of adultery by the wife did not constitute a breach of her covenant not to molest her husband, but, even if there had been a breach of that I

- A** covenant, that covenant and the husband's covenant to pay the annuity were not interdependent; accordingly, observance of the covenant not to molest was not a condition of the husband's liability to pay the annuity, which in any case he was liable to continue to pay.

Per SIR BALIOL BRETT, M.R., and COTTON, L.J.: To constitute molestation within the non-molestation clause in the deed there must be an act done by the wife with the purpose and intent to annoy and injure the husband.

- B** **Notes.** Applied: *Sweet v. Sweet*, [1895] 1 Q.B. 12. Followed: *Hunt v. Hunt*, [1897] 2 Q.B. 547. Referred to: *Kennedy v. Kennedy*, [1907] P. 49; *Hyman v. Hyman*, *Hughes v. Hughes* (1928), 139 L.T. 416.

- As to separation agreements, see 19 HALSBURY'S LAWS (3rd Edn.) 877 et seq.; and for cases see 27 DIGEST (Repl.) 212 et seq.

- C** Cases referred to:

- (1) *Seagrave v. Seagrave* (1807), 13 Ves. 439; 33 E.R. 358; 27 Digest (Repl.) 155, 1132.
- (2) *Jee v. Thurlow* (1824), 2 B. & C. 547; 4 Dow. & Ry. K.B. 11; 2 L.J.O.S.K.B. 81; 107 E.R. 487; 27 Digest (Repl.) 220, 1753.
- (3) *Sidney v. Sidney* (1734), 3 P.Wms. 269; 2 Eq. Cas. Abr. 29; 24 E.R. 1060, L.C.; 27 Digest (Repl.) 155, 1131.
- (4) *Blount v. Winter*, *Winter v. Blount* (1781), 3 P.Wms. 276, n.; 24 E.R. 1063; 40 Digest (Repl.) 532, 429.
- (5) *Sullivan v. Sullivan* (1824), 2 Add. 299; 162 E.R. 303; 27 Digest (Repl.) 446, 3775.

- E** Also referred to in argument:

W — v. B —, *B — v. W —* (1863), 32 Beav. 574; 55 E.R. 226; sub nom. *Willyams v. Bullmore*, *Bullmore v. Willyams*, 33 L.J.Ch. 461; 9 L.T. 216; 9 Jur.N.S. 1115; 11 W.R. 506; 12 Digest (Repl.) 310, 2388.

Hart v. Hart (1881), 18 Ch.D. 670; 50 L.J.Ch. 697; 45 L.T. 13; 30 W.R. 8; 27 Digest (Repl.) 239, 1923.

- F** *Gandy v. Gandy*, ante p. 376; 7 P.D. 168; 51 L.J.P. 41; 46 L.T. 607; 30 W.R. 673, C.A.; 27 Digest (Repl.) 235, 1887.

Scholey v. Goodman (1823), 1 C. & P. 36, N.P.; subsequent proceedings, 1 Bing. 349; 27 Digest (Repl.) 214, 1700.

Morrall v. Morrall (1881), 6 P.D. 98; 50 L.J.P. 62; 47 L.T. 50; 29 W.R. 897; 27 Digest (Repl.) 235, 1886.

- G** *Evans v. Carrington* (1860), 2 De G.F. & J. 481; 30 L.J.Ch. 364; 4 L.T. 65; 25 J.P. 195; 7 Jur.N.S. 197; 45 E.R. 707, L.C.; 27 Digest (Repl.) 222, 1774.

Thomas v. Everard (1861), 6 H. & N. 448; 30 L.J.Ex. 214; 158 E.R. 184; 27 Digest (Repl.) 227, 1818.

Goslin v. Clark (1862), 12 C.B.N.S. 681; 31 L.J.C.P. 330; 6 L.T. 824; 9 Jur.N.S. 520; 142 E.R. 1310; 27 Digest (Repl.) 229, 1836.

- H** *Charlesworth v. Holt* (1873), L.R. 9 Exch. 38; 43 L.J.Ex. 25; 29 L.T. 647; 22 W.R. 94; 27 Digest (Repl.) 229, 1837.

Sanders v. Rodway (1852), 16 Beav. 207; 22 L.J.Ch. 230; 20 L.T.O.S. 122; 16 Jur. 1005; 1 W.R. 11; 51 E.R. 757; 27 Digest (Repl.) 241, 1943.

Grant v. Budd (1874), 30 L.T. 319; 22 W.R. 544; 27 Digest (Repl.) 229, 1839.

- I** **Appeal** by the defendant and a cross-appeal by the plaintiff from a decision of the Divisional Court (DENMAN and MANISTY, JJ.) (12 Q.B.D. 539).

The action was brought by the plaintiff, as trustee for the Countess of Aylesford, on the covenants of an indenture of separation between the Earl and Countess of Aylesford, by which the defendant, the husband, agreed to allow his wife an annuity of £500 a year during their joint lives, in respect of a year's annuity which was in arrear. The plaintiff's claim was for payment of the amount of the annuity for a year, which amount had not been paid. The indenture contained the following covenant to the effect that he (the trustee)

"for himself, his heirs, executors, and administrators, doth covenant with the said Earl of Aylesford, his executors and administrators, that the said Countess of Aylesford should not at any time hereafter molest the said Earl of Aylesford, and should not in any manner compel or endeavour to compel him to cohabit with her."

The Countess of Aylesford (as was proved at the trial) had, during her separation, committed adultery which resulted in the birth of a male child. On the part of the defendant it was not denied that the annuity was in arrear, but it was alleged by way of defence and counterclaim that the conduct of the plaintiff and the Countess of Aylesford in respect of the illegitimate child was such molestation as would be a breach of the covenant not to molest, and exonerated the defendant from his liability to pay the annuity, and entitled him to counterclaim for damages by way of compensation for such molestation. The action came before DAY, J., and a special jury, and the jury found that there had been a breach of the covenant not to molest, and assessed the damages at £100. DAY, J., held that the covenant to pay the annuity on the one side and the covenant not to molest on the other were interdependent and that the molestation was an answer to the claim. Therefore, he gave judgment for the defendant upon the claim, and upon the counterclaim for £100. The Divisional Court affirmed this decision. The defendant appealed and there was a cross-appeal on the part of the plaintiff.

Waddy, Q.C., and *Francis Turner (E. F. Studd with them)* for the husband.

Finlay, Q.C., and *R. O. B. Lane*, for the plaintiff, were not called on to argue.

SIR BALIOL BRETT, M.R.—I have carefully read the judgments of the judges in the Divisional Court, and I agree with part of those judgments and differ from part. The action is brought by the trustee of Lady Aylesford in order to enforce the payment of an annuity which was granted by a separation deed executed by her husband, it being admitted that the payments were in arrear. In answer to that it was pleaded that there was a defence, or that there were defences, which relieved the husband from any liability upon the claim. One of those defences was that the wife had, after the separation deed had been executed, committed adultery, and that adultery caused the deed thenceforth to be inoperative. Another defence was that the plaintiff had covenanted in the separation deed that the countess should not molest her husband, and it was urged by way of defence that she had molested her husband within the meaning of that clause and that the payment of the annuity was dependent on her observing that covenant—that is to say, that as between those two covenants the one was the condition upon which the other was to remain valid, and, therefore, that, the condition having been broken, there was a defence to this action. There was a counterclaim on the part of the husband to the effect that, though he should have at law no defence against the claim, yet he had a right to counterclaim, for his wife had broken the covenant not to molest him, and, therefore, he was entitled to damages. That was the view which the judgment of the court below upholds. Their judgment was that there was no defence to the statement of claim, and that, therefore, on the claim, the trustee of the wife was entitled to recover the arrears of the annuity, but that on the counterclaim there was evidence to go to the jury on which the jury had not improperly found that the wife had molested the husband, and that, therefore, the husband was entitled to damages which the jury had assessed at £100. We have to say whether we agree in that judgment.

The deed before us is a separation deed. Differences had arisen between the husband and wife, and it is of no use to disguise what those differences were. The wife had been accused by the husband, and as far as we can see rightly accused, of having been guilty of the grievous offence of breaking her marriage vows and having committed adultery. For reasons into which it is not necessary to enter, he did not go the length of obtaining a divorce, although he went the length of at first persisting in trying to obtain one. That fell through, and instead of

- A persisting in obtaining a divorce or a judicial separation, a separation was come to by agreement and that agreement was carried out by this deed. In the deed there is an absolute covenant by the husband in plain and simple words to pay the wife a certain sum of money (£500 a year), by half-yearly payments, as long as he and she shall live. That is admitted to be one simple, plain, and absolute covenant. Then there is a covenant on the part of the trustee for the wife, which is equivalent to a covenant by the wife herself, that she will not molest her husband.

- B The first point taken is that, even if that covenant not to molest was not in the deed, yet the fundamental condition of a separation deed is that the wife must remain chaste after the separation, and that, if she commits adultery, that ipso facto prevents her from ever suing on the deed, or insisting upon the payment of the annuity. It has been argued that the court must so hold on the ground that it is against public policy that a separation deed should be allowed to stand otherwise than on the footing that, if the wife commits adultery, the deed from that time becomes invalid. I entirely agree that when a covenant is made between two persons in plain terms, from which the only inference to be drawn is that they intended what they have said, it is a most dangerous doctrine to introduce into that covenant, unless one is forced to do it by almost inevitable necessity, another
- C covenant which everybody must know the parties did not intend to introduce, on the ground that, unless it be introduced, the contract between the parties is against public policy. If this point were now for the first time to be decided, I should absolutely refuse to say that, owing to the mere fact of a woman falling into this grave offence under any circumstances of neglect by her husband, or after any effluxion of time, public policy requires that—whatever may have been the temptation under which the woman has succumbed—the husband shall not be obliged to pay to her the annuity which he has undertaken to pay to her without any such condition being expressed.

- D There is more than that. It seems to me that that point has been decided in England for many years, for if ever there was such a doctrine in our law, it must have existed during the whole of that time, and yet it has again and again been
- E overlooked. If the argument be true, the clause which is often put into such deeds by the most expert conveyancers is an absolutely futile and senseless clause, namely, the clause that the annuity shall be paid only while the wife remains chaste. Therefore, authority and principle seem to me to show that there is no such doctrine as that as to public policy which has been vouched in order to take away the effect of this deed.

- F Then it was urged that, when there is a covenant in the deed that the wife shall not molest the husband, this is not only a covenant, but a condition on the happening of which the other covenant to pay the annuity becomes ineffective. The doctrine on which the courts have decided whether covenants or clauses in deeds or agreements, which in their form are separate and distinct, are nevertheless to be treated as reciprocal, the one being a condition of the other, has been often
- G enunciated, and the rules have been laid down. Does this case, where the two covenants are independent in form, come within those rules? Again, if it was to be decided for the first time, it would be found that it does not come within the rules; but it is not to be decided now on such a footing, for again, for many years such deeds as this have been known in England, and it has been held again and again, both in courts of law and in courts of equity, that these covenants are not
- H so far reciprocal that the observance of the one is a condition subsequent on the breach of which the other fails. I feel that I should have decided in the same way.

- I Even if I should not have decided the point in the same way, if this had been merely a case of the first complexion, nevertheless I must have decided it, as I do, on a rule of conduct which has been adopted many times, namely, that I must come to the conclusion that this deed has been drawn on the faith of the cases which have been known to the skilled persons who draw deeds of this kind. Even although I were to think that the cases were wrong at the time they were decided, I cannot overrule them now for the purpose of getting rid of a deed

which has been drawn upon the faith of them. It follows that deeds drawn on the faith of those decisions are drawn with the intent and meaning that those decisions will be followed, and, therefore, that these covenants are not reciprocal, and the covenant that the countess will not molest is not a condition subsequent, which will take away the effect of the independent covenant to pay the annuity. Therefore, even although there had been molestation by the wife, that would not relieve the defendant from being liable on the claim.

The rest of the argument only goes to the question of the counterclaim. It has been urged that the countess has broken the covenant not to molest, and that her trustee is liable in damages. It is true that, if she has broken the covenant not to molest, he is liable in damages because he has undertaken with the defendant that she shall not break the covenant. It is said that she has broken the covenant upon two views. It has been strongly urged, as might have been expected, that she broke the covenant, even although it is not proved that she held out a child who is not the son of Lord Aylsford as the son of Lord Aylesford. It is contended that the wife has molested her husband, because she committed adultery, and, further, because she has had a child as the result of that adultery. That is one view of the case. It is said to be adultery with an aggravation, and it is contended that adultery with an aggravation is molestation. Then it is said that not only has she committed adultery, but she has committed it under circumstances of public notoriety, and that would be molestation. If the adultery alone is not molestation, I fail to see how the fact of having a child, which is the result of that adultery, can be said to be molestation by her. My brother DENMAN, I observe from his judgment, went at some length into that matter, and I think it obvious, without going further into it, that, if the fact of adultery is not sufficient, the result, which sometimes happens as the consequence of adultery, is not sufficient, namely, the birth of a spurious child.

To determine this point of molestation, I think that I am bound to consider what would be molestation, or what would entitle a jury to say that within the meaning of such a covenant as this in a separation deed there had been molestation by the wife. First of all, it seems to me that it must be an act done either by the wife herself, or by some agent authorised by her to do it. No act done by anyone else can be a breach of the covenant that she will not molest. What kind of act must be done in order to constitute a molestation? I am of opinion that the act done by the wife or by her authority must be an act which is done with intent to annoy, and does in fact annoy, or which is in fact an annoyance; or, to put the latter proposition into another shape, that it must be an act done by her with a knowledge that what she is doing must of itself, without more, annoy her husband, or annoy a husband with ordinary and reasonable feeling. I am not sure, but I am inclined to think that what I have put as an alternative proposition is really included in the first, because, if a wife does not act with a knowledge that what she is doing must of itself without more annoy her husband, if he is a person of proper and ordinary feeling as a husband, it seems to me that the natural and proper conclusion to be drawn as a matter of inference from the evidence would be that she did intend to annoy; but whichever may be the more correct form of stating the proposition, one or other of those propositions must be fulfilled.

Does the fact of committing adultery come within either? Can it be said that the mere fact of a woman committing adultery is evidence of an intention to annoy her husband? It must be considered whether it is a true proposition to say that the mere fact of a woman committing adultery at any time, at any interval of time, at any distance from the place where the husband may be, under any circumstances whatever, of itself would show that she is then intending to annoy her husband. It is contrary to the truth. That is my answer to the argument. No man who will think carefully can come to the opinion that a woman, when she is committing adultery, misconducts herself with the intent of annoying her husband. She does it from other motives. It may be from mere wickedness, or she may do it under grievous temptation, in which case, although it is very wrong, the woman

A is as much to be pitied as condemned. To say that a woman commits adultery in order to or with intent to annoy her husband, is absolutely untrue. The contrary is the truth, and there is no doubt that in almost all cases when she gives way in that manner, it is not for the purpose of annoying her husband, but to gratify the man for whom she has come to entertain either a temporary or permanent affection. Can adultery come within the principle that the wife is doing an act with a knowledge that what she is doing must of itself, without more, annoy her husband? Certainly not. The utmost that can be said is that she must know that, if it comes to the knowledge of her husband, it will annoy him, but that is to introduce another circumstance that does not come within the proposition, that circumstance being that her adultery shall be brought to his knowledge. Therefore, the mere fact of the adultery does not come within either proposition, and the mere fact of having a child afterwards does not.

It has been urged that, however great her distance may be from her husband, if she commits adultery publicly so that people know that she is doing it, that must molest him. But again, the molestation will depend upon whether the people who know it will go and tell her husband. Another and a particular circumstance must be introduced, for which the wife is not responsible, and which does not necessarily follow, and therefore in no view can it be molestation.

Then I come to this, if a woman, having a child which she knows is not her husband's, does openly produce that child, and does acts which would intimate that she is putting it forward to the world as the child of her husband, from that conduct alone there might be evidence, and possibly strong evidence, of an intent to annoy. If she shows that she means to found some legal claim either to his title or to his property in respect of that spurious child, I confess I have not a doubt that in either of those cases there would be strong evidence of an intent to annoy, and that when that is proved, the jury would be quite justified in saying there was a molestation in contravention of the covenant which I am considering. If, therefore, there had been evidence that this child was put forward by Lady Aylesford to the world as being "Lord Guernsey," from which the inevitable deduction would be that she was flaunting it in the face of the world as the child of her husband when she knew that it was not, I say that, without more, that would be evidence upon which a jury would be justified in finding molestation. The question is whether there was evidence to go to the jury, that the putting forward was done with her knowledge.

The effect of evidence, when it is properly left to the jury, is for the jury alone, but the question whether there is any evidence to go to the jury is a question of law, and we have to see whether there was in point of law sufficient evidence to go to the jury that this child was called Lord Guernsey by the authority or with the consent of Lady Aylesford. There is evidence, although it is very slight, that this child was called Lord Guernsey in the house of its mother. I am inclined to think that every person present at the trial understood that questions asked as to conversations with the lady's maid were put with the view of showing Lady Aylesford's authority. But we must act according to the rules of evidence. Is it evidence that Lady Aylesford authorised the lady's maid to call the child Lord Guernsey, that the lady's maid told a witness at the trial that Lady Aylesford had told her to do so? It requires the stress of such a case as this even to excuse or to authorise counsel to contend that what a lady's maid has said about what her mistress has said is evidence of what the lady herself has said. It is impossible to hold that that is evidence that Lady Aylesford had authorised it. Then it is said that the plaintiff himself had stated that he would call the child Lord Guernsey, and that if he ever drew a deed in which his name occurred he would put it in, and he would defy the solicitor on the other side to show that the child was not Lord Guernsey. How can that be evidence that the mother has authorised people to call the child by the name of Lord Guernsey? It seems clear beyond all doubt that there was no legitimate evidence to be left to the jury that the child was

called Lord Guernsey by the direction or with the authority of its mother, Lady Aylesford. A

On the whole I have come to the conclusion that the plaintiff was entitled to succeed upon the statement of claim, and that there was no evidence to go to the jury in favour of the defendant's counterclaim, and that, consequently, the decision at the trial ought to have been that the plaintiff was entitled to the verdict and judgment against the defendant on the counterclaim. B

COTTON, L.J.—I am of the same opinion. In my view there is no support for the argument that the covenant not to molest is coincident with the covenant to pay the annuity, and that upon the breach of one covenant the other also fails. I do not differ from the Master of the Rolls on that point. I must consider what "molestation" is. I have satisfied myself that, in order to come within this covenant, it must be some act done by the lady herself which annoys Lord Aylesford, but that it is not sufficient merely to show that she has done an act which annoys Lord Aylesford, and, in my opinion, the first branch of the definition given by the Master of the Rolls really involves the whole, namely, that in order to hold that there has been molestation within the words of the covenant, there must be an act done by Lady Aylesford with the purpose and intent to annoy and injure, and, of course, when a person does an act the natural tendency of which is to annoy and injure, *prima facie* she must be supposed to have that intention. I quite agree with that. I myself have very often expressed the opinion that when a person does an act the obvious consequence of which is a certain result, that person must be taken to contemplate that result; but when I find an act done which, although it may annoy, injure, or vex, nevertheless is obviously and clearly referable, not to an intention to vex, or annoy, or injure, but to an entirely different motive, I cannot say that that is molestation. There is always a difficulty in definitions. C D E

What I have to see is whether acts have been done on the part of Lady Aylesford which were breaches of this covenant not to molest. I may dispose very shortly of the alleged holding out of this child as the legitimate son of Lord Aylesford and as Lord Guernsey. I agree with the Master of the Rolls on this point, and, therefore, I think I need only say that, if she had so held out the illegitimate child, knowing that this child was not Lord Guernsey, she must be considered as having done that for the purpose of annoying Lord Aylesford personally or injuring him as regards his property; but, in my opinion, there was no evidence to be left to the jury on this question. The other acts relied upon are the adultery and the birth of the child. In my opinion, it would be wrong for us to say that those acts, either the adultery, or the adultery coupled with the birth of the child, can be considered a breach of this covenant not to molest. The adultery is obviously not referable to an intent to annoy the husband. We know not under what circumstances the act was committed, whether by reason of her having an affection for the man with whom she committed the adultery or for the mere purpose of satisfying her own passion, and we shall be going contrary to the view which we must entertain from our knowledge of the world, if we were, especially under the circumstances of this case, to say that the adultery was an act done in order to injure, annoy, or vex her husband. Can the birth of a child come to more? Obviously this was no fresh act done by her. It must be referred back to the adultery, and if the adultery is not of itself a molestation, I cannot see how that which is the natural result of an act of illicit intercourse can in any way be a molestation. It may be, that if she had publicly communicated the fact that she had been guilty of adultery to her husband, that might be a molestation: but there is nothing of that sort here, because she was living under an assumed name in Paris, and there is no suggestion that what occurred was done in such a way as to be communicated to her husband, and in no sense can it be said to have been an annoyance. F G H I

A I come to what really is a much graver question, because it involves general principle, and it is that under the circumstances proved at the trial, without reference to the covenant against molestation, the annuity has ceased. There is no provision in terms in this deed providing that its continuance must depend on the wife leading a chaste life, and, although there is a clause to that effect which is not by any means unusual in separation deeds, it has not been inserted in this deed. I should
B say myself that a provision is generally inserted in separation deeds that the annuity shall be payable to the wife as long as she leads a chaste life. But it is said that the living a chaste life on the part of this wife was so far a condition upon which the parties were acting that it ought to be considered as the foundation of the deed, that when the chastity came to an end, the provision made by the deed went too, and that this construction must be considered *prima facie* as having
C been the intention of the parties. It is true that we cannot suppose the parties to have had in their minds that there would be unchastity on the part of the wife, but they have omitted to make a provision for that which was not on their minds, namely, the fact of leading an unchaste life. There have been decisions during the last fifty years that adultery alone on the part of the wife is not an answer to her claim to be paid her annuity; and, in my opinion, this fact shows that the
D parties should be considered as having intended that the provision against unchastity should be implied.

It is said that it is contrary to public policy that this annuity should continue to be paid after the wife has committed adultery. That means that, as a matter of law, this deed after that event would be ineffectual so far as the payment to her of this annuity is concerned. Cases (which I am not prepared to overrule) have
E decided that that is not the law, and those cases for many years have been followed in numerous instances, and, in my opinion, not only are we bound by them, but the decisions in those cases were right. How was the argument put as a matter of principle? It was said that, if the parties contemplated the continuance of the annuity after the adultery of the wife, they were providing for and had in their contemplation the wife's adultery, and on that ground the deed would be
F void; and then it was urged that, if a *dum casta* clause was not to be implied in the deed, there would be a licence to the woman to commit adultery. If the deed was so constructed as to enable the woman to commit adultery with impunity, and it was executed with that object, no doubt it would be against public policy; but it is erroneous to say that because the parties have not provided in the deed that the wife shall be chaste, and, if she is not, she shall lose this annuity, they
G are providing for adultery, or are giving her licence to commit adultery. It only means that they have not said that, if she commits adultery, this provision shall come to an end. I am not at all satisfied that public policy would be struck at by continuing an allowance to a wife who has committed adultery. I am not at all sure that that would be wrong, but I will not express an opinion upon it.
H It is not to my mind an inducement to the wife to commit adultery. I am at loss to see how public policy requires that when a woman commits adultery she shall at once be made destitute, and be entirely stripped of all those means which her husband provided for her when they separated, so as to prevent her from falling into a state of indigence and want. In my opinion, there is no ground for saying that it is contrary to public policy that this annuity should continue,
I although the wife has committed adultery.

It has been urged that the adultery is to be considered as a part of the equitable defence (at least so I understand it) to the claim of the wife. There may be circumstances of such a character as will prevent the guilty wife from insisting upon the deed, and will enable the husband in a court of equity to set up an equitable defence; but, in my opinion, the mere adultery does not deprive the guilty wife of the right to come into the High Court to get the assistance of the court in order to obtain the provision which has been made for her. In my opinion, therefore, the covenant to pay the annuity can be enforced and there is no ground

upon which we ought, on behalf of the husband, to interfere and prevent the trustee for the wife from insisting upon the legal rights which she possesses under the deed. A

LINDLEY, L.J.—I am of the same opinion, and I shall make observations upon three points only. The first is whether the adultery of the wife is a defence to the action for the annuity. That appears to me to be so settled by long authority, both in law and in equity, that it would be wrong for us to disturb that rule, even although we thought it unsound. It has been settled for at least one hundred years, as may be seen by tracing the cases back from *Seagrave v. Seagrave* (1) and *Jee v. Thurlow* (2). The earliest cases that I need mention are *Sidney v. Sidney* (3), decided in 1734, and *Blount v. Winter* (4), decided in 1781. In these the matter was discussed, and from the time of these decisions it has not been seriously argued in courts of either law or equity. I am aware that dicta may be found in the Court of Arches (see *Sullivan v. Sullivan* (5)) which are not altogether in accordance with the view which has been taken in other cases. But the present proceeding is a mere action at common law for an annuity due under a deed, and to that action adultery is no answer. That I take to be perfectly settled. B

The next question which arises is whether there has been any breach by this lady of the covenant not to molest her husband. I do not attempt to define the word "molest." It may not be capable of being easily defined in ordinary language. The word is elastic, and I do not say whether it is possible to "molest" without an intent to molest. I do not say it is; but I wish to guard myself against being supposed to come to any decision upon it. The lady, by her trustee, covenants not to molest her husband. What has she done? It is alleged that, because she allowed some man other than her husband to have intercourse with her, she has molested her husband. I cannot understand that conduct to be a breach of the covenant, and if once it is admitted that such conduct is not a molestation, no breach of the covenant has been proved to have been committed. No doubt some circumstances coupled with adultery may amount to molestation; but I cannot say as a general proposition that the mere fact of adultery, even coupled with the birth of a child, is a molestation of him. It seems to me that so to hold would be to stretch language, and would be to put a forced construction upon the words which they would not bear in ordinary parlance. C

Another point has been taken. It is said that there is evidence to show that the wife molested her husband by passing off her bastard son as his. That is another matter altogether. I think, if that were made out, there would certainly be evidence to go to the jury with regard to molestation by her. But the evidence is of the most shadowy kind, and, to my mind, there is not a particle of evidence that she did anything of the sort, although there may be some evidence that the plaintiff called the child Lord Guernsey; whatever that may have amounted to, it has not been traced to her. I think that question ought not to have been left to the jury. It appears to me, therefore, that the plaintiff is entitled to judgment on the claim and on the counterclaim. D

Judgment varied. E

Solicitors: *J. H. Lee; G. E. Kaye & Co.*

[Reported by A. A. HOPKINS, Esq., Barrister-at-Law.] F

H.

A

LONDON AND COUNTY BANKING CO. v. GROOME

[QUEEN'S BENCH DIVISION (Field, J.), November 26, December 19, 1881]

[Reported 8 Q.B.D. 288; 51 L.J.Q.B. 224; 46 L.T. 60; 46 J.P. 614;
30 W.R. 382]

B

Bank—Cheque—State cheque—Inference of fraud—Circumstances in which cheque taken.

The rule that persons who take overdue bills of exchange and promissory notes take them at their peril does not apply to cheques. Where a person takes a stale cheque it is a question of fact whether the cheque was taken by such person under such circumstances as ought to have excited his suspicion that the cheque was tainted with fraud.

C

Notes. As to the effect of a negotiable instrument being overdue in general, see 3 HALSBURY'S LAWS (3rd Edn.) 185–186; and for cases see 6 DIGEST (Repl.) 182 et seq.

D

Cases referred to:

- (1) *Down v. Halling* (1825), 4 B. & C. 330; 6 Dow. & Ry. K.B. 455; 3 L.J.O.S.K.B. 234; 107 E.R. 1082; 6 Digest (Repl.) 183, 1249.
- (2) *Rothschild v. Corney* (1829), 9 B. & C. 388; Dan. & Ll. 325; 7 L.J.O.S.K.B. 270; 109 E.R. 144; 6 Digest (Repl.) 183, 1250.
- (3) *Brown v. Davies* (1789), 3 Term Rep. 80; 100 E.R. 466; 6 Digest (Repl.) 186, 1284.
- (4) *Serrell v. Derbyshire, Staffordshire and Worcester Junction Rail. Co.* (1850), 9 C.B. 811; 19 L.J.C.P. 371; 15 L.T.O.S. 254; 137 E.R. 1110; 6 Digest (Repl.) 183, 1251.
- (5) *Gill v. Cubitt* (1824), 3 B. & C. 466; 5 Dow. & Ry. K.B. 324; 3 L.J.O.S.K.B. 48; 107 E.R. 806; 6 Digest (Repl.) 397, 2844.

E

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Also referred to in argument:

- Goodman v. Harvey* (1836), 4 Ad. & El. 870; 6 Nev. & M.K.B. 372; 6 L.J.K.B. 260; 111 E.R. 1011; 6 Digest (Repl.) 131, 970.
- Bank of Bengal v. Macleod* (1849), 7 Moo.P.C.C. 35; 5 Moo. Ind. App. 1; 14 L.T.O.S. 285; 13 Jur. 945; 18 E.R. 795, P.C.; 1 Digest (Repl.) 349, 287.
- Robinson v. Hawksford* (1846), 9 Q.B. 52; 15 L.J.Q.B. 377; 7 L.T.O.S. 204; 10 Jur. 964; 115 E.R. 1195; 6 Digest (Repl.) 216, 1495.
- Brooks v. Mitchell* (1841), 9 M. & W. 15; 11 L.J.Ex. 51; 152 E.R. 7; 6 Digest (Repl.) 181, 1238.
- Boehm v. Sterling* (1797), 7 Term Rep. 423; 2 Esp. 574; 101 E.R. 1055; 6 Digest (Repl.) 183, 1248.
- Ingham v. Primrose* (1859), 7 C.B.N.S. 82; 28 L.J.C.P. 294; 5 Jur.N.S. 710; 141 E.R. 745; 6 Digest (Repl.) 398, 2849.

G

H

Further Consideration of an action brought by the plaintiffs, the London and County Banking Co., suing as the holders in due course of a cheque drawn by the defendant.

The plaintiffs alleged in their statement of claim that on Aug. 21, 1880, the defendant by his cheque directed to the National and Provincial Bank required the bank to pay the sum of £98 to one A. Moss or bearer. The plaintiffs had become the bearers of the cheque which had been presented for payment and dishonoured. The defendant had due notice of dishonour, but he had not paid the amount of the cheque or any part of it. The defendant admitted all these allegations except that he had notice of dishonour. He then pleaded that on or about Aug. 20, he handed the cheque to one G. Colls, who gave him as consideration for it, a distinct agreement and understanding that the cheque was to be held as security for a bill of exchange which Colls had requested the defendant to procure discount of for him. Colls further promised that he would not part with nor in

I

any way deal with the cheque until the defendant procured discount of the bill of exchange. The defendant was unable to procure discount of the bill of exchange, and gave notice thereof to Colls before he paid the cheque to the plaintiffs. In breach of the agreement and in fraud of the defendant Colls paid the cheque to the plaintiffs, who had notice of the premises. The defendant, after repeating the above allegations, further alleged that the plaintiffs were the agents of Colls for the purpose only of collecting the proceeds of the cheque, and if the cheque were paid of placing the proceeds to his credit. The plaintiffs had given no consideration for the cheque, and held it subject to the above agreement, and to the equities existing between Colls and the defendant. The cheque was presented for payment by Colls and dishonoured by the defendant's bank, and the plaintiffs, after the expiration of eight days, took the cheque with notice, and subject to the above agreement and the equities existing between Colls and the defendant. The plaintiffs joined issue and specially replied, excusing notice of dishonour.

At the trial before FIELD, J., and a special jury on Nov. 7, 1881, the plaintiffs recovered a verdict for the full amount but FIELD, J., reserved for further consideration the point of law arising during the case.

H. Matthews, Q.C. (J. R. Paget with him) for the plaintiffs.

Rose Innes for the defendant.

Cur. adv. vult.

Dec. 19, 1881. **FIELD, J.**—This is an action brought to recover £98, the amount of a cheque of which the plaintiffs were the bearer. It was dated Aug. 21, 1880, and it directed the National Bank to pay that sum to A. Moss or bearer; and the statement of claim alleged presentation for payment, nonpayment, and due notice of dishonour. The defendant, by his defence, denied notice of dishonour, and alleged that the defendant, on Aug. 20, handed the cheque to George Colls under such circumstances as, if proved and if the latter had been the plaintiff, might have furnished a good answer to his claim. The defence further alleged that Colls, in fraud, delivered the cheque to the plaintiffs, who had notice of the premises. As a separate defence the defendant further alleged the same circumstances, and that the plaintiffs were the agents of Colls, and had given no consideration, and held the same subject to the equities existing between Colls and the defendant. As a further defence the defendant said that the cheque was presented for payment by Colls and dishonoured, and the plaintiffs, at the expiration of eight days, took the same with notice and subject to the equities.

At the trial the plaintiffs proved that Colls was a customer, having an account at one of their branches, and that he had on Aug. 29 (eight days after the date), paid in the cheque to the credit of his account, and that they had given him consideration for the same. The defendant cross-examined the plaintiffs' witnesses, but did not elicit from them any circumstances tending to show any notice or absence of bona fides on the plaintiffs' part, or anything which tended to show that the payment of the cheque by Colls into his account was made under any circumstances which ought to have excited the suspicion of the plaintiffs as reasonable men of business that the cheque was at all tainted with fraud, except the circumstance that the delivery to them was made eight days after the date of the cheque.

The plaintiffs' counsel contented himself with proving a prima facie case; and at the close of it counsel for the defendant said that he had not affirmative evidence to prove any notice to the plaintiffs, and did not wish to address the jury upon the question as to the consideration given by the plaintiffs, or the presentation by Colls alleged in the statement of defence, or the notice of dishonour; but he submitted that, inasmuch as the statement of defence alleged that the plaintiffs had taken the cheque eight days after its date, I was bound to rule that this circumstance alone was sufficient to entitle him to the benefit of the well-established rule of law as applicable to overdue bills of exchange and promissory notes, that those who take them take them at their peril, and stand in no better position than

A those from whom they take them as to any equities between the latter and the acceptor or maker attaching to the instrument; and for his authority on this point he cited *Down v. Halling* (1). Counsel for the plaintiffs, denied the existence of any such rule of law, and relied upon *Rothschild v. Corney* (2). I for the purposes of the day ruled against the defendant, and directed a verdict for the plaintiffs, reserving, however, for further consideration the question whether the mere circumstance that the plaintiffs took the cheque eight days after its date was enough by itself, as a matter of law, to place the plaintiffs in the position of takers at their peril, so as to entitle the defendant to treat them as if they were in the position of Colls, and liable to have their title to sue defeated by any matter attaching to the cheque which would have amounted to an answer against Colls. The case was afterwards argued before me on further consideration, when all the authorities on both sides were ably and fully brought before me, and having considered them, I see no reason to alter the view which I took at the trial.

B That the holder of an overdue bill or note payable at a fixed date of course appearing upon it is in the position suggested is established beyond all doubt, and the reason of the rule is that inasmuch as these instruments are usually current during the period before they become payable, and their negotiation after that period is out of the usual and ordinary course of dealing, that circumstance is sufficient of itself to excite so much suspicion that as a rule of law the endorsee must take it on the credit of, and can stand in no better position than, the endorser: *Brown v. Davies* (3). But with regard to cheques no such rule has been laid down; *Down v. Halling* (1), as I shall show presently, not amounting I think to any such decision, and there is one case in which that proposition has been denied or doubted.

E In *Rothschild v. Corney* (2) the action was brought by the maker of the cheques to recover the amount from the defendants. The cheque was dated Jan. 19. It had been obtained from the plaintiffs by the fraud of Brady; and Brady five days after date handed it to the defendants, who cashed it bona fide, and afterwards presented it and received the amount from the plaintiffs' bank. At the trial the learned judge directed the jury that if they thought the circumstances of the case were such as ought to have excited the suspicion of a prudent man, and that the defendants had not acted with reasonable caution, they should find a verdict for the plaintiff, otherwise for the defendant. A rule was then obtained for a new trial on the ground that the judge ought to have directed the jury that the cheques were overdue, and so the defendants took them at their peril, and could have no better title than Brady. After argument, in which *Down v. Halling* (1) was cited, the rule was discharged, LORD TENTERDEN, C.J., saying that it could not be laid down as a matter of law that a party taking a cheque after any fixed time from its date must do so at his peril. LITLEDAL, J., observed that, although the rule of law was so as to bills of exchange and promissory notes, it could not be applied to cheques.

G In *Serrell v. Derbyshire, Staffordshire and Worcester Rail. Co.* (4) the cheque was dated Aug. 13, and was not presented until Oct. 6, and *Down v. Halling* (1) was cited by CRESSWELL, J., for a proposition of HOLROYD, J., in it that the defendants having taken the cheque more than five days after date took it at their peril, and Serjt. Byles, arguendo, said that *Down v. Halling* (1) was not consistent with *Rothschild v. Corney* (2). MAULE, J., held that no such strict law existed that a cheque must as against the maker under such circumstances be presented promptly, but that when a reasonable time has passed a cheque stands on the same footing as a bill of exchange, and holding the cheque in that particular case might probably be considered in the nature of an overdue bill, and fraud being shown in its inception the onus was thrown upon the plaintiff of showing how he got it.

H Of course, even with regard to cheques, there is no doubt that in the ordinary course of business they are intended almost as cash for early, if not prompt, payment; and it is well known law that as between the maker and payee, although there is no absolute duty to present a cheque promptly, that duty so much exists

that exact rules have been laid down beyond what period the payee may not delay presentation if he wishes to avoid the consequences of any damage caused to the maker by the insolvency of the drawee, or other injuries falling upon his own shoulders. Having regard to this duty, I have come to the conclusion that, looking to the peculiar circumstances of *Down v. Halling* (1), and the mode in which the matter was there treated, there is no such conflict between that case and *Rothschild v. Corney* (2) as has been supposed. In *Down v. Halling* (1) the plaintiff sought to recover the amount of a cheque for £50, dated Nov. 16, 1824; he did not show how that cheque got out of his hands, but on the evening of the 22nd a woman unknown to the defendant bought at his shop goods worth £5, and tendered the cheque in payment, he paying her the difference; he presented the cheque on the following day, and received the amount. No evidence having been given by the plaintiff accounting for its having got out of his hands, the defendant claimed a nonsuit on that ground.

LORD TENTERDEN told the jury to find for the plaintiff if they thought that the defendant had taken the cheque under circumstances which ought to have excited the suspicion of a reasonable man, and further (on the authority of *Gill v. Cubitt* (5), which has since been overruled) asked whether the defendant, although not acting fraudulently, had acted negligently in taking the cheque; and upon those directions the jury found a verdict for the plaintiff. Upon a rule having been moved for a new trial on the ground of misdirection, the court supported the direction as to negligence upon the authority of *Gill v. Cubitt* (5), and as to the rule, BAYLEY, J., is reported to have said generally that if a cheque is taken after it is due, the party taking it can have no better title than the person from whom he took it; and it is in this passage that he is supposed to lay that proposition down as a rule of law. It must be remembered, however, that LORD TENTERDEN was also a party to the decision in *Rothschild v. Corney* (2), and could not have intended to hold in that case contrary to the so recent decision in *Down v. Halling* (1); and if the language of HOLROYD, J., is looked at when he says that five days ought to have excited the defendant's suspicions, and that in the earlier case a reasonable time had elapsed, I think the true result of that case is, that the court decided it rather upon its own peculiar facts than as intending to lay down any strict rule of law. In *Serrell v. Derbyshire, Staffordshire and Worcester Rail. Co.* (4), MAULE, J., says perhaps the two cases may be reconciled, and if my view of the character of the decision in *Down v. Halling* (1) is right, I have been able to come to the same conclusion.

I should, therefore, under ordinary circumstances, have contented myself with giving judgment for the plaintiff; but I think, assuming this to be the true view of *Down v. Halling* (1), it follows from that case, as well as from the other cases, that the true question for the jury being whether the cheque in the present case was taken by the plaintiffs under such circumstances as ought to have excited their suspicion, and the lapse of eight days, being a circumstance undoubtedly, though not conclusive, to be taken into consideration by them in considering that question, I ought to have left that question to the jury. I should indeed have done so if I had understood that counsel for the defendant had wished it. From what passed, however, at the argument, I think there may have been some misunderstanding on my part in the matter. It is undoubtedly true that that question was not put to the jury; and the defendant is entitled to have it put if he so wishes. I, therefore, give judgment for the plaintiff with costs, subject to the condition that, if the defendant elect within ten days after my judgment to have a new trial, he may do so.

Rule accordingly.

Solicitors: *White, Broughton & White; J. A. Hales.*

[Reported by W. P. EVERSLEY, Esq., Barrister-at-Law.]

A

MUNSTER v. LAMB

[COURT OF APPEAL (Sir Baliol Brett, M.R., and Fry, L.J.), July 3, 5, 1883]

[Reported 11 Q.B.D. 588; 52 L.J.Q.B. 726; 49 L.T. 252;
47 J.P. 805; 32 W.R. 243]

B

Slander—Privilege—Absolute privilege—Advocate engaged in judicial inquiry.

No action lies against a counsel or other advocate for defamatory words spoken in the course of a judicial inquiry in which he is engaged as counsel or advocate with reference to the matter which forms the subject of the inquiry, whether the words are relevant or not and whether they are actuated by malice or not. An advocate speaking in the conduct of a case must be free to do so with his mind uninfluenced by the fear of an action for defamation.

C

Notes. Followed: *Weldon v. Maples* (1888), 4 T.L.R. 529. Considered: *Pedley and May v. Morris* (1891), 61 L.J.Q.B. 21. Applied: *Law v. Llewellyn*, [1904-7] All E.R.Rep. 536; *Marriman v. Vibert*, [1962] 3 All E.R. 380. Referred to: *Bottomley v. Brougham*, [1908] 1 K.B. 584; *Burr v. Smith*, [1908-10] All E.R.Rep. 443; *Copartnership Farms v. Harvey-Smith*, [1918] 2 K.B. 405; *Smith v. National Meter Co.*, [1945] 2 All E.R. 35; *Hargreaves v. Bretherton*, [1958] 3 All E.R. 122; *Addis v. Crocker*, [1960] 2 All E.R. 629; *Lincoln v. Daniels*, [1961] 3 All E.R. 740.

D

E

As to absolute privilege, see 24 HALSBURY'S LAWS (3rd Edn.) 48 et seq., and for cases see 32 DIGEST (Repl.) 118 et seq.

Cases referred to:

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- (1) *Revis v. Smith* (1856), 18 C.B. 126; 25 L.J.C.P. 195; 27 L.T.O.S. 106; 20 J.P. 453; 2 Jur.N.S. 614; 4 W.R. 506; 139 E.R. 1314; 32 Digest (Repl.) 123, 1447.
- (2) *Henderson v. Broomhead* (1859), 4 H. & N. 569; 28 L.J.Ex. 360; 33 L.T.O.S. 302; 5 Jur.N.S. 1175; 7 W.R. 492; 157 E.R. 964, Ex. Ch.; 32 Digest (Repl.) 125, 1462.
- (3) *Scott v. Stansfield* (1868), L.R. 3 Exch. 220; 37 L.J.Ex. 155; 18 L.T. 572; 32 J.P. 423; 16 W.R. 911; 32 Digest (Repl.) 121, 1421.
- (4) *Dawkins v. Lord Rokeby* (1873), L.R. 8 Q.B. 255; 42 L.J.Q.B. 63; 28 L.T. 134; 21 W.R. 544, Ex. Ch.; affirmed (1875), L.R. 7 H.L. 744; 45 L.J.Q.B. 8; 33 L.T. 196; 40 J.P. 20; 23 W.R. 931, H.L.; 32 Digest (Repl.) 119, 1404.
- (5) *Seaman v. Netherclift* (1876), 1 C.P.D. 540; 45 L.J.C.P. 798; 34 L.T. 878; 24 W.R. 884; affirmed, 2 C.P.D. 53; 46 L.J.Q.B. 128; 35 L.T. 784; 41 J.P. 389; 25 W.R. 159, C.A.; 32 Digest (Repl.) 123, 1443.
- (6) *R. v. Skinner* (1772), Lofft, 54; 98 E.R. 529; 32 Digest (Repl.) 121, 1417.
- (7) *Kennedy v. Hilliard* (1859), 1 L.T. 78; 10 I.C.L.R. 195; 32 Digest (Repl.) 125, *482.
- (8) *Kendillon v. Maltby* (1842), Car. & M. 402; 2 Mood. & R. 438, N.P.; 33 Digest (Repl.) 209, 2269.

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Also referred to in argument:

- Robinson v. May* (1804), 2 Smith, K.B. 3; 32 Digest (Repl.) 190, 2028.
Butt v. Jackson (1846), 10 I.L.R. 120; 3 Digest (Repl.) 393, *248.
Allardice and Boswell v. Robertson (1830), 1 Dow. & Cl. 495; 6 E.R. 610, H.L.; 32 Digest (Repl.) 121, 1418.
Thomas v. Churton (1862), 2 B. & S. 475; 31 L.J.Q.B. 139; 6 L.T. 320; 8 Jur.N.S. 795; 26 J.P.Jo. 308; 121 E.R. 1150; 32 Digest (Repl.) 121, 1426.
Clark v. Molyneux (1877), 3 Q.B.D. 237; 47 L.J.Q.B. 230; 37 L.T. 694; 42 J.P. 277; 26 W.R. 104; 14 Cox, C.C. 10, C.A.; 32 Digest (Repl.) 191, 2045.

Appeal from a decision of the Divisional Court (MATHEW, J., and A. L. SMITH, J.), discharging a rule nisi for a nonsuit to be set aside in an action brought by Henry Munster against Charles Lamb to recover damages, for slander.

The plaintiff in his statement of claim alleged that in March, 1881, his dwelling-house was broken into, and William Hill and Ellen Hill, his wife, were tried before the recorder of Brighton on the charge of committing the offence, William Hill being convicted, and Ellen Hill acquitted on the ground that she had acted under the influence of her husband; that on June 9, 1881, Ellen Hill was charged at the Brighton Petty Sessions with having unlawfully administered soporific drugs to the plaintiff's servants; that the defendant then falsely and maliciously spoke and published of the plaintiff the words: "He has put her (meaning Ellen Hill's) sister into a convent to shut her mouth" (meaning thereby that the plaintiff had caused a sister of Ellen Hill to be placed in a convent against her will, to prevent her from giving evidence at her sister's trial, or from disclosing that the plaintiff had been guilty of a criminal offence, as he the defendant meant that the fact was); that the hearing of the charge was adjourned to June 17, 1881, and at the adjourned hearing the defendant spoke and published falsely and maliciously of the plaintiff:

"I have my own opinion for what purposes all these young women are resident in the house of Mr. Munster. I can believe that there may have been drugs in Mr. Munster's house, and I have my own opinion for what purposes they were there, and for what they may have been used."

The defendant in his statement of defence pleaded that he was a solicitor, and, as such solicitor, was engaged in defending Ellen Hill on the charge, and that the alleged words were spoken while he was engaged as such advocate, and in the capacity of advocate and not otherwise. Issue having been joined, the action came on for trial before WATKIN WILLIAMS, J., who, at the conclusion of the evidence for the plaintiff, was of opinion that there was no case to be submitted to the jury, and nonsuited the plaintiff. A rule nisi calling upon the defendant to show cause why the nonsuit should not be set aside was discharged by the Divisional Court who held that the expressions complained of were within the line indicated by the authorities as the boundaries of the advocate's privilege. The plaintiff appealed.

Waddy, Q.C., and *Woollett (H. Tindal Atkinson with them)* for the plaintiff.

Edward Clarke, Q.C., and *Gore*, for the defendant, were not called on to argue.

SIR BALIOL BRETT, M.R.—This action was brought against a solicitor, who had been acting as advocate for a person charged with a criminal offence, for things said in court while he was so acting as advocate. What he said I shall assume, for the purpose of this judgment, to have been malicious, in the sense that it was not said for the purpose of doing anything for the defence of his client. I shall assume that there was no justification or ground for saying what he said, and I shall assume that he acted from an indirect motive—that is, from anger against the prosecutor. If I thought the action would lie at all, I should wish to send back the case for a new trial, in order that these facts might be found by the jury; but I am of opinion that, even though the defendant may have acted from an indirect motive, desiring to injure the plaintiff in consequence of personal anger, and not acting for the benefit of his client, and even if what he said was irrelevant to any issue or fact in the case then before the magistrates, nevertheless, inasmuch as it was said with reference to, and in the course of, the inquiry which was taking place, no civil action will lie, however improper the conduct of the defendant may have been.

It has been said on behalf of the plaintiff that every person whose character is defamed *prima facie* has a cause of action, that the other party must show a defence in order to avoid liability, and that nothing which has ever been held to be a defence has been shown here. I cannot agree with that view. The common

A law consists, not only of cases, but of principles, which are stated as having existed from the beginning of the law. The judges do not make new law; they only declare what the law has always been. New circumstances and new combinations of facts are constantly arising, and the judges are obliged to apply what they consider the common law to be. It sometimes seems as if they were making new law, but they are not really doing so, but only applying the law which already exists. We, therefore, have to find out what the principle is, which now by decision is to be applied for the first time, for I cannot see that there has been any decision on the same state of facts, though there have been analogous cases.

Cases of libel and slander are always subject to one principle, namely, that if what is said or written is said or written on some particular occasion, it is not an actionable slander or libel. The rule is not that what is said or written on such an occasion is a slander or libel subject to a defence, but that if it is said or written on a privileged occasion, it is not, from the moment it is said or written, slander or libel at all. There are many privileged occasions which the common law has recognised, for different reasons, but in all cases for good and practical reasons. In the class of cases which we have now to consider, the thing said or written is said or written in an inquiry which takes place in the administration of the law; that it is said on a privileged occasion with regard to some persons is undoubted. It was admitted by counsel for the plaintiff that for some purposes counsel are privileged; but he said that the privilege exists only as long as the counsel is acting bona fide, and is saying what is relevant to the proceedings in which he is engaged. He goes on to contend that counsel who do not act bona fide are not protected, and that, if what is said is irrelevant, the counsel is not a person to whom the privileges apply. That is the question which we have to decide.

The result of the decisions is that we have got so far as this, that what is said in an inquiry held for the purpose of the administration of the law is as to some persons privileged. What persons are to be included? There may be mentioned (though I do not say it is an exhaustive list) judges, counsel, parties, and witnesses. As to judges, parties, and witnesses, there have been decisions, and it has been held that whatever is said by them with reference to the matter which is the subject of inquiry is privileged, and they are not liable. It has been suggested that this is so only in some cases, that is, that judges who are acting without malice, and saying what is relevant, are not liable; that parties acting without malice and saying what is relevant are not liable; and that witnesses acting without malice, and saying what is relevant are not liable; but it is said, as to all three classes, that if they speak without relevancy and with malice, they are not privileged. I am inclined to think that, as to some of these classes of persons, there is not the same statement of law to be found in the judgments of the different judges; some judges will not carry the doctrine further than they can help, while others are inclined to carry it to the full extent.

As to witnesses we have *Revis v. Smith* (1) and *Henderson v. Broomhead* (2). These are the chief cases as to witnesses. The general result of the decisions is that all witnesses, speaking with reference to the matter which forms the subject of inquiry, whether their statements are relevant or not, and whether they are actuated by malice or not, are not liable to any action in respect of such statements, whether made by words spoken or by affidavit. Different reasons are given for the exemption in the different cases, but, though different, the reasons are not necessarily inconsistent. What we have to do is to get at a rule which is wide enough to cover all the classes of cases if we can.

It has been suggested that although a counsel may not be liable to an action for slander, he might be liable to another action on the case, namely, an action analogous to the action for malicious prosecution, in which the plaintiff must go further than to show that the defendant made a false statement, and one which was false to his own knowledge, and must allege and prove a want of reasonable and probable cause. This has been said by great judges, and, therefore, I feel some hesitation in dealing with the proposition, but it seems to me to be wholly

untenable. How can a man maintain an action, which he could not otherwise maintain, by altering the form? It seems to me that every objection which applies to the action for slander would apply to the other suggested action. I will deal with it by using the words of one of the most consummate pleaders, CROMPTON, J. In *Henderson v. Broomhead* (2) he said (4 H. & N. at p. 579):

"The attempts to obtain redress for defamation having failed, an effort was made in *Revis v. Smith* (1) to sustain an action analogous to an action for malicious prosecution. That seems to have been done in despair."

This is a strong and picturesque statement showing an absolute denial on the part of that learned judge that the new cause of action which had been suggested could exist.

In answer to the action for defamation for words spoken by counsel in the conduct of a case, it is said that from the time of Queen Elizabeth downwards such an action has never been successfully maintained, and within the last thirty years there have been decisions and dicta which are inconsistent with the right to maintain such an action. In the case of the other suggested action, the same answer may also be given, and every objection equally applies. No lawyer has ever heard of such an action having been successfully brought, and it is impossible to suppose that, if it could be maintained, the occasion for bringing it has never arisen. In *Henderson v. Broomhead* (2), in the part of his judgment immediately preceding the passage which I have just read, CROMPTON, J., made the following observations (*ibid.*):

"My brother MARTIN held that, even if the slanderous matter was proved to be malicious and false to the knowledge of the defendant, the action would not lie. No action will lie for words spoken or written in the course of any judicial proceeding. In spite of all that can be said against it, we find the rule acted upon from the earliest times. The mischief would be immense if the person aggrieved, instead of preferring an indictment for perjury, could turn his complaint into a civil action. By universal assent it appears that in this country no such action lies. CRESSWELL, J., pointed out in *Revis v. Smith* (1) that the inconvenience is much less than it would be if the rule were otherwise. The origin of the rule was the great mischief that would result if witnesses in courts of justice were not at liberty to speak freely, subject only to the animadversion of the court."

It is true that the reasoning in that case was only applied to the case of a witness; but the reason of the rule with regard to witnesses is given, and that reason is not peculiar to the case of a witness or a party, for the reason for the privilege is that the words written or spoken are written or spoken in the course of administration of the law. The reason is founded on public policy.

Scott v. Stansfield (3) was the case of a judge. KELLY, C.B., in giving judgment for defendant, said (L.R. 3 Exch. at p. 222):

"The question raised upon this record is whether an action is maintainable against the judge of a county court, which is a court of record, for words spoken by him in his judicial character, and in the exercise of his functions as judge in the court over which he presides, where such words would, as against an ordinary individual, constitute a cause of action; and where they are alleged to have been spoken maliciously and without probable cause, and to have been irrelevant to the matter before him."

The Chief Baron proceeds to lay down that the privilege applies to all judges, whether of superior or inferior courts, and continues as follows (*ibid.* at p. 223):

"This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and

A without fear of consequences. How could a judge so exercise his office if he were in daily and hourly fear of an action being brought against him, and of having the question submitted to a jury whether a matter on which he had commented judicially was or was not relevant to the case before him?"

B The reason of the privilege is there stated to be public policy. MARTIN, B., adds (ibid. at p. 224):

C "If words spoken under such circumstances were the subject of an action of slander, the most mischievous consequences would ensue; no judge, as my Lord has pointed out, would then be able freely to administer justice, for if it were alleged, as is the case here, that he spoke falsely and maliciously, and not bona fide in the discharge of his duty, and that what he said was irrelevant to the matter in hand, a jury would have to determine the question whether what he said in the course of a case which he had jurisdiction to try was or was not said under the circumstances so alleged. What judge could try a case with any degree of independence if he were to be afterwards subject to have his conduct in the administration of justice commented upon to a jury, and the propriety of it determined by them?"

D It seems to me that he means not only the question of relevancy, but the whole question, and holds that for the sake of the public benefit, and looking to the balance of convenience, it is better that a judge should not be subject to any fear in consequence of what he may say in the course of a case which he has to try. It follows, therefore, that both witnesses and judges are within the rule, and are privileged, although they may be acting from an indirect motive and with malice. E The law says if in some particular case this happens, still it is better on the whole to state distinctly that no action will lie.

F There is a later case as to a witness, *Dawkins v. Lord Rokeby* (4). The decision proceeded on the assumption that the statements made were false and malicious, and yet it was held that no action would lie. Nothing could be more strong or decisive than that case.

G What is the ground of the rule thus laid down? The rule was not made in order to protect the witness who makes false and malicious statements, and it does not look to the benefit of the person injured by such statements, but proceeds on the ground of public policy, in order that the administration of law may be free, and that a witness may give evidence with no fear of ever being charged in an action for anything that he may have said in the course of his evidence. The same point was decided in the Common Pleas Division, and in the Court of Appeal in *Seaman v. Netherclift* (5), a case which proceeded on the same ground. We find also that the same rule applies to the case of parties to an action. If it is right, for the reasons which have been given, that the privilege should attach to judges though they act with malice and speak falsely, and have no reasonable ground for what they say, how can it be suggested that it is not for the public benefit that counsel should be within the rule? H Of all the three classes, judges, witnesses, and counsel, the person who most wants to have his mind clear from fear of the consequences of what he may say is a counsel who is engaged in the conduct of a case. A counsel is in a position of extreme difficulty, for he has not to speak of the things which he knows; he does not know whether the facts which he is instructed to bring forward are true or false, but he has to argue in favour of the proposition which will best advance the case of his client. I If in the midst of these difficulties he is to be called on to consider whether what he desires to say in support of his client's case is relevant to the question at issue, if he is to be subject to the risk of being liable to an action, should he, by an error of judgment, or in consequence of incorrect instructions, make a statement which turns out not to be relevant, the difficulty of doing his duty will be greatly increased. He wants protection more than the judge or the witness, and he wants it more for the public benefit. In my opinion, the reason of the rule covers him, not merely

as much as the other classes of persons, but more, in order that he may be able to keep his mind free for the performance of his duty. It is illogical to my mind to say that counsel do not want protection. The protection is given, not for the benefit of a man who may wish to act with malice, but because, if the rule were otherwise, an innocent counsel would be in danger, and would be put to trouble. It is better that the rule should be made large, even though it may be large enough to cover the case of a man who acts with malice and is guilty of misconduct. A B

In *Dawkins v. Lord Rokeby* (4) the judgment of the Court of Exchequer Chamber, which was delivered after the case had been elaborately argued, was a written judgment, and, therefore, must have been in terms laid before each of the judges who took part in the decision, and each judge must have written on the back of the judgment his assent to the terms which it contains. That judgment lays down the proposition that no action lies for words spoken in legal proceedings against different classes of persons, including counsel. In *R. v. Skinner* (6), LORD MANSFIELD, a master of legal knowledge, who took pride in laying down principles, states the rule in similar terms. That of itself is a very strong authority; and, moreover, LORD MANSFIELD's rule was adopted by the Court of Exchequer Chamber in *Dawkins v. Lord Rokeby* (4) (L.R. 8 Q.B. at p. 264). C

The reasons for the rule are, I think, more applicable to counsel than to any other persons, and this remark seems to apply to the rule as stated in *Kennedy v. Hilliard* (7) in the elaborate and learned judgment of PIGOT, C.B.—a judge of immense learning. He says (10 I.C.L.R. at p. 209): D

“Upon a review of the authorities, it appears to me that the law is correctly laid down in the following proposition, with which MR. STARKIE, in his TREATISE ON LIBEL AND SLANDER, closes his description of this part of the subject, viz., ‘That an action of slander cannot be maintained for anything said or otherwise published by either a judge, a party, or a witness in due course of a judicial proceeding, whether criminal or civil.’ I take this to be a rule of law, not founded, as is the protection in other cases of privileged statements, on the absence of malice in the party sued, but founded on public policy, which requires that a judge in dealing with the matter before him, a party in preferring or resisting a legal proceeding, or a witness in giving evidence oral or written, in a court of justice, shall do so with his mind uninfluenced by the fear of an action for defamation or a prosecution for libel.” E F

It seems to me that we may introduce counsel into this statement, and then the rule so stated is the rule of the common law, for the rule requires that a counsel speaking in the conduct of a case in which he is instructed shall do so with his mind uninfluenced by the fear of an action for defamation. If we take that to be the rule, the question of malice, of bona fides, or of relevancy cannot be raised. The only question is whether what is complained of was said in the course of the administration of the law, and, if this is so, the case must be stopped, for no action can be maintained from the moment the fact is established that what the plaintiff is suing for was said by the defendant acting as counsel in a judicial inquiry in any court of justice. If this rule is applied to the facts of the present case, it becomes clear that the plaintiff has no cause of action, and therefore the judgment must be affirmed. G H

FRY, L.J.—I concur with the judgment of the Master of the Rolls, and will add a very few words. For the purposes of the present argument the facts must be taken to be these. An advocate made a statement which was defamatory and false and made by reason of malice, but it was made when he was speaking as an advocate, and with reference to the case which was being tried, and the question is: Is it actionable? It is a remarkable fact, and creditable to the legal profession, that there is no direct decision to be found upon the point; but, although there is not a decision, there are dicta bearing on the question. We have the opinion of I

A LORD MANSFIELD more than one hundred years ago. In *R. v. Skinner* (6), he observed :

B "What Mr. Lucas [counsel for the defendant] has said is very just; neither party, witness, counsel, jury, or judge, can be put to answer, civilly or criminally, for words spoken in office. If the words spoken are opprobrious or irrelevant to the case the court will take notice of them as a contempt, and examine on information. If anything of mala mens is found on such inquiry, it will be punished suitably."

I read this passage in order to show that in stating the rule as to privilege LORD MANSFIELD was dealing with cases where the person whose words were complained of was actuated by malice, or mala mens.

C In *Dawkins v. Lord Rokeby* (4), the rule is thus stated in the judgment of the Court of Exchequer Chamber (L.R. 8 Q.B. at p. 263) :

D "The authorities are clear, uniform, and conclusive that no action of libel or slander lies, whether against judges, counsel, witnesses, or parties, for words written or spoken in the ordinary course of any proceeding before any court or tribunal recognised by law."

In the same judgment the following passage occurs (*ibid.* at p. 268) :

E "But another ground on which this action must fail, and which embraces the great variety of cases in which statements made, whether orally or in writing, are privileged and protected, is that by reason of the occasion on which they are made, the making of them is not such a publication as will support an action for libel or slander. On this ground, whatever is said, however false or injurious to the character or interests of a complainant, by judges upon the Bench, whether in the superior courts of law or equity, or in county courts, or sessions of the peace, by counsel at the Bar in pleading causes, or by witnesses in giving evidence, or by members of the legislature in either House of Parliament, or by ministers of the Crown in advising the Sovereign, is absolutely privileged, and cannot be inquired into in an action at law for defamation."

F Although these statements were not necessary for the decision of the particular cases, still they are of the highest importance and value, and, in my opinion, they declare the common law. The analogous cases are those of witnesses, of judges, and of parties. As to judges the cases establish this proposition, that a defamatory statement made by a judge, which is false and malicious, and for which there is no reasonable or probable cause, is not actionable, and a similar rule prevails with regard to a witness. Why should a judge who degrades his office by his misconduct, and is guilty of conduct of the worst description, be protected, and why should a witness, who is guilty of perjury, and, actuated by malice, makes a false statement affecting the character or interests of some other person, be protected? The reason is not because the conduct of those persons ought not to be actionable, but because actions would be brought where there was no malice and no improper conduct. We must bear in mind that the rule was not made in order to protect those who are actuated by malice and speak falsely, but because others would be liable to be vexed by actions. Both analogy and convenience apply the rule to the case of counsel. The court has control over the proceedings before it, and has stringent powers for the purpose of preventing abuses, and if such an action could be maintained no person acting as counsel would be free from the apprehension of being harassed for what he might feel himself called upon to say in the performance of his duty. On every ground I am of opinion that such an action ought not to be maintained. At the same time the decision we have arrived at shows how strong the duty is in foro conscientiae not to abuse the privilege of counsel.

SIR BALIOL BRETT, M.R.—I wish to add, as to what was said by LORD DENMAN in *Kendillon v. Maltby* (8), that, as is obvious from our judgments, we do not agree with it.

Appeal dismissed.

Solicitors: *William Brewer; Palmer & Bull, for Lamb & Evett, Brighton.*

[*Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.*]

LYELL v. KENNEDY (No. 1)

[HOUSE OF LORDS (The Earl of Selborne, L.C., Lord Watson, Lord Bramwell, and Lord FitzGerald), February 26, 27, March 1, 2, 19, 1883]

[Reported 8 App. Cas. 217; 52 L.J.Ch. 385; 48 L.T. 585;
31 W.R. 618]

Discovery—Interrogatory—Action for ejectment—Matters within defendant's knowledge tending to support plaintiff's case.

A plaintiff in an action of ejectment suing on a legal title may administer interrogatories relating to matters which are within the defendant's knowledge and tend to support, not the defendant's, but the plaintiff's, case. This does not in the least trench on the rule that a plaintiff in ejectment must succeed, if at all, on the strength of his own title, and not on the weakness of the title of the defendant in possession—in other words, that the plaintiff must prove his title before the defendant can be called on to enter his defence.

In an action for ejectment the plaintiff had to prove that the persons through whom he claimed were co-heiresses of a person who at the time of her death was seised of the land sought to be recovered. He also had to repel the defence of the statute of limitations set up by the defendant.

Held: the plaintiff was entitled to administer to the defendant interrogatories relevant to these two matters.

Horton v. Bott (1) (1857), 2 H. & N. 249, explained.

Notes. Distinguished: *Ponsonby v. Hartley*, [1883] W.N. 44. Considered: *Hunnings v. Williamson* (1883), 10 Q.B.D. 459; *Roberts v. Oppenheim* (1884), 26 Ch.D. 724. Distinguished: *Horton v. Donnington* (1886), 2 T.L.R. 739. Referred to: *Hall v. Truman, Hanbury & Co.* (1885), 29 Ch.D. 307. *Bidder v. Bridges* (1885), 29 Ch.D. 29; *Leeke v. Portsmouth Corpn.* (1912), 106 L.T. 627.

As to interrogatories in actions for the recovery of land, see 12 HALSBURY'S LAWS (3rd Edn.) 75, 76; and for cases see 18 DIGEST (Repl.) 201–203.

Cases referred to:

- (1) *Horton v. Bott* (1857), 2 H. & N. 249; 26 L.J.Ex. 267; 29 L.T.O.S. 228; 3 Jur.N.S. 568; 5 W.R. 792; 157 E.R. 104; 18 Digest (Repl.) 202, 1752.
- (2) *Roe d. Urry v. Harvey* (1769), 4 Burr. 2484; on appeal (1770), 5 Burr. 2638; 98 E.R. 387; 44 Digest 698, 5394.
- (3) *Crow v. Tyrell* (1817), 2 Madd. 397.
- (4) *Wright v. Plumtree* (1818), 3 Madd. 481.
- (5) *Pennington v. Beechey* (1825), 2 Sim. & St. 282; 57 E.R. 354; Digest (Pleading) 46, 377.
- (6) *Drake v. Drake* (1844), 3 Hare, 523; 13 L.J.Ch. 406; 8 Jur. 642.
- (7) *Bennett v. Glossop* (1844), 3 Hare, 578; 67 E.R. 510; 18 Digest (Repl.) 124, 1088.
- (8) *Brown v. Wales* (1872), L.R. 15 Eq. 142; 42 L.J.Ch. 45; 27 L.T. 410; 21 W.R. 157; 18 Digest (Repl.) 128, 1133.

- A** (9) *Butterworth v. Bailey* (1808), 15 Ves. 358.
 (10) *Hylton v. Morgan* (1801), 6 Ves. 293.
 (11) *Jones v. Jones* (1817), 3 Mer. 161.
 (12) *R. v. Bishop of Worcester* (1669), Vaugh. 53; 1 Mod. Rep. 276; 124 E.R. 967; sub nom. *R. v. Jervise*, T.Jo. 8; sub nom. *R. v. Gervaise*, Freem.K.B. 7; 11 Digest (Repl.) 600, 335.
- B** Also referred to in argument:
Stone v. Godfrey (1854), 5 De G.M. & G. 76; 2 Eq. Rep. 866; 23 L.J.Ch. 769; 23 L.T.O.S. 289; 18 Jur. 524; 43 E.R. 798, L.J.J.; 21 Digest (Repl.) 477, 1675.
Foster v. Bates (1843), 12 M. & W. 226; 1 Dow. & L. 400; 13 L.J.Ex. 88; 2 L.T.O.S. 150; 7 Jur. 1093; 152 E.R. 1180; 23 Digest (Repl.) 62, 537.
- C** *Fleet v. Perrins* (1868), L.R. 3 Q.B. 536; 37 L.J.Q.B. 233; 19 L.T. 147; affirmed (1869), L.R. 4 Q.B. 500, Ex. Ch.; 18 Digest (Repl.) 232, 1997.
Campbell v. Rothwell (1877), 47 L.J.Q.B. 144; 38 L.T. 33; 22 Digest (Repl.) 521, 5804.
- D** *Bullock v. Corry* (1878), 3 Q.B.D. 356; 47 L.J.Q.B. 352; 38 L.T. 102; 42 J.P. 232; 26 W.R. 330; 18 Digest (Repl.) 92, 759.
Southwark Water Co. v. Quick (1878), 3 Q.B.D. 315; 47 L.J.Q.B. 258; 26 W.R. 341, C.A.; 18 Digest (Repl.) 91, 752.
Lane v. Gray (1873), L.R. 16 Eq. 552; 43 L.J.Ch. 187; 18 Digest (Repl.) 38, 303.
Egremont Burial Board v. Egremont Iron Ore Co. (1880), 14 Ch.D. 158; 49 L.J.Ch. 623; 42 L.T. 179; 28 W.R. 594; 18 Digest (Repl.) 29, 234.
- E** *Daniel v. Ford* (1882), 47 L.T. 575; 18 Digest (Repl.) 18, 126.
Lady Shaftesbury v. Arrowsmith (1798), 4 Ves. 66; 31 E.R. 35, L.C.; 18 Digest (Repl.) 126, 1110.
Mutloe v. Smith (1796), 3 Anst. 709; 145 E.R. 1014; 18 Digest (Repl.) 202, 1751.
Chester v. Wortley (1856), 17 C.B. 410; 25 L.J.C.P. 117; 2 Jur.N.S. 287; 4 W.R. 325; 139 E.R. 1133; 18 Digest (Repl.) 201, 1740.
- F** *Stoate v. Rew* (1863), 14 C.B.N.S. 209; 32 L.J.C.P. 160; 11 W.R. 595; 143 E.R. 426; 18 Digest (Repl.) 202, 1744.
Pearson v. Turner (1864), 16 C.B.N.S. 157; 33 L.J.C.P. 224; 10 L.T. 461; 10 Jur.N.S. 731; 12 W.R. 801; 143 E.R. 1085; 18 Digest (Repl.) 202, 1746.
Wallen v. Forrestt (1872), L.R. 7 Q.B. 239; 41 L.J.Q.B. 96; 26 L.T. 290; 18 Digest (Repl.) 202, 1748.
- G** *Bellwood v. Wetherell* (1835), 1 Y. & C.Ex. 211; 4 L.J.Ex. Eq. 23; 160 E.R. 86; 18 Digest (Repl.) 127, 1117.
Harris v. Harris (1844), 3 Hare, 450; 13 L.J.Ch. 349; 8 Jur. 978; 67 E.R. 458; 18 Digest (Repl.) 123, 1065.
Flitcroft v. Fletcher (1856), 11 Exch. 543; 25 L.J.Ex. 94; 26 L.T.O.S. 227; 2 Jur.N.S. 191; 156 E.R. 946; sub nom. *Flintcroft v. Fletcher*, 4 W.R. 263; 18 Digest (Repl.) 202, 1741.
- H** *Edwards v. Wakefield* (1856), 6 E. & B. 462; 27 L.T.O.S. 201; 2 Jur.N.S. 762; 4 W.R. 710; 119 E.R. 937; 18 Digest (Repl.) 173, 1499.
Wright v. Vernon (1853), 1 Drew. 344; 22 L.J.Ch. 447; 1 W.R. 138; 61 E.R. 483; 18 Digest (Repl.) 127, 1119.
- I** *Goodall v. Little* (1851), 1 Sim.N.S. 155; 20 L.J.Ch. 132; 15 Jur. 309; 61 E.R. 60; 18 Digest (Repl.) 114, 961.
Greenwood v. Greenwood (1857), 6 W.R. 119; 18 Digest (Repl.) 123, 1071.
Burrell v. Nicholson (1833), 1 My. & K. 680; 39 E.R. 838, L.C.; 18 Digest (Repl.) 81, 660.
Minet v. Morgan (1873), 8 Ch. App. 361; 42 L.J.Ch. 627; 28 L.T. 573; 21 W.R. 467, L.C. & L.J.; 18 Digest (Repl.) 96, 793.
A.-G. v. London Corp. (1850), 2 Mac. & G. 247; 2 H. & Tw. 1; 19 L.J.Ch. 314; 14 L.T.O.S. 501; 14 Jur. 205; 42 E.R. 95, L.C.; 18 Digest (Repl.) 9, 50.

- Balguy v. Broadhurst* (1850), 1 Sim.N.S. 111; 16 L.T.O.S. 385; 14 Jur. 1105; 61 E.R. 43; 18 Digest (Repl.) 43, 348.
- Brickell v. Hulse* (1837), 7 Ad. & El. 454; 2 Nev. & P.K.B. 426; Will. Woll. & Dav. 610; 7 L.J.Q.B. 18; 2 Jur. 10; 112 E.R. 541; 22 Digest (Repl.) 522, 5820.
- Cameron v. Lightfoot* (1778), 2 Wm. Bl. 1190; 96 E.R. 701; 22 Digest (Repl.) 438, 4775.
- Richards v. Morgan* (1863), 4 B. & S. 641; 3 New Rep. 198; 33 L.J.Q.B. 114; 9 L.T. 662; 28 J.P. 55; 10 Jur.N.S. 559; 122 E.R. 600; sub nom. *Richards v. Morgan*, *Morgan v. Morgan*; 12 W.R. 162; 22 Digest (Repl.) 78, 541.
- Beasley v. McGrath* (1804), 2 Sch. & Lef. 31; 12 Digest (Repl.) 118, *471.
- Morgan v. Couchman* (1853), 14 C.B. 100; 2 C.L.R. 53; 23 L.J.C.P. 36; 2 W.R. 59; 139 E.R. 42; 21 Digest (Repl.) 375, 1128.
- Greaves v. Greenwood* (1877), 2 Ex.D. 289; 46 L.J.Q.B. 252; 36 L.T. 1; 25 W.R. 639, C.A.; 22 Digest (Repl.) 170, 1556.
- Doc d. Harvey v. Francis* (1837), 2 Mood. & R. 57, N.P.; 30 Digest (Repl.) 375, 173.
- A.-G. v. Gaskill* (1882), 20 Ch.D. 519; 51 L.J.Ch. 870; 46 L.T. 180; 30 W.R. 558, C.A.; 18 Digest (Repl.) 154, 1379.
- Eade v. Jacobs* (1877), 3 Ex.D. 335; 47 L.J.Q.B. 74; 37 L.T. 621; 42 J.P. 200; 26 W.R. 159, C.A.; 18 Digest (Repl.) 172, 1489.
- Sketchley v. Conolly* (1863), 2 New Rep. 23; 11 W.R. 573; 18 Digest (Repl.) 202, 1760.
- Coster v. Baring* (1854), 2 C.L.R. 811; 18 Digest (Repl.) 87, 718.
- Towne v. Cocks* (1874), L.R. 9 Exch. 45; 43 L.J.Ex. 41; 18 Digest (Repl.) 202, 1754.
- New British Mutual Investment Co., Ltd. v. Peed* (1878), 3 C.P.D. 196; 26 W.R. 354; 18 Digest (Repl.) 18, 124.
- A.-G. v. Duplessis* (1752), Park. 144; 145 E.R. 739; affirmed sub nom. *Duplessis v. A.-G.* (1753), 1 Bro. Parl. Cas. 415, H.L.; 18 Digest (Repl.) 68, 539.
- Rumbold v. Forteath* (1857), 3 K. & J. 748; 3 Jur.N.S. 657; 69 E.R. 1311; 18 Digest (Repl.) 126, 1111.
- Chadwick v. Broadwood* (1840), 3 Beav. 308; 49 E.R. 121; 32 Digest (Repl.) 528, 1262.
- Lord Grey v. Lady Grey* (1677), 1 Cas. in Ch. 296; 2 Swan. 594; Cas. temp. Finch, 338; 22 E.R. 809, L.C.; 25 Digest (Repl.) 558, 75.
- Anderson v. Bank of British Columbia* (1876), 2 Ch.D. 644; 45 L.J.Ch. 449; 35 L.T. 76; 24 W.R. 624, 724; 3 Char. Pr. Cas. 212, C.A.; 18 Digest (Repl.) 102, 863.
- Bustros v. White* (1876), 1 Q.B.D. 423; 45 L.J.Q.B. 642; 34 L.T. 835; 24 W.R. 721; 3 Char. Pr. Cas. 229, C.A.; 18 Digest (Repl.) 63, 501.
- Farrier v. Atwool* (1866), 14 L.T. 278; sub nom. *Ferrier v. Atwool*, 12 Jur.N.S. 365; 14 W.R. 597, L.J.J.; 18 Digest (Repl.) 72, 576.
- Felkin v. Lord Herbert* (1861), 30 L.J.Ch. 798; 9 W.R. 756; 18 Digest (Repl.) 123, 1067.
- Re Alison, Johnson v. Mounsey* (1879), 11 Ch.D. 284; 40 L.T. 234; 27 W.R. 537, C.A.; 32 Digest (Repl.) 555, 1477.
- Sanders v. Sanders*, ante p. 197; 19 Ch.D. 373; 51 L.J.Ch. 276; 45 L.T. 637; 30 W.R. 280, C.A.; 32 Digest (Repl.) 532, 1307.
- Wheeler v. le Marchant* (1881), 17 Ch.D. 675; 50 L.J.Ch. 793; 44 L.T. 632; 45 J.P. 728; 30 W.R. 235, C.A.; 18 Digest (Repl.) 90, 743.

Appeal by the plaintiff in the action from a decision of the Court of Appeal (Sir GEORGE JESSEL, M.R., BRETT and HOLKER, L.J.J.), affirming a decision of BACON, V.-C., in an action brought by the appellant to recover possession of lands and houses at Manchester, and for mesne profits.

A The plaintiff, by his statement of claim, alleged that one Anne Duncan had been seised in fee of the property in question at her death, that she died intestate as to this property in 1867, and that in 1880 her heirs-at-law conveyed their interest in the property to him (the plaintiff). He further alleged that the defendant had been in possession of the property since the death of Miss Duncan as agent, and "upon an express trust" for the heir-at-law. The defendant denied the allegations in the statement of claim, and pleaded the Statute of Limitations. The plaintiff administered a number of interrogatories relating to the pedigree and the alleged agency, which the defendant declined to answer on the ground that they were irrelevant, and not put bona fide. The plaintiff took out a summons for further and better answers. BACON, V.-C., dismissed the summons, and his decision was affirmed by the Court of Appeal, on the ground that before the Judicature Acts a bill of discovery could not have been filed in aid of an action of ejectment, and that no such right as alleged had been given by the Judicature Acts, which only altered the procedure. The plaintiff appealed to the House of Lords.

McClymont for the appellant.

Horton Smith, Q.C., and *Clare* for the respondent.

D At the conclusion of the arguments their Lordships announced that they would reverse the decision of the Court of Appeal, but would give their reasons at a later date.

Mar. 19, 1883. The following opinions were read.

THE EARL OF SELBORNE, L.C.—The action in this case (brought in the Chancery Division of the High Court of Justice) is to recover possession of real estate in England, with mesne profits, by a legal title. The plaintiff exhibited interrogatories in the ordinary course to obtain discovery from the defendant of certain matters which (as I understand them) are all relevant to the plaintiff's and not to the defendant's case. To these interrogatories (with an exception, which I need not more particularly mention) the defendant has in effect refused to give any answer; and in that refusal he has been upheld by the judgments of BACON, V.-C., and of the Court of Appeal.

I should be very sorry to encourage appeals to your Lordships' House from interlocutory orders upon interrogatories raising no question of principle. But this appeal does raise an important question of principle. The decision of the Court of Appeal, as understood by both parties, proceeded upon the general ground that a plaintiff in ejectment, claiming by a legal title, is entitled to no discovery, even of matters relevant to his (the plaintiff's) own case, from the defendant in possession. It was held (I think correctly) that the right of discovery under the present Rules of the Supreme Court is not in principle more extensive than it formerly was in the Court of Chancery; and the plaintiff's counsel was challenged to produce authorities in support of the right of a plaintiff in an action of ejectment at law to file and obtain an answer to a bill of discovery in equity. This, as I understand, he was not at that time prepared to do; and it seems to have been concluded that the settled course of practice in equity was against the existence of such a right, and that this practice was founded upon principles which are, indeed, altogether beyond question—viz., that a plaintiff in ejectment at law must succeed (if at all) by the strength of his own title, and that it is against public policy to assist him in searching into the evidences of the defendant's title. Reference was also made to a case at law of *Horton v. Bott* (1) in which discovery of matters relevant only to the defendant's title was very properly refused. It does not, however, appear to me to follow from these principles, or from *Horton v. Bott* (1), that a plaintiff in an action of ejectment, suing upon a legal title, ought to be denied that discovery of matters within the defendant's knowledge, and tending to support, not the defendant's, but the plaintiff's case, to which a plaintiff at law would be entitled in any other kind of action.

In the arguments before your Lordships the appellant's counsel produced a series of authorities, which, if they had been cited in the Court of Appeal, might,

not improbably, have satisfied that court (as I believe they have satisfied all your Lordships) that bills of discovery in aid of the title of the plaintiffs at law, in actions of ejectment, were neither unknown to the Court of Chancery nor excluded by any rule or practice of that court—on the contrary, that they were dealt with in the same manner and on the same principles as similar bills in other cases. If there had been such a course of practice as that supposed, it must have been familiar to the leading writers on the law of discovery, SIR JAMES WIGRAM and MR. HARE. There is, however, no trace of it in the learned treatises of either of those authors. What they say is inconsistent with it. MR. HARE'S DISCOVERY OF EVIDENCE was published in 1836, before that of SIR JAMES WIGRAM, by whom it is much commended. He says (at p. 198):

"That which has been said of the action of ejectment [quoting LORD MANSFIELD's words in *Roe d. Urry v. Harvey* (2) (4 Burr. at p. 2487): 'The plaintiff cannot recover but upon the strength of his own title,' etc.] seems not less applicable to every suit seeking to change the right and the possession of property. . . . A case has been put of an ejectment brought against a party in possession, who cannot, by filing a bill against the plaintiff in the action, compel a discovery of his title deeds by merely alleging that they would show that he had no title. The defendant is left to sustain his case or defend his possession as he may. The purposes of justice are accomplished in affording to the plaintiff all the evidence that tends to establish affirmatively the facts upon which he insists."

SIR JAMES WIGRAM in his work on DISCOVERY (2nd Edn.), p. 14, lays down what he calls "the two cardinal rules of the law of discovery," as follows:

"First, the right, as a general proposition, of every plaintiff to a discovery of the evidences which relate to his case; and secondly, the privilege of every defendant to withhold a discovery of the evidences which exclusively relate to his own."

In the several "propositions" founded on these two cardinal rules, which he proceeds to formulate, and to the elucidation of which the rest of his treatise is devoted, his language is equally large; and the exceptions from and qualifications of those rules and propositions, which he examines in detail at pp. 79 to 120, do not touch the present question. He states expressly (p. 122) that the expression "every plaintiff" is meant by him to include a plaintiff at law who files a bill for discovery only in equity, as well as a plaintiff in equity who seeks relief.

Examples of bills for discovery only, in aid of actions of ejectment brought in courts of law, are found in *Crow v. Tyrell* (3), *Wright v. Plumtree* (4), *Pennington v. Beechey* (5), *Drake v. Drake* (6), *Bennett v. Glossop* (7), and *Brown v. Wales* (8), cases which came (all but one of them) on demurrer or plea before SIR JOHN LEACH, SIR JAMES WIGRAM, and SIR JOHN WICKENS. In four of those cases the demurrer or plea was overruled, and it was held that discovery must be given; in another, a plea of purchaser for valuable consideration without notice (as to which see WIGRAM ON DISCOVERY (2nd Edn.), pp. 81, 82) was allowed. The sixth came before the court, after a full answer, upon a motion for the production of deeds, which was refused because the deeds appeared by the pleadings to be evidence of the defendant's title only, and for no other reason. In none of those cases was there the least trace of any objection, in principle, to such a bill of discovery. In one of them (*Drake v. Drake* (6)) SIR JAMES WIGRAM said (3 Hare, at pp. 525, 526):

"This is a mere bill of discovery in aid of an ejectment. . . . The allegation [of the plea] if true, is not at law a bar to the action; and, if the plaintiff is entitled to the relief he seeks at law, he is *prima facie* entitled to discovery also. If the plaintiff is entitled to recovery at law, his right to discovery is *prima facie* incident to his right to the relief; and the defendant can no more refuse to give discovery in such a case than he could refuse to answer a bill in this court, when the right to relief in equity could not be controverted."

A *Butterworth v. Bailey* (9) is another case of a bill of discovery only, in aid of an ejectment at law, which came before LORD ELDON, after a full answer, upon a motion to amend by adding a prayer for relief. The motion was refused, but upon grounds not implying any doubt that the bill, as it stood, was proper according to the course of the court. In *Hylton v. Morgan* (10) the bill was not for discovery only, but also prayed that the defendant to the action of ejectment might be restrained from setting up outstanding terms. LORD ELDON refused an interlocutory motion for an injunction, saying (6 Ves. at p. 294):

"There are two ways of proceeding. You may get a discovery in aid of an ejectment; but, if you will have equitable relief to aid the trial of your title at law, you must have that relief upon a decretal order prior to the trial at law."

C *Jones v. Jones* (11) was a case in which the plaintiff, stating in his bill a legal title to land, on which he was about to proceed at law, asked relief, to which demurrer was allowed. SIR WILLIAM GRANT said (3 Mer. at p. 170):

"If this had been a bill merely for discovery, there are several parts of it to which an answer must undoubtedly have been given."

D It was admitted by the learned counsel for the respondent that discovery in aid of an ejectment at law might always be obtained by a bill praying relief, even if the relief were only to prevent the setting up of outstanding terms.

E It is unnecessary to consider whether the present action, in a court which can give both discovery and relief, may not (for this purpose) be equivalent to a bill praying relief; because the right to discovery really rested upon the same principles, whether relief was prayed or not, and whether there was or was not any special equity beyond that which was, in all cases alike, the foundation of the right to discovery. Upon this point, SIR JAMES WIGRAM's authority in his *LAW OF DISCOVERY* may again be referred to. He states (pp. 5, 6) that the distinction between bills of discovery and bills for relief,

F "so far as principle is concerned, has no real existence. . . . The right of discovery is, in both cases, founded upon one and the same principle"

(see also *ibid.* p. 122).

G I am, therefore, of opinion that the general ground on which the judgment appealed from appears to have proceeded cannot be maintained; and that, unless the whole matters inquired into by the interrogatories which the defendant has not answered, are irrelevant to "the plaintiff's case about to come on for trial," in the words of SIR JAMES WIGRAM's second "proposition" (*WIGRAM ON DISCOVERY*, p. 15), the defendant must make some sufficient answer to those matters. The plaintiff claims by conveyance from alleged co-heiresses of Ann Duncan, who died in 1867, being at the time of her death entitled to and seised of the land sought to be recovered in the action as the defendant admits. The plaintiff will have to prove at the trial that the persons through whom he claims were in fact the heirs of H Ann Duncan. In aid of that part of his case, he has addressed to the defendant, by his 20th and 21st interrogatories, a series of questions which are certainly not irrelevant. The defendant, by his answer, has claimed privilege for any information which he may possess on the subject of those questions; but he has not, to my mind, answered with the particularity and distinctness necessary to reduce the discovery, which he so declines to give, to matters clearly within the privilege which I he claims.

If the plaintiff succeeds in establishing the fact of heirship, it will also be necessary for him at the trial to repel the defence of the statute of limitations, the action having been brought more than twelve years after Ann Duncan's death. Most of the special averments in the statement of claim, and the interrogatories founded on them, have for their object to repel that defence; and, if they are proved in fact (the heirship being also proved), the question will have to be determined at the trial whether they are sufficient for that purpose in law. Unless their insufficiency is so manifest as to make it certain that they raise no question

proper for determination at the trial (whatever the facts may then turn out to be), the plaintiff ought to be at liberty to prove this part of his case by all proper means, discovery included. The case, so set up by the plaintiff, amounts in substance to this—that the possession which the defendant has had of Ann Duncan's estate, from the time of her death, was obtained and retained by means of the assumption by him of a fiduciary character towards her heirs whoever they might be, and that he had, from time to time, made admissions to that effect, acknowledging himself to be accountable on that footing, sometimes by writing under his hand, and sometimes on oath, including two letters addressed by him to the plaintiff himself, though before the plaintiff had any title. The plaintiff, as I understand his pleading, claims the benefit of the fiduciary relation, so alleged to have been undertaken by the defendant; and he will doubtless, at the trial, insist that when he commenced this action he was entitled to, and did, affirm and ratify, and that the defendant was estopped from denying, that fiduciary relation. A
B
C

I express no opinion on the question, whether this case, if established, will be sufficient in law to repel the defence of the Statute of Limitations, but I think it raises a question proper to be determined at the trial upon such facts as the plaintiff may then be able to prove, and not proper to be prejudged by an interlocutory order upon interrogatories, at this stage of the action. The defendant, therefore, must answer the interrogatories relevant to that portion of the plaintiff's case. It is no sufficient objection that the plaintiff may have, and to some extent (on his own showing) has, other means of proving the facts inquired after. Admissions of the facts by the defendant might simplify the proof, and materially diminish the expense of trial. D

Of the interrogatories in detail (of which I cannot approve the length) no more need now be said than that I think they ought generally to be answered in substance, subject to any privilege against particular discovery which the defendant may be entitled to claim. What I propose to your Lordships is to reverse the order appealed from, and to remit this case to the court below, with a declaration that the respondent ought to put in a further and better answer to the appellant's interrogatories. The respondent ought, I think, to pay the costs here and the costs of the summonses in both the courts below, whatever may be the result of the action. E
F

LORD WATSON concurred.

LORD BRAMWELL.—I agree in the conclusion that has been arrived at, and in the reasons given. But I wish, also, to call attention to the principle which should govern this case, and seems to have been lost sight of except by **BRETT, L.J.** G

Strange to say, it seems to have been supposed that *Horton v. Bott* (1) was an authority for the decision now under consideration, and the opinion there expressed was quoted with approval as justifying that decision. There could not be a greater mistake. As a general rule, a party to a suit in the superior courts has, to support his own case, a right to discovery from his opponent. This must be because the law supposes that the ends of justice will be furthered thereby. But it is said that the case of a plaintiff seeking to recover land is an exception to this rule. I cannot agree. Such an exception can only exist because justice in such suits would not be furthered by such discovery, or because it is not desirable that it should be. It seems to me impossible to say the former. The truth will be got at by the same means in suits to recover land as in other suits. We are driven, therefore, to the only other reason, namely that in such suits it is not desirable that justice should be furthered thereby, which is impossible. Why should it not? Why not by all the means by which it is furthered in other suits? H
I

It was said by **BRETT, L.J.**, that public policy is opposed to it. Why? It is said that the plaintiff in such a suit recovers on the strength of his own title. Supposing that was true in such suits, and in them only, why should he not be at liberty, in order to show its strength, to use this procedure, as in all other suits, to prove facts? But the truth is, a plaintiff always, if he recovers, does so on

A the strength of his own title. If the action is for the detention of a chattel, the plaintiff must show a title to it. If on a bill of exchange, he must show that the defendant is a party, and so on. I see no reason in principle for the defendant's contention. As to the authorities, they are, to my mind, clear for the plaintiff. After the examination of them by the Lord Chancellor, I will not trouble your Lordships with any further remarks. I am of opinion that this appeal should be
B allowed.

LORD FITZGERALD.—I also have arrived at the conclusion that the order of the Court of Appeal cannot be sustained, inasmuch as the rule on which it was supposed to rest does not exist.

C There is no principle properly applicable in support of that order, and it seems to me that it does not recommend itself to our notions of justice. There can be no doubt what the Court of Appeal intended to decide, as the language of the lords justices is so plain and clear. **BRETT, L.J.**, said :

D “Therefore this action seems to be clearly an action brought to recover possession of land, and the right to recover is rested upon the legal title of the plaintiff. The question, therefore, is whether in such an action as that the plaintiff can interrogate the defendant upon the matters affecting the plaintiff's title; or I will put it as high as this—whether he can interrogate the defendant at all.”

He proceeds to discuss that question, and after some observations on the rule that a plaintiff in such an action must succeed, if at all, on the strength of his
E own title, he says that the plaintiff

“must show that he himself has the legal title, or a superior title to that of the person who is in possession, and he must show it entirely by his own means, and until he has shown that *prima facie* case the defendant is not called upon to answer anything, or to disclose anything.”

F He adds as a conclusion :

“Therefore, neither before the Common Law Procedure Act, nor afterwards, was it possible for either of the courts properly to allow a plaintiff in ejectment to interrogate a defendant for the purpose of supporting the plaintiff's claim.”

G **SIR GEORGE JESSEL, M.R.**, puts it as forcibly and as clearly. After inquiring whether there was any case in which a court of equity had enforced discovery under such circumstances, he observes :

H “There is no such case, and the reason is obvious, that it would be against public policy. . . . The object of it all was simply to make a man recover in an action of ejectment by the strength of his own title alone, and I think there was a good reason for it; but reason or no reason the course of practice in these actions is conclusive as to the non-existence of the right to file a bill for discovery by defendants in actions of ejectment; and we do find special exceptions in actions for the recovery of land where the landlord's title is admitted, but we find no such case where the person claiming adversely to the defendant has been admitted to do that.”

I The counsel for the respondent took very high ground indeed when he urged that this was a point of high public policy, and the case has been argued at great length, as involving a principle applicable to all actions of ejectment on a legal title when the plaintiff's title is controverted. A great number of cases were cited and commented on, and we were referred to several textbooks of considerable authority, and several cases in point were discovered and brought under our notice. I entirely agree with the Lord Chancellor, as the result of the examination of the authorities, that there exists no rule or practice in equity which forbade the enforcement of discovery in aid of an action of ejectment founded on a legal title; and that, on the contrary, bills of discovery in such cases were entertained,

and discovery enforced, as in other cases. Having arrived at that conclusion, the appeal must be allowed, and the defendant must answer. If the interrogatories have not been put bona fide, or are oppressive, or irrelevant, or scandalous, or are subject to any other valid objection, it will lie on the defendant to apply to strike them out; or he may refuse to answer some of them on special grounds, or he may seek to postpone some portions of the discovery until the plaintiff has established heirship.

I may be permitted to observe that your Lordships' decision does not in the least trench on the rule or maxim so much relied on in the court below that a plaintiff in ejectment must succeed, if at all, on the strength of his own title, and not on the weakness of the title of the defendant in possession; or, in other words, that the plaintiff must prove his title before the defendant can be called upon to enter on his defence. Possession is enough for him until the plaintiff has shown a right to take that possession from him. *Melior est conditio possidentis* is not confined to land, though more frequently applied to the actual and visible possession of land than to chattels, for the possession of land has ever been regarded by the law with some degree of favour as *prima facie* evidence of ownership in fee. In *R. v. Bishop of Worcester* (12) it is said (Vaugh. at p. 58):

"When you will recover anything from me it is not enough for you to destroy my title; you must prove your own better than mine; for it is not rational to conclude you have no right to this and therefore I have, for without a better right *melior est conditio possidentis* regularly."

The plaintiff does not contest this maxim nor seek to escape from it. He admits that he must prove his title, and can only succeed on a proved title. He claims to be permitted to prove that title. He seeks to do so now by the examination of the defendant as to his (the plaintiff's) title, just as he would be entitled to call the defendant as a witness on the trial, and examine him as to the pedigree on which the plaintiff relies, or any other step in his title on which the defendant may be a competent witness. The contention of the defendant, on the other hand, seems to be inconsistent. He says the plaintiff must prove his title, but

"he is not permitted to interrogate me now as to it, even though I may be his only witness."

There is nothing in the maxim, and there is nothing in public policy, or in the policy of the law, which deprives the plaintiff of the ordinary right of proving his own title by the lips of the defendant.

There was one other question discussed in the case on which I desire to guard myself, namely, whether, under the Judicature Acts and rules, the right of discovery is or is not more extensive than it formerly was in courts of equity. It was put thus. The Judicature Acts are Acts to regulate procedure, not to affect established rights; and if there was no right to discovery before the passing of the Acts, there is no right to interrogate now. On these propositions I refrain from expressing any opinion, save that they are stated too loosely, for there can be no doubt that the Judicature Act, 1873, in carrying into effect the object stated in its preamble, "the better administration of justice," does interfere with and alter rights. If the expressions used be limited to "discovery" and to "administering interrogatories," the rules clearly do make an alteration as to what has been called "right." For example, a court of equity, in the exercise of its auxiliary jurisdiction, did not lend its aid to enforce discovery where the action was in respect of a mere tort, or to recover a penalty, or enforce a forfeiture; but I should think now that a plaintiff may, in an action properly constituted for any of these purposes, exhibit interrogatories and enforce discovery. [*Hunnings v. Williamson* (1883), 10 Q.B.D. 459.] It seems to me also not to be very clear that increased power to exhibit interrogatories to the defendant and enforce discovery as to the plaintiff's title, or vice versa, is an interference with the rights of the party interrogated, or is more than alteration of procedure. Since the passing of the Evidence Amendment Acts, making all parties competent witnesses, it is difficult to see that

- A there can be a "right" in any litigant to refuse to answer proper interrogatories, where he is liable to be called as a witness, and examined viva voce to the same matters. The Judicature Acts and R.S.C., 1875, Ord. 31 seem to confer on the litigant in every action the right to exhibit interrogatories to his opponent, subject to the protection given by the exercise of judicial discretion, and by the succeeding rules of that order; and probably the intention was to give the litigant in all cases
- B a right to interrogate his adversary as to every relevant matter on which he could examine him if he thought fit to call him as a witness in the cause.

Appeal allowed.

Solicitors: *J. Balfour Allan; Rooke & Sons, for Earle Sons & Co., Manchester.*

[*Reported by C. E. MALDEN, ESQ., Barrister-at-Law.*]

D

LYELL v. KENNEDY (No. 2)

[HOUSE OF LORDS (Lord Blackburn, Lord Watson and Lord Bramwell), December 5, 6, 7, 1888]

E

[Reported 9 App. Cas. 81; 53 L.J.Ch. 449; 50 L.T. 277;
32 W.R. 497]

Discovery—Interrogatory—Answer—Sufficiency—Privilege—Interrogatory as to knowledge, information, and belief—Only information of party interrogated acquired through communications with solicitor.

F

It is a sufficient answer to an interrogatory as to knowledge, information, and belief, for the party interrogated to say that he has no information on the subject except what he has acquired as the result of privileged communications between himself and his solicitors or their agents for the purposes of the action.

G

Notes. Followed: *Seal v. Turner* (1913), 30 T.L.R. 227. Referred to: *Bursill v. Tanner* (1885), 16 Q.B.D. 1; *Re Holloway, Young v. Holloway* (1887), 12 P.D. 167; *Sammon v. Bennett* (1892), 8 T.L.R. 235; *Calcraft v. Guest*, [1895-9] All E.R.Rep. 346; *Ainsworth v. Wilding*, [1900] 2 Ch. 315.

As to answers to interrogatories, see 12 HALSBURY'S LAWS (3rd Edn.) 63 et seq.; and for cases see 18 DIGEST (Repl.) 211 et seq.

H

Cases referred to:

(1) *Lawrence v. Campbell* (1859), 4 Drew. 485; 28 L.J.Ch. 780; 5 Jur.N.S. 1071; 7 W.R. 336; 62 E.R. 186; sub nom. *Laurence v. Campbell*, 33 L.T.O.S. 355; 18 Digest (Repl.) 102, 861.

(2) *Minet v. Morgan* (1873), 8 Ch. App. 361; 42 L.J.Ch. 627; 28 L.T. 573; 21 W.R. 467, L.C. & L.J.; 18 Digest (Repl.) 96, 793.

I

Also referred to in argument:

Agar v. Bective (1823), 1 L.J.O.S.Ch. 132; 18 Digest (Repl.) 211, 1829.

Flight v. Robinson (1844), 8 Beav. 22; 13 L.J.Ch. 425; 50 E.R. 9; sub nom. *Robinson v. Flight, Flight v. Robinson*, 8 Jur. 888; 18 Digest (Repl.) 95, 789.

Greenlaw v. King (1838), 1 Beav. 137; 8 L.J.Ch. 92; 48 E.R. 891; 18 Digest (Repl.) 91, 747.

Earl of Glengall v. Frazer (1842), 2 Hare, 99; 12 L.J.Ch. 128; 6 Jur. 1081; 67 E.R. 41; 18 Digest (Repl.) 44, 353.

- Pavitt v. North Metropolitan Tramways Co.* (1888), 48 L.T. 730; 18 Digest (Repl.) 213, 1850.
- Mackenzie v. Yeo* (1841), 2 Curt. 866; 1 Notes of Cases, 516; 5 Jur. 1041; 163 E.R. 612; 18 Digest (Repl.) 97, 813.
- Duchess of Kingston's Case* (1776), 20 State Tr. 355; 22 Digest (Repl.) 468, 5164.
- Bramwell v. Lucas* (1824), 2 B. & C. 745; 4 Dow. & Ry.K.B. 367; 2 L.J.O.S.K.B. 161; 107 E.R. 560; 22 Digest (Repl.) 405, 4355.
- Fenner v. London and South Eastern Rail. Co.* (1872), L.R. 7 Q.B. 767; 41 L.J.Q.B. 313; 26 L.T. 971; 37 J.P. 182; 20 W.R. 830; 18 Digest (Repl.) 111, 940.
- Greenough v. Gaskell* (1833), 1 My. & K. 98; Coop. temp. Brough. 96; 39 E.R. 618, L.C.; 18 Digest (Repl.) 95, 782.
- Manser v. Dix* (1855), 1 K. & J. 451; 3 Eq. Rep. 650; 24 L.J.Ch. 497; 25 L.T.O.S. 113; 1 Jur.N.S. 466; 3 W.R. 313; 69 E.R. 536; 18 Digest (Repl.) 100, 836.
- English v. Tottie* (1875), 1 Q.B.D. 141; 45 L.J.Q.B. 138; 33 L.T. 724; 24 W.R. 393; 3 Char. Pr. Cas. 198; 18 Digest (Repl.) 106, 909.
- Philippus v. Philippus* (1878), 4 Q.B.D. 127; 48 L.J.Q.B. 135; 39 L.T. 556; 27 W.R. 436; Digest (Pleading) 201, 1691.
- A.-G. v. London Corpn.* (1850), 2 Mac. & G. 247; 2 H. & Tw. 1; 19 L.J.Ch. 314; 14 L.T.O.S. 501; 14 Jur. 205; 42 E.R. 95, L.C.; 18 Digest (Repl.) 9, 50.
- Harland v. Emerson* (1834), 2 Cl. & Fin. 10.
- Dartmouth Corpn. v. Holdsworth* (1840), 10 Sim. 476; 59 E.R. 700; 18 Digest (Repl.) 105, 895.
- Wright v. Vernon* (1853), 1 Drew. 344; 22 L.J.Ch. 447; 1 W.R. 138; 61 E.R. 483; 18 Digest (Repl.) 127, 1119.
- Balguy v. Broadhurst* (1850), 1 Sim.N.S. 111; 16 L.T.O.S. 385; 14 Jur. 1105; 61 E.R. 43; 18 Digest (Repl.) 43, 348.
- Lewis v. Pennington* (1860), 29 L.J.Ch. 670; 2 L.T. 344; 6 Jur.N.S. 478; 8 W.R. 465; 18 Digest (Repl.) 229, 1956.
- Russell v. Jackson* (1851), 9 Hare, 387; 21 L.J.Ch. 146; 18 L.T.O.S. 166; 15 Jur. 1117; 68 E.R. 558; 18 Digest (Repl.) 116, 976.
- Glyn v. Coulfield* (1851), 3 Mac. & G. 463; 18 L.T.O.S. 215; 15 Jur. 807; 42 E.R. 339, L.C.; 18 Digest (Repl.) 106, 905.
- Benbow v. Low* (1880), 16 Ch.D. 93; 50 L.J.Ch. 35; 44 L.T. 119; 29 W.R. 265, C.A.; 18 Digest (Repl.) 174, 1500.
- Penruddock v. Hammond* (1847), 11 Beav. 59; 50 E.R. 739; 18 Digest (Repl.) 100, 835.
- Pearse v. Pearse* (1846), 1 De G. & Sm. 12; 16 L.J.Ch. 153; 8 L.T.O.S. 361; 11 Jur. 52; 63 E.R. 950; 18 Digest (Repl.) 91, 748.

Appeal by the defendant in the action from a decision of the Court of Appeal (BAGGALLAY and COTTON, L.JJ.), reported 23 Ch.D. 387, affirming an order of BACON, V.-C.

The appellant commenced an action of ejectment against the respondent in January, 1881, to recover property at Manchester, and for mesne profits. In his statement of claim he alleged that one Anne Duncan had died seised in fee of the property in question and intestate, and that in 1880 her heirs-at-law had conveyed their interest in the property to him. In this action a question arose as to discovery in ejectment, which was taken on appeal to the House of Lords: see *Lyell v. Kennedy* (No. 1), ante p. 798. In June, 1881, the respondent commenced the present action against the appellant for penalties, on the ground that he had brought himself within the provisions of the Maintenance and Embracery Act, 1540 (32 Hen. 8, c. 9), by buying a "pretenced title," within s. 2 of that Act [repealed by Land Transfer Act, 1897]. The appellant administered to the respondent a number of interrogatories, the only two of which material for the purposes of this report, the 3rd and 31st, related to the pedigree of Anne Duncan. The respondent answered that he had no information on the subject except informa-

A tion which had been procured by his solicitors for the purposes of the action, and the court below held the answer sufficient.

McClymont and Robert Wallace for the appellant.

Horton Smith, Q.C., and Clare for the respondent.

LORD BLACKBURN.—This case has occupied a good deal of time, and a number of cases have been cited, but, as it seems to me, most of them are authorities upon matters which nobody would dispute, or for propositions which are not involved in the question of controversy before us, and I cannot help thinking that there is no occasion to notice any of them. The action is a very peculiar one. It is brought on the statute 32 Hen. 8, c. 9, the respondent claiming, as a common informer, the penalty of half the value of the estate, upon certain grounds. It was pointed out that there were objections to the action, and it was urged that the statute having said that the common informer might recover this penalty by an action of debt, there was an objection to its being recovered, or a doubt whether or no it could be recovered, in this suit which has been brought in equity [Actions by common informers, with few exceptions, have been abolished: see Common Informers Act, 1951 (30 HALSBURY'S STATUTES (2nd Edn.) 42)]. But, as that objection is coming hereafter, it is unnecessary to express any opinion upon it now.

The appellant, as he was entitled to do, made a statement of defence to the action, and in that statement of defence he raised two main grounds, which were these: First, he said that the title which he purchased was not a pretended title, but a real and true title; and, secondly, that the owners were not out of possession at the relevant time, for his possession was theirs as he held as agent for the heirs of Miss Duncan. I think that it would be premature to express any opinion one way or the other as to these defences being good defences or not further than to say that they are so plausible and strong that they are defences which the defendant is entitled to prove.

That brings me to the real matter before us. The appellant having set up a title just as the respondent had set up a title, the appellant is entitled to discovery and interrogatories in aid of his title. I take it to be tolerably clear and certain that he is entitled to discovery of all that is in the knowledge of the other party whom he is interrogating which would really be material to support his case, and that he is entitled, as it has been phrased, to search the respondent's conscience and to ask him not merely what he may himself have seen, or may himself know, but as to all the facts which he has, and all the information which he has for forming a knowledge and belief, derived from his agent. That is the general rule, and although there are a great many niceties and technicalities upon it, which it is not necessary to notice here, it has been established from very early times that, for the purpose of public policy and protection, a client may consult a solicitor for the purposes of his cause and of litigation which is pending, and that, in order to encourage free intercourse between him and his solicitor, the client has the privilege of preventing his solicitor from disclosing anything which he gets when so employed, and of preventing its being used against him, although it might otherwise be evidence against him. This further rule has been established, that the other side is not entitled, on discovery, to require the opponent to produce as a document those papers which the solicitor or attorney has prepared in the course of the case, and has sent to his client. They may be very relevant, but they are not to be produced simply for that reason. To put it in a short way, the privilege may extend to many things which do not amount to that; but when a solicitor, having made inquiry as to everything which is going on, and having prepared the case, has written out a brief, and sent it to his client, I think it must be considered as perfectly well settled that the other side is not entitled to say: "Show me that brief which you have got from your attorney." He may show it if he pleases, but it is a good answer to an application for discovery to say: "It was prepared for me by my legal adviser, my attorney, confidentially, and it is my

privilege to say that you shall not read it"; and I think it was hardly disputed that on a discovery of documents you could not discover that brief. A

It is argued that, though that is so, you may "search the conscience of the party" by inquiring as to his information and belief, from whencesoever derived, and that it consequently follows that, although it has been said: "You must not inspect that brief," you are nevertheless entitled to ask the party himself: "Did you not read the brief, and when you had read it, what was your belief derived from reading that brief?" That, I think, was the position which was taken; B
and the argument in support of it was that, inasmuch as nobody had ever actually raised the point, and inasmuch as in all the books of pleading and practice where they discuss what is the extent of discovery, nobody has hitherto discussed this point, either one way or the other, the silence of people implied that you ought to be able to put that question. As to that, I believe that there is no authority, C
but, as it seems to me, the plain reason and sense of the thing is that as soon as you say that the particular premises are privileged and protected, it follows that the mere opinion and belief of the party from these premises should be privileged and protected also. I do not mean to state—and I mention it in case I should be misunderstood—that a man has a privilege to say: "I have a deed which you are entitled to see in the ordinary course of things, but I claim a D
privilege for that deed, because it was obtained for me by my attorney in getting up a defence to an action," or "in the course of litigation." That would attract no privilege at all. So again with regard to another fact, such as a man being told by an attorney's brief that there is ground for thinking that there is a tombstone, or a pedigree, in a particular place—if the man went there and looked at it, and saw the thing itself, I do not think that he would be privileged in that E
case, because it is no answer to say: "I know the thing which you want to discover, but I first got possession of the knowledge in consequence of previous information." That is not within the meaning of privilege. But when the interrogatory is simply: "What is the belief which you have formed from reading that brief?" it seems to me—and I think that is the effect of what *COTTON, L.J.*, says at the end of his judgment in the court below—to follow that you cannot ask that question. It is a new point; it has never been raised before; but it seems to me that it is right. F

In his answer to interrogatories 3 and 31 the respondent said:

"Anne Duncan died at Balchrystie on or about Nov. 5, 1867, without ever having been married, and I believe that she was the daughter of David Duncan, of Balhousie. Except as aforesaid I have no personal knowledge of any of the matters inquired after by the 3rd interrogatory, or the first ten subsections of the 31st interrogatory. Such information as I have received in respect of the said matters, other than as aforesaid, has been derived by me from information G
procured by my solicitors or their agents in and for the purpose of defending my title to the said hereditaments, and I submit that I ought not to be required to make any further answer to the said 3rd and 31st interrogatories." H

We know that there was, and is, an action of ejectment pending by the appellant against the respondent and that he would naturally employ a solicitor to make inquiries, and get up a brief. The first question is: Does the respondent's answer amount to saying: "All my knowledge and information on these points is derived from reading the brief?" I think that it does. I think that is the fair and I
intelligible meaning of it, and that consequently the privilege claimed is good as far as it goes. If there was any ground for saying that there was something which pointed to the fact that the attorney in his researches had found a pedigree in Anne Duncan's repositories in which it was stated who were her next heirs, I do not think that he would be allowed to refuse it; but I do not think that there is anything which would lead your Lordships to suppose that such was the case. Therefore, upon the point whether or not that answer was sufficient, I am of

A opinion, and I advise your Lordships to come to the same conclusion, that the Court of Appeal were right in deciding that no further answer was required.

[His LORDSHIP proceeded to discuss answers to other interrogatories not material for the purposes of this report, and expressed an opinion that they were not sufficient, and continued:] The appeal is partially successful and partially not. It has failed upon the question which was mainly argued below, and has been
B mainly argued here. I think that, as the order appealed against is to be varied, each party should pay his own costs of the appeal.

LORD WATSON.—I am of opinion that it is quite foreign to the duties of this House to determine questions of law of great importance and nicety which may possibly arise at the trial of this action. A certain defence in law founded upon
C allegations of fact made in his pleadings is set up by the present appellant, and he is entitled to prove these allegations in order to raise the defence which he has stated. If he fails to prove his allegations, *cadit quæstio*; but if these are made out, it will then, and not till then, become the duty of the court to consider how far his pleadings in point of law are relevant or sufficient to afford a defence to the action.

D Questions of various kinds have been largely discussed at the Bar. Undoubtedly, the most important of them relates to the plea of privilege which is taken by the respondent in regard to certain queries which have been put to him. Looking to the subject-matter of the 3rd and the first ten sections of the 31st interrogatory, it is very obvious in the first place that these relate to matters not necessarily within the personal knowledge of this plaintiff; and in the second place, they are not
E matters in regard to which there is any duty upon the plaintiff to inform himself before answering the interrogatories put to him. In many of the cases cited at the Bar there was such a duty. But in the present case, the first and most important question is *quid juratum*? What is the real substance of the answers which have been given to these interrogatories touching matters, as I have said, not personally within the cognisance of the respondent? It appears to me that the
F substance of the answers given by him to these interrogatories is not doubtful. He says: "I have no personal knowledge, but I have certain information derived from communications oral or written with my solicitor, and I have no other information or means of forming a belief." That appears to me to be quite sufficient to protect him from discovery, either of the belief which he entertains, if he entertains any decided belief, or of the information upon which that belief is
G founded.

The general principle of law relating to the protection of communications passing between a client and his agent was very well summed up by KINDERSLEY, V.-C., in *Lawrence v. Campbell* (1). He says (4 Drew. at p. 489):

H "The general principle is founded upon this, that the exigencies of mankind require that, in matters of business which may lead to litigation, men should be enabled to communicate freely with their professional advisers, and their communications should be held confidential and sacred, and that no one should have a right to their production."

Again he observes (*ibid.* at p. 490):

I "It is not now necessary, as it formerly was, for the purpose of obtaining protection [the word is printed 'production,' but it clearly ought to be 'protection'] that the communications should be made either during or relating to an actual or even an expected litigation. It is sufficient if they pass as professional communications in a professional capacity."

That statement of the principle and its limits was approved of in terms by LORD SELBORNE, L.C., in *Minet v. Morgan* (2) in the course of which case his Lordship reviews the authorities very fully, and comes to the same conclusions upon them as are stated in the words I have read from the judgment of KINDERSLEY, V.-C.

I concede that, in professional contact with his agent for professional purposes, solely with a view to advice and counsel as to a coming or a pending litigation, a client may be brought into contact with evidence of such a description that his consideration of that evidence must necessarily give him information creating a belief which is, in the sense of the law, personal knowledge. It may be real and primary evidence of such a description as is calculated to beget some kind of conclusion in the mind of any intelligent person who considers it; and when such a belief is brought home to the mind of an individual it certainly constitutes personal knowledge. Personal knowledge, according to my understanding of the expression, is not limited to that which a man sees taking place, deeds done or events occurring before his eyes, but extends to knowledge derived from that which is in itself evidence calculated to induce a reasonable belief. On the other hand, mere speculative opinions, formed from statements made by his solicitor, as to what he conceives will be the import at the trial of depositions or of witnesses statements, and what he believes will be the actual result of his solicitor's confidential information, are not within the category of personal knowledge; and as to his protection against discovery of such, it appears to me that there is no principle whatever upon which it can be said that a belief founded upon that fluctuating kind of information, which may beget a reasonable belief in one sense of the word, is a belief which litigants entertaining it can be compelled to state.

It appears to me that the respondent has, in effect, stated that, if he has any belief at all, it is such a belief as that which I have last described, and that, if he entertains any settled belief, which does not appear, it is derived from information given to him at second hand in the course of communications with his solicitor, and that he has no other grounds upon which to form any conclusion at all. The interrogatories, as put, call upon him to state, "as touching the matters in question, whether he has received any, and what, information touching all or some of the matters therein referred to, and whether he believes such information to be true." If the information be of the class which I think is described and pointed out by the terms of his deposition on oath, there can be no doubt that it is protected by privilege; and it would be a very singular result if, it being protected, he was still compelled to answer the query: "What is your belief upon that subject?" To my mind, it is just the same thing as asking him to narrate the particulars upon which it rests; because I venture to say that any one who is called upon to state his belief in respect of information which he has received, will have very great difficulty in answering that question without divulging the information which he has got. Given his belief founded upon such materials, and I do not think it will be very difficult to infer from it what passed in his confidential intercourse with his agent.

In the case where a party to a suit is under legal obligation to state his belief, I apprehend that he must state the grounds of it. If his belief is that which his opponent desires, I daresay he will remain content with accepting it; but if his belief is different from the conclusion which his opponent is anxious to make out, the latter has a perfect right to insist on being told the grounds on which it is founded—to test, in other words, the reality and value of that belief. In this case the proposition which appears to be maintained is that you cannot get the brief which was handed to him, but that you can get the opinion which he formed. As I said before, I think it is quite impossible to separate belief in the mind of a litigant, which is derived from such materials as information from his agent (it may be a written opinion, it may be partly advice and counsel), from the information itself. I cannot see upon what principle he can be called upon to state that belief while at the same time he is not under obligation to communicate or even to indicate any one of the grounds upon which it is founded. Therefore, in the circumstances of this case I concur, so far, in the judgment which was pronounced in the court below. As to the other interrogatories I entirely agree

A in the view stated by LORD BLACKBURN, and I concur in thinking that the question of costs will be very properly dealt with by leaving each party to bear his own.

LORD BRAMWELL.—With respect to interrogatories 3 and 31, I am of opinion that the reason given for not answering them is sufficient, and my reasons are very much those of LORD WATSON.

B The questions put to the respondent amount to the following: "What are your knowledge, information, and belief" upon such and such matters? The plaintiff says: "Personal knowledge I have none; information I have none except that which has been derived from privileged and confidential communications from my solicitor." Therefore, belief he can have none except that which is founded upon that information. How can it possibly be held that, not being bound to give the information, he is nevertheless bound to state his belief which is founded upon it? How can that be? It would be most unreasonable to hold that he was bound so to do, and I think it may be shown in this way. A man surely would be at liberty, if he was bound to state his belief, to state his reasons for it, and to say, "That is my belief, founded upon those reasons, and upon that information which has been given to me, but I require the defendant to prove his case by something other than my belief. My belief may be prima facie evidence when we get before a jury, or before the tribunal which is to decide the matter, for aught I know; but still I desire it to be open to me, because the information given to me may not be accurate; the jury may not adopt it; they may think that I have chosen a conclusion unfavourable to myself without sufficient reason for doing so"—but he cannot avail himself of that right without stating what the information was. If, therefore, you compel a man to state his belief founded upon privileged information, you would be depriving him of a right which he would have if his information had been of a different character, not privileged, unless he gave up his right to withhold the privileged communication.

F It appears to me, therefore, upon reason and principle, that a man ought not to be called upon to state that his belief is founded upon information, which information is privileged, and which he is not bound to disclose. It is always dangerous to lay down general propositions of that sort, and I should rather like to limit my observations to the particular case before us, because one can conceive the possibility of such a case as this. A man may be asked: "What is your information and belief as to there being a tombstone in a certain churchyard with a certain inscription on it?" It may possibly be that his information upon the subject is of a privileged character, nevertheless he might be bound to state his belief. I do not say that he would be so bound; I have the greatest misgiving about it, because even then what he might say is: "I have been told, but I may have been misinformed" I, therefore, doubt it very much, even in that case. But I desire to do no more than to deal with the particular case before us, or with cases of precisely the same character. With respect to the costs, H I think it is very reasonable that each party should pay his own.

Order appealed from varied.

Solicitors: *J. Balfour Allan; Rooke & Sons, for Earle & Sons, Manchester.*

[Reported by C. E. MALDEN, Esq., Barrister-at-Law.]

LYELL v. KENNEDY (No. 3)

[COURT OF APPEAL (Cotton, Bowen and Fry, L.JJ.), March 19, 20, 25, 26, 29, April 8, 1884]

[Reported 27 Ch.D. 1; 53 L.J.Ch. 937; 50 L.T. 730]

Discovery—Privilege—Legal professional privilege—Extent—Communications between party or solicitor and agent of solicitor employed in preparation of party's case—Facts in interrogatory result of deductions drawn by legal adviser.

Discovery—Interrogatory—Further and better answer—Original answer insufficient, impertinent, or embarrassing.

In dealing with an application for a further and better answer to an interrogatory the court has only to consider whether the answer was insufficient. It will not go into the truthfulness of the answer. It will not order a further answer on the ground of insufficiency unless the insufficiency is very clear indeed. The question is whether the person who is required to answer answered that which his opponent has required him to answer, or, in other words, that which he has no excuse for not answering.

A party will not be ordered to answer an interrogatory where the facts to which it relates, e.g., the identity of the heir-at-law of a deceased person, are the results of deductions drawn by the legal advisers of the party for the purpose of preparing the party's case. This privilege is not confined to communications between the party and his solicitor, but is extended to communications between the party or his solicitor and agents employed by the solicitor in the preparation of the party's case.

If protection is claimed on the ground of privilege the court will not require a further answer to be made unless it is clearly satisfied, either from the answer itself, or from that which is made part of the answer, or from the nature of the document regarding which protection is claimed, that the facts cannot be such as to justify the protection claimed. But it must not be a case of mere suspicion. The court must be clearly satisfied that the oath of the party by which he claims protection cannot be available for the purpose for which he puts it forward.

If an answer to an interrogatory is impertinent or embarrassing the court may order a further and better answer to be made.

Discovery—Document—Affidavit—Statements of fact conclusive—Further affidavit—Suspicion that party has further relevant documents—Embarrassing affidavit.

Discovery—Privilege—Production of document—Copies of or extracts from records or documents publici juris obtained by solicitor.

Statements as to matters of fact in an affidavit of documents are conclusive, but, if the court sees anything to raise a reasonable suspicion that the party giving the discovery has in his possession other documents relating to the matters in question, it may require him to make a further affidavit.

A party cannot be compelled to produce copies of or extracts from public records or documents, although publici juris, made or obtained, not by himself, but by his solicitor for the purposes of his case.

When an affidavit is couched in a form which makes it embarrassing, i.e., which prevents the person who asks for it from using it without having thrust on him irrelevant matter as part of it, the affidavit is insufficient, and the proper course is to ask that a further affidavit should be put in. An affidavit is not sufficient which is so involved in the answers as not to be capable of being used.

A Notes. Explained: *Lyell v. Kennedy* (1884), 33 W.R. 44. Considered: *Pearce v. Foster* (1885), 15 Q.B.D. 114. Distinguished: *Lambert v. Home*, [1914] 3 K.B. 86.

As to discovery of documents and answers to interrogatories, see 12 HALSBURY'S LAWS (3rd Edn.) 26 et seq., 77 et seq., and for cases see 18 DIGEST (Repl.) 9 et seq., 211 et seq.

B Cases referred to:

(1) *Kennedy v. Lyell* (1883), 23 Ch.D. 387; 48 L.T. 455; 31 W.R. 691, C.A.; on appeal sub nom. *Lyell v. Kennedy* (No. 2), ante p. 807; 9 App. Cas. 81; 53 L.J.Ch. 449; 50 L.T. 277; 32 W.R. 497, H.L.; 18 Digest (Repl.) 228, 1949.

C (2) *Lyell v. Kennedy* (No. 1) (1883), ante p. 798; 8 App. Cas. 217; 52 L.J.Ch. 385; 48 L.T. 585; 31 W.R. 618, H.L.; 18 Digest (Repl.) 18, 127.

(3) *Noel v. Noel* (1863), 1 De G.J. & Sm. 468; 2 New Rep. 294; 32 L.J.Ch. 676; 8 L.T. 555; 9 Jur.N.S. 589; 11 W.R. 791; 46 E.R. 186, L.J.J.; 18 Digest (Repl.) 55, 422.

D (4) *Wright v. Vernon* (1853), 1 Drew. 344; 22 L.J.Ch. 447; 1 W.R. 138; 61 E.R. 483; 18 Digest (Repl.) 127, 1119.

(5) *Storey v. Lord Lennox* (1836), 1 My. & Cr. 525; 6 L.J.Ch. 99; 40 E.R. 476, L.C.; 18 Digest (Repl.) 71, 572.

(6) *Balguy v. Broadhurst* (1850), 1 Sim.N.S. 111; 16 L.T.O.S. 385; 14 Jur. 1105; 61 E.R. 43; 18 Digest (Repl.) 43, 348.

E (7) *Walsham v. Stainton* (1863), 2 Hem. & M. 1; 3 New Rep. 241; 9 L.T. 603; 12 W.R. 199; 71 E.R. 357; 18 Digest (Repl.) 101, 848.

(8) *Peyton v. Harting* (1873), L.R. 9 C.P. 9; 48 L.J.C.P. 10; 29 L.T. 478; 22 W.R. 61; 18 Digest (Repl.) 219, 1883.

Also referred to in argument:

F *Compagnie Financière du Pacifique v. Peruvian Guano Co.* (1882), 11 Q.B.D. 55; 52 L.J.Q.B. 181; 48 L.T. 22; 31 W.R. 395, C.A.; 18 Digest (Repl.) 42, 334.

Hardman v. Ellames (1834), 2 My. & K. 732; 3 L.J.Ch. 74, L.C.; 18 Digest (Repl.) 129, 1141.

Marsh v. Sibbald (1814), 2 Ves. & B. 375; 35 E.R. 361, L.C.; 18 Digest (Repl.) 75, 585.

G *Evans v. Richard* (1818), 1 Swan. 7; 36 E.R. 275, L.C.; 18 Digest (Repl.) 75, 586.

Saull v. Browne (1874), L.R. 17 Eq. 402; 18 Digest (Repl.) 56, 427.

Wright v. Pitt (1868), 3 Ch. App. 809; 16 W.R. 1073, L.J.J.; 18 Digest (Repl.) 56, 423.

H *Jones v. Monte Video Gas Co.* (1880), 5 Q.B.D. 556; 49 L.J.Q.B. 627; 42 L.T. 639; 28 W.R. 758, C.A.; 18 Digest (Repl.) 51, 395.

Manby v. Bewicke (No. 3) (1856), 8 De G.M. & G. 476; 27 L.T.O.S. 285; 2 Jur.N.S. 671; 4 W.R. 757; 44 E.R. 474, L.J.J.; 18 Digest (Repl.) 123, 1076.

Nolan v. Shannon, 1 Molloy, 168.

Tipping v. Clarke (1843), 2 Hare, 383; 67 E.R. 157; 18 Digest (Repl.) 217, 1864.

Unsworth v. Woodcock (1818), 3 Madd. 432.

I *Fleet v. Perrins* (1868), L.R. 3 Q.B. 536; 9 B. & S. 575; 37 L.J.Q.B. 233; 19 L.T. 147; affirmed (1869), L.R. 4 Q.B. 500; 9 B. & S. 575; 38 L.J.Q.B. 257; 20 L.T. 814; 17 W.R. 862, Ex. Ch.; 18 Digest (Repl.) 232, 1997.

Bewicke v. Graham (1881), 7 Q.B.D. 400; 50 L.J.Q.B. 396; 44 L.T. 371; 29 W.R. 436, C.A.; 18 Digest (Repl.) 46, 376.

A.-G. v. Emerson (1882), 10 Q.B.D. 191; 52 L.J.Q.B. 67; 48 L.T. 18; 31 W.R. 191, C.A.; 18 Digest (Repl.) 52, 404.

Taylor v. Rundell (1841), Cr. & Ph. 104; 41 E.R. 429, L.C.; 18 Digest (Repl.) 44, 352.

- Vaillant v. Dodemead* (1748), 2 Atk. 524; 26 E.R. 715, L.C.; 22 Digest (Repl.) 412, 4128. **A**
- Brown v. Thornton* (1837), 6 Ad. & El. 185; 1 Nev. & P.K.B. 339; Will. Woll. & Dav. 11; 6 L.J.K.B. 82; 1 Jur. 198; 112 E.R. 70; 22 Digest (Repl.) 210, 1961.
- Rochdale Canal Co. v. King* (1852), 15 Beav. 11; 51 E.R. 439; 18 Digest (Repl.) 37, 297. **B**
- A.-G. v. East Retford Corpn.* (1833), 2 My. & K. 35; 39 E.R. 857; on appeal (1838), 3 My. & Cr. 484, L.C.; 18 Digest (Repl.) 221, 1898.
- Stuart v. Lord Bute* (1842), 12 Sim. 460; 18 Digest (Repl.) 212, 1839.
- Lewis v. Pennington* (1860), 29 L.J.Ch. 670; 2 L.T. 344; 6 Jur.N.S. 478; 8 W.R. 465; 18 Digest (Repl.) 229, 1956.
- Harland v. Emerson* (1834), 2 Cl. & Fin. 10. **C**
- Saunders v. Jones* (1877), 7 Ch.D. 435; 47 L.J.Ch. 440; 37 L.T. 769; 26 W.R. 226, C.A.; 18 Digest (Repl.) 182, 1568.
- Eade v. Jacobs* (1877), 3 Ex.D. 335; 47 L.J.Q.B. 74; 37 L.T. 621; 42 J.P. 200; 26 W.R. 159, C.A.; 18 Digest (Repl.) 172, 1489.
- A.-G. v. London Corpn.* (1850), 2 Mac. & G. 247; 2 H. & Tw. 1; 19 L.J.Ch. 314; 14 L.T.O.S. 501; 14 Jur. 205; 42 E.R. 95, L.C.; 18 Digest (Repl.) 9, 50. **D**
- Philipps v. Philipps* (1878), 4 Q.B.D. 127; 48 L.J.Q.B. 135; 39 L.T. 556; 27 W.R. 436; Digest (Pleading) 201, 1691.
- Atkins v. Wright* (1807), 3 Ves. 211.
- Churton v. Frewen* (1865), 2 Drew. & Sm. 390; 12 L.T. 105; 13 W.R. 490; 62 E.R. 669; 18 Digest (Repl.) 151, 1352.
- Flight v. Robinson* (1844), 8 Beav. 22; 13 L.J.Ch. 425; 50 E.R. 9; sub nom. *Robinson v. Flight*, *Flight v. Robinson*, 8 Jur. 888; 18 Digest (Repl.) 95, 789. **E**
- Felkin v. Lord Herbert* (1861), 30 L.J.Ch. 798; 9 W.R. 756; 18 Digest (Repl.) 123, 1067.
- Pavitt v. North Metropolitan Tramways Co.* (1883), 48 L.T. 730; 18 Digest (Repl.) 213, 1850. **F**
- Fenner v. London and South Eastern Rail. Co.* (1872), L.R. 7 Q.B. 767; 41 L.J.Q.B. 313; 26 L.T. 971; 37 J.P. 182; 20 W.R. 830; 18 Digest (Repl.) 111, 940.
- Minet v. Morgan* (1873), 8 Ch. App. 361; 42 L.J.Ch. 627; 28 L.T. 573; 21 W.R. 467, L.C. & L.J.; 18 Digest (Repl.) 96, 793.
- Newall v. Telegraph Construction Co.* (1866), L.R. 2 Eq. 756; 35 L.J.Ch. 827; 14 W.R. 914; 18 Digest (Repl.) 53, 413. **G**
- Parker v. Wells* (1881), 18 Ch.D. 477; 45 L.T. 517; 30 W.R. 392, C.A.; 18 Digest (Repl.) 180, 1548.
- Dalrymple v. Leslie* (1881), 8 Q.B.D. 5; 51 L.J.Q.B. 61; 45 L.T. 478; 30 W.R. 105, D.C.; 18 Digest (Repl.) 211, 1833.
- Bolchow v. Fisher* (1882), 10 Q.B.D. 161; 52 L.J.Q.B. 12; 47 L.T. 724; 31 W.R. 235; 5 Asp.M.L.C. 20, C.A.; 18 Digest (Repl.) 213, 1849. **H**
- Whceler v. Le Marchant* (1881), 17 Ch.D. 675; 50 L.J.Ch. 793; 44 L.T. 632; 45 J.P. 728; 30 W.R. 235, C.A.; 18 Digest (Repl.) 90, 743.
- Southwark Water Co. v. Quick* (1878), 3 Q.B.D. 315; 47 L.J.Q.B. 258; 26 W.R. 341, C.A.; 18 Digest (Repl.) 91, 752.
- Penruddock v. Hammond* (1847), 11 Beav. 59; 50 E.R. 739; 18 Digest (Repl.) 100, 835. **I**
- Earl of Glengall v. Frazer* (1842), 2 Hare, 99; 12 L.J.Ch. 128; 6 Jur. 1081; 67 E.R. 41; 18 Digest (Repl.) 44, 353.
- Wood v. Morewood* (1841), 9 Dowl. 669; 3 Scott, N.R. 197; 10 L.J.C.P. 229; 5 Jur. 389; 18 Digest (Repl.) 82, 677.
- Manser v. Dix* (1855), 1 K. & J. 451; 3 Eq. Rep. 650; 24 L.J.Ch. 497; 25 L.T.O.S. 113; 1 Jur.N.S. 466; 3 W.R. 313; 69 E.R. 536; 18 Digest (Repl.) 100, 836.

- A *The Palermo* (1883), 9 P.D. 6; 53 L.J.P. 6; 49 L.T. 551; 32 W.R. 403; 5 Asp.M.L.C. 165, C.A.; 18 Digest (Repl.) 104, 892.
Nordon v. Defries (1882), 8 Q.B.D. 508; 51 L.J.Q.B. 415; 46 J.P. 566; 30 W.R. 612; 18 Digest (Repl.) 117, 999.
Bullock v. Corry (1878), 3 Q.B.D. 356; 47 L.J.Q.B. 352; 38 L.T. 102; 42 J.P. 232; 26 W.R. 330; 18 Digest (Repl.) 92, 759.
- B *Bustros v. White* (1876), 1 Q.B.D. 423; 45 L.J.Q.B. 642; 34 L.T. 835; 24 W.R. 721; 3 Char. Pr. Cas. 229, C.A.; 18 Digest (Repl.) 63, 501.
Westinghouse v. Midland Rail. Co. (1883), 48 L.T. 462, C.A.; 18 Digest (Repl.) 106, 913.
Nicholl v. Jones (1865), 2 Hem. & M. 588; 5 New Rep. 361; 13 W.R. 451; 71 E.R. 592; 18 Digest (Repl.) 55, 417.
- C *Ford v. Tennant* (No. 2) (1863), 32 Beav. 162; 1 New Rep. 303; 32 L.J.Ch. 465; 7 L.T. 733; 27 J.P. 211; 9 Jur.N.S. 292; 11 W.R. 324; 55 E.R. 63; 18 Digest (Repl.) 103, 869.
Westminster Brymbo Coal and Coke Co., Ltd. v. Clayton (1863), 3 New Rep. 111; 9 L.T. 534; 12 W.R. 123; 18 Digest (Repl.) 57, 437.
Lazarus v. Mozley (1859), 1 L.T. 3; 5 Jur.N.S. 1119; 18 Digest (Repl.) 43, 344.
- D *Rumbold v. Forteath* (1856), 3 K. & J. 44.
Quin v. Ratcliff (1860), 3 L.T. 363; 6 Jur.N.S. 1327; 9 W.R. 65; 18 Digest (Repl.) 10, 53.
Hunnings v. Williamson (1883), 10 Q.B.D. 459; 52 L.J.Q.B. 400; 48 L.T. 581; 47 J.P. 390; 31 W.R. 924; sub nom. *Hummings v. Williams*, 52 L.J.Q.B. 273; sub nom. *Hemmings v. Williamson*, 48 L.T. 392; 31 W.R. 336; 18 Digest (Repl.) 15, 93.
- E *Orr v. Diaper* (1876), 4 Ch.D. 92; 46 L.J.Ch. 41; 35 L.T. 468; 25 W.R. 23; 18 Digest (Repl.) 6, 17.

Appeal by the plaintiff from a decision of BACON, V.-C., on a summons taken out by the plaintiff for an order that the defendant be ordered to make a further and better answer to interrogatories and a further and better affidavit of documents.

In January, 1881, David Lyell, the plaintiff, commenced this action against the defendant, J. L. Kennedy, for a declaration that Kennedy was a trustee of certain hereditaments at Manchester for one Ann Duncan, deceased, her heirs and assigns, and for an order that the defendant should give the plaintiff possession of the premises, and for certain incidental accounts and inquiries.

- G The statement of claim alleged that Ann Duncan, spinster, formerly of Balchrystie, in the county of Fife, was, at her death, seised in fee of the hereditaments at Manchester, and was then in the actual receipt of the rents and profits; that she acquired the property as devisee in fee under the will of her maternal uncle, Lawrence Buchan, who died on July 21, 1859; that Ann Duncan was a domiciled Scotswoman, and died at Balchrystie, on or about Nov. 5, 1867,
- H intestate as to realty in England; that at her death she was the last surviving descendant and heir-at-law of her father, David Duncan, of Balhousie, Perthshire, and also of her paternal grandfather, George Duncan, of Fingask, in the same county, and of Ann Duncan (née Cunningham) his wife; that at the time the lineal ancestors of George Duncan were all dead and their issue extinct; that the hereditaments, therefore, vested in Eleanor Bradock (née Cunningham) and Catherine
- I and Isabella Cunningham, spinsters, of Glasgow, as coparceners, as being the co-heiresses of George Cunningham, of Abernethy, in the same county, who was the father of the said Ann Duncan, the paternal grandmother of the intestate; that Eleanor Bradock's husband died in October, 1877; and that, by deed dated Dec. 24, 1880, the three sisters conveyed their entire interest in the property to the plaintiff. Further, that Ann Duncan requested the defendant to undertake the management of the property in Manchester, which was let to weekly tenants; that the defendant acted as her agent, bailiff, and receiver, and "upon an express trust" for her; and that for about five years after her death he accounted to her executors for the

rents due to her at her death. Further, that the defendant continued, after the death of Ann Duncan, to receive the rents and profits "upon an express trust" for her heir-at-law, and, as he had often since alleged, to pay the same to a separate account at a bank to the credit and for the benefit of the heir-at-law when he should be ascertained, and that he now held the property for the plaintiff in the manner and upon the terms and trusts aforesaid. By his defence Kennedy did not admit the pedigree; claimed that the property vested in the three co-heiresses; alleged that the deed of December, 1880, was obtained by the plaintiff for the express purpose of instituting the action, and that the deed, which was executed in consideration of five shillings, was void at common law and under the Maintenance and Embracery Act, 1540 (32 Hen. 8, c. 9); denied the possession of the three co-heiresses or any of their ancestors, or that he was or had been a trustee; and pleaded the Statute of Limitations.

The plaintiff in the present action on July 22, 1881, delivered twenty-one interrogatories of great length, to be answered by the defendant, relating to the pedigree and the alleged agency. Most of these questions the defendant declined to answer, but he put in a short answer to the others on Nov. 2, 1881. The plaintiff then took out a summons for a full and sufficient answer, and also a summons for the production of documents referred to in the second schedule of the defendant's affidavit; but BACON, V.-C., dismissed the summons on Jan. 11, 1882, and the Court of Appeal affirmed his decision on both summonses on Feb. 15, 1882. An appeal was then brought by the plaintiff to the House of Lords, and their Lordships, on Mar. 19, 1883, ordered the defendant to put in a further and better answer, and to file a further and better affidavit of documents: *Lyell v. Kennedy* (No. 1) (2), ante p. 798.

On June 22, 1883, the defendant filed a further answer to the interrogatories, and shortly afterwards put in a further affidavit of documents. The plaintiff then took out a summons that the defendant's further answer might be declared to be insufficient, embarrassing, and impertinent, that the further affidavit of documents might also be held to be insufficient and that the defendant might be ordered to make and file another and further and better answer and also a further and better affidavit as to documents; and that the defendant might be ordered to produce for inspection such of the documents specified in the second part of the first schedule of the original affidavit as to documents as consisted of copies of entries in registers and public records, and of other original documents, and of photographs of tombstones and houses, notwithstanding the privilege claimed by the defendant in his affidavits of documents, or either of them. When the summons was heard by BACON, V.-C., it was conceded that to some of the interrogatories named in the summons a further answer ought to be put in, but the affidavit of documents was held sufficient. The plaintiff appealed.

The action of *Kennedy v. Lyell* (No. 1) (1), which is referred to in the judgments, was commenced by the defendant in this action against the plaintiff, claiming against him the benefit of the forfeitures imposed by the Act of 1540; an inquiry as to the value of the premises; and an order on the plaintiff to pay the plaintiff one-half of such value. The discovery sought by the defendant in *Kennedy v. Lyell* (No. 2) (1), is fully stated in the report of that case: ante p. 807.

MacClymont and Robert Wallace for the plaintiff.

Horton Smith, Q.C., and *O. L. Clare* (*Tanner* with them) for the defendant.

April 8, 1884. **COTTON, L.J.**—This was an appeal by the plaintiff from two orders of BACON, V.-C., one of which refers to the affidavit filed by the defendant in answer to interrogatories, which I will call the answer, and the other was with reference to the production of documents. In the first place, we must see what the first order is. Before BACON, V.-C., the plaintiff complained that certain interrogatories were not answered, and, either by the decision of the Vice-Chancellor or by the concession of the defendant, to whom the interrogatories were

A administered, further answers were to be given to several of those interrogatories which were said not to have been sufficiently answered, and the only interrogatories which we have to consider now are the 10th, 18th, and 21st. The plaintiff claims by purchase from one whom he alleges to be the heir-at-law of Ann Duncan, who died intestate, and the defendant is a person who was trusted by Ann Duncan in her lifetime and managed her estates for her, and he has since her death been
B in possession of the estates. The time during which he has been in possession is sufficient to bar the claim of the plaintiff, even if he is the assignee of the heir-at-law, but subject to the submission of the plaintiff that there are circumstances which prevent time from being a bar in this case. The House of Lords, in *Lyell v. Kennedy* (No. 1) (2) (ante p. 798) has laid down, though without determining anything further, or whether, even on his own showing, the plaintiff can
C avoid the bar of time, that the proper course, as regards the questions put by the interrogatories in this action, is to deal with the case as if that were the question to be tried at the hearing.

Before one deals with the interrogatories, one should, I think, deal with two points which have been raised by counsel for the plaintiff. He contended that a further answer or affidavit ought to be required from the defendant on the ground,
D not that the interrogatories had not been sufficiently answered, but that the answers were embarrassing and impertinent, and that on that ground the defendant ought to be required to make a further affidavit or that the passages of which the plaintiff complains should be struck out. I think that, under ordinary circumstances, as in the cases which have been cited here, the court would, if the answers were impertinent or embarrassing, require a further affidavit or answer to be sworn;
E but in my opinion, the frame of these answers does not render it necessary that one should decide that question.

There are three paragraphs in the answer on which the plaintiff chiefly relied in support of his contention that the answer is embarrassing and impertinent, and I will deal with them in their order. The first in order was the 27th, and he particularly referred, not only to the great mass of the affidavit, but also to the
F particular paragraphs at the end of it. I will take that first, dropping for the present the point as to the great bulk of the affidavit. The plaintiff had asked by sub-s. (12) of his 21st interrogatory whether certain affidavits had not been filed on behalf of the defendant in a former action brought against him by the plaintiff—the plaintiff is an old litigant, and this is not the first claim he has made to these estates—and the defendant, in the 27th paragraph of his answer, admits in
G substance that he did file the affidavits, but he gives an explanation why the statements in them should not be taken as *prima facie* evidence against him, and that explanation is complained of as embarrassing and as preventing the plaintiff from reading that admission. Although I think that the defendant might and ought to have stated his reasons for not being bound by that affidavit more shortly and in a better form, yet, in my opinion, he was perfectly justified in stating
H that, from circumstances which had come to his knowledge since that affidavit was filed, he had discovered that what was there relied on was inaccurate, and he might, I think, very properly have stated that that was in consequence of the course taken on behalf of the plaintiff. That, however, is what he has done, but he has done it undoubtedly at somewhat unnecessary length, and possibly in somewhat an offensive manner. But, in my opinion, that is not sufficient to justify
I the court in ordering the defendant to make a further affidavit, whatever it ought to do upon a motion to strike out for scandal and impertinence.

Then we come to the later portion of the 27th paragraph of the answer, and here there is an admission by the defendant that he did file the affidavits, and he says :

“Subject to such explanation as aforesaid and to the submission hereinafter contained, the persons respectively mentioned in the said affidavits are the same as the persons of the corresponding names in the 7th, 8th, and 9th sub-sections of the same interrogatory. For the reasons hereinbefore stated I

do not admit that any of such persons . . . were related in blood to any others of them." A

That is somewhat involved, and I must say I do not quite understand what "the submission hereinafter contained" is; but, in my opinion, although it is involved and possibly not as clear as it might have been, it is not such an embarrassment as would justify the court in requiring another affidavit to be filed. What the defendant means is, I think, this: "I admit the persons named are the same as the persons who are referred to in the affidavit, and in the subsections of a particular interrogatory; but I do not admit their relationship, as they are referred to in the interrogatories named, as being the brothers and sisters, and so forth, of a person mentioned in the pedigree." In my opinion, this is not a case in which the defendant should be required to swear this affidavit without those paragraphs. B C

Then we come to the 28th and 29th paragraphs of the answer. If those answers or paragraphs were such as to enable the defendant to require the plaintiff to read every paragraph of the answer if he relied on any admission in the answer, in my opinion that would be highly improper on the part of the defendant, and such a course ought not to be adopted. But I do not so read them. It seems to me it is a bad form of pleading or a bad way of answering. Of course, when a man is required to answer interrogatories he may refer to the whole of his affidavit in answer, and not simply to those passages which purport to deal with a particular interrogatory, and that is, I rather think, what the pleader means to do here. But the plaintiff cannot, in my opinion, be embarrassed by that, for under R.S.C., Ord. 31, r. 24 [now R.S.C. (Revision) 1962, Ord. 26, r. 7], he can read one passage of the answer without referring even to the whole of the same paragraph, and, in my opinion, no judge would allow a defendant, where he had made an admission, to read a passage which was not connected in sense or substance with that, even if he had put in a statement submitting that he was entitled to do so, and claiming to do so. When an admission is read, everything ought to be read which is fairly connected with that admission; but, in my opinion, it would be wrong for the defendant to try, and he would not be allowed to bring in matter which was not in any way connected with the matter admitted. In my opinion, therefore, those paragraphs, especially having regard to the rules, would not impede or embarrass the plaintiff, and I do not consider, on the true reading of them, that such was the object and intention of the pleader. D E F

We come to the interrogatories which are said not to have been sufficiently answered, and upon that point a great deal was said as to how far the old practice differed from the new—how far the old practice went, and how far the new practice differs from and has done away with it. In old days, which probably I can recollect better than my colleagues, the substitution of an "and" for an "or," or of the word "or" for the word "and," was held to justify the court in requiring a further answer to be put in; but that is all gone now—the substance is to form the answer. What is required is that, where answers are to be made, interrogatories must be answered in substance. You must now answer substantially, and we are not to look to the precise dotting of i's and crossing of t's. [His LORDSHIP dealt with certain interrogatories.] I come to a matter which has been very much argued on this appeal, and in substance on a previous appeal which went to the House of Lords, *Kennedy v. Lyell* (No. 2) (1). That is the answer to interrogatory 21—it is No. 31 in the interrogatories in *Kennedy v. Lyell* (No. 2) (1). That interrogatory asks about steps or persons in the pedigree of the heir-at-law through whom the present claimant claims; and one question about Ann Duncan (the intestate) in substance the defendant declines to answer on the ground of privilege. The first question one has to consider is this: Is the ground of protection, as claimed, good in law? G H I

Subject to one point which I must mention, one is relieved from difficulty on that point by the decision of the House of Lords on practically the same interrogatory in *Kennedy v. Lyell* (No. 2) (1), where Kennedy, the plaintiff here the

A defendant—was suing Lyell the defendant—here the plaintiff—for penalties. The defence there was that it was no pretended title, and the defendant there asked substantially the same question in order to get an admission of his title there, as he does in order to get an admission of his title in this action of ejectment. The House of Lords affirmed the decision of this court that the protection which was claimed was good on the ground that the questions asked were inquiring into the
B advice given, or the views taken, by the legal advisers of the then plaintiff, with reference to the result of inquiries as to the pedigree and family of Miss Duncan. This applies just in the same way here, because, although it is true apparently, and it is asked as apparently a fact, whether Ann Duncan died, and who was the heir, and so on, yet those are not simple facts, but are the results of deductions drawn by the legal advisers employed for the purpose, from the facts relating to the
C pedigree which came to their knowledge; and, subject to one point, the protection is, in my opinion, sufficiently claimed in law.

The point arises in this way. In para. 26 of the answer (the answers being in para. 25 and 26) what the defendant says is this :

D “Except as aforesaid, I have no personal knowledge of any of the matters inquired after by the 21st interrogatory, and the only information or belief that I have received or have respecting any of such matters has been derived from and is founded upon information of a confidential nature procured by my solicitors or agents for the purpose of my defence against the aforesaid claims, and in the defence of my title, and for the purpose of enabling them, and counsel instructed by them, to advise me and conduct my defence against the
E aforesaid claims.”

The only privilege which can be claimed, and which the defendant desires to claim, is what is called “professional privilege,” the object being, as has frequently been stated, that the English law is technical, and, therefore, the greatest facilities ought to be afforded to everyone who is uninformed in the law—especially in such an action as this, where there are a great many legal questions to be
F discussed—to consult a solicitor and to receive from his solicitor communications which shall be privileged, and so obtain the fullest advice from his solicitor on what course he shall adopt without affording the opportunity to an opponent of prying into those communications, those searches, and those responses which are all of a confidential character according to English law. But the privilege is confined to that which is communicated to or by that man to or by the solicitors,
G or the agents who can be properly treated as agents of the solicitors. If a man directs, by such agents, inquiries to be made, that is all viewed by the law as done by his solicitors. We have, therefore, thought it right, in order to prevent any evasion of what is the proper view of the law by the use of that word “agents,” to require that the defendant shall put in a further affidavit, stating whether
H those agents were his agents, or whether they were the agents of the solicitors and persons who would be entitled to the protection given to solicitors, and necessarily to the agents of the solicitors, as every attorney’s clerk may be said to be. We think that the protection claimed is in law good.

Assuming it is the case—as I hold, subject to that correction—that the privilege is properly claimed in law, can the plaintiff show that in fact what the defendant says is not true and, therefore, cannot be relied upon as a ground of protection.
I The general rule is undoubtedly that in all questions of discovery, where you have the oath of the plaintiff appealing against and challenging the oath of the defendant, the oath of the defendant is conclusive for this purpose. But what the plaintiff says is that the practice ought to be the same as regards answers to interrogatories as it is with reference to an affidavit of documents, and the plaintiff’s counsel referred to the practice which prevails as regards requiring the party interrogated, or who is asked to produce documents, to put in a further answer or affidavit of documents under certain circumstances.

First of all, we must see how we have arrived at this practice of requiring an affidavit as to documents, and what it is. In former days discovery of documents was always part of the answer—that is to say, the plaintiff interrogated the defendant as to certain documents, and he put in an answer; but under the Judicature Acts and Rules the practice is now different, and, instead of an answer as to documents, there is a separate affidavit. That is under R.S.C., Ord. 31, r. 14 [now R.S.C. (Revision) 1962, Ord. 24, r. 13], by which:

"It shall be lawful for the court or a judge, at any time during the pendency of any cause or matter, to order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such cause or matter, as the court or judge shall think right."

With regard to affidavits of documents the question arose under the new practice, and it was held that the party making the affidavit could not be cross-examined, and that the party requiring it could not file affidavits to show that it was false, but it was held to be conclusive. The court, however, has held that if, from any documents produced, or any statements in the pleadings, it appears that the party making the affidavit has in his possession documents which in his affidavit were not mentioned, it will require him to make a further affidavit. It does not purport to make him produce documents which he does not admit he has; the production is only ordered of those which he has admitted. If there was a probable ground for supposing he had more, then he was required to make a further affidavit. That proceeded upon the footing that the oath of the defendant was conclusive as against the party requiring the production. But the court has not restricted itself to requiring the defendant to make one affidavit only; it might require him to make another at any time if there was reasonable probability of there being other documents. When the attention of the court had been called to that reasonable probability, and it was clearly satisfied of it, it might require the defendant to make a further affidavit. In the principal—I think the first—case on the point, that of *Noel v. Noel* (3), TURNER, L.J., put it on the ground that there might be more than one affidavit, and then, if there was a reasonable ground for suspicion that the defendant had got more documents in his possession, he might be ordered to make another affidavit. What TURNER, L.J., says in that case is this (1 De G.J. & Sm. at p. 472):

"I do not see anything in s. 18 of the [Court of Chancery Procedure Act, 1852] to preclude the court from requiring more than one affidavit of documents. If, after an affidavit has been made, the court sees anything to raise a reasonable suspicion that the defendant has in his possession other documents relating to the matter in question, I think it may require him to make a further affidavit."

That was the ground of his decision, that, if there is that reasonable suspicion, a further affidavit will be required.

Do answers to interrogatories stand on the same footing? That depends on R.S.C., Ord. 31, r. 10 and r. 11. I will read both rules, though the first is not so very material. Rule 10 [revoked, 1917] is as follows:

"No exceptions shall be taken to any affidavit in answer, but the sufficiency or otherwise of any such affidavit objected to as insufficient shall be determined by the court or a judge on motion or summons."

By r. 11 [now R.S.C. (Revision) 1962, Ord. 26, r. 5]:

"If any person interrogated omits to answer, or answers insufficiently, the party interrogating may apply to the court or a judge for an order requiring him to answer, or to answer further, as the case may be. And an order may be made requiring him to answer, or answer further, either by affidavit or by viva voce examination, as the judge may direct."

A So that, with regard to the form of discovery by an answer to interrogatories, what the court has to consider is simply whether the answer is insufficient. It has not to go into the question of the truthfulness of the answer, but must see whether it is insufficient or not. If it is insufficient, then only can it require a further answer. What is the insufficiency? The real point is this: Has the person who is required to answer answered that which his opponent has required
B him to answer, or, in other words, that which he has no excuse for not answering?

If protection is claimed, the court will not require a further answer to be made unless it is clearly satisfied either from the answer itself, or from that which is made part of the answer, or from the very nature of the document regarding which protection is claimed, that the facts cannot be such as to justify that protection, so that protection cannot properly be claimed. But it must not be a case of mere
C suspicion. Suspicion is quite sufficient with regard to requiring a further affidavit as to documents. But, in the case of an answer to interrogatories, the court must be clearly satisfied, either from admissions or from other documents, that the oath of the defendant by which he claims his protection, cannot be available for the purpose for which he puts it forward.

What, in my opinion, disposes of this point in the present case is that what we
D have, notwithstanding the numerous documents which were relied upon, amounts only to a matter of suspicion. It might all be explained if the defendant were here at liberty to make an affidavit, as he practically did on this appeal, to explain the circumstances he relied upon. In my opinion, where it is mere suspicion, you are not justified in saying you can disregard the oath of the defendant by which he claims that which is in law a sufficient protection, and compel him not to put
E in a further claim for protection, but to put in a further answer to those interrogatories which he has declined to answer on grounds which, if true, are a sufficient protection to him from being required to answer. If he makes a further affidavit, he may frame it in exactly the same terms, and then the court will do no more; but what we are asked to do is to hold that an answer must be given to those questions which the defendant seeks to protect himself from answering upon his
F oath. In my opinion, before doing that, either we must be positively clear, from the subject-matter for which he seeks that protection that it is not true, or it must be entirely falsified by the documents. I do not intend to go into the question as to how far, under the present practice, one can refer to anything which is in the possession of the defendant, not referred to in his answer, but scheduled to his affidavit of documents, because, although there are some things in that
G affidavit which are stronger than anything in the answer, yet they all come to nearly the same thing, raising the same sort of a case of suspicion which one can easily see might well be answered [His LORDSHIP dealt with the facts relating to interrogatory 21].

Before I leave this part of the appeal I must deal with one suggestion of counsel for the plaintiff, that, if we hold the answer to be in any way insufficient, we
H ought simply to make a declaration to that effect, leaving the plaintiff to take such steps as he may be advised. I suppose he would for that purpose rely on one of the Rules of Court in order to take the case *pro confesso* or to have a judgment in default of answering. In my opinion, that would not be the proper course to take. The court has power, no doubt, if it sees that a defendant is refusing to give discovery, to say that the parties ought to be left to take such
I steps as may be suggested; but here, although we do hold that in some particulars there ought to be a further answer, that, in my opinion, is not the proper view to be taken of this answer. The only true course, in my opinion, is to assume that the defendant will ask for further time, and to give him that further time, and to require him to put in a further answer to those interrogatories which have not been sufficiently answered at present.

That disposes of the question of the answer to the interrogatories. Then one comes to the appeal against the second order, which relates to production of documents. There the defendant has claimed protection for certain documents.

He objects to produce "copies of entries in registers and public records, and of A other original documents, which are not, and never have been, in my possession, custody, or control." Further, he objects to produce "photographs of tombstones and houses." He also claims protection for documents which, he says:

"were made, prepared, or procured by my solicitors, or by their clerks or confidential agents instructed or employed by them, for the purpose of defending B me from the claims of persons who had commenced legal proceedings against me for the recovery of the hereditaments in this action, and were made and procured solely for that purpose."

Again he says:

"For the purposes of my defence I had, through my solicitors, to obtain the assistance of counsel, and for that purpose to make searches and inquiries C and obtain copies of entries in registers, public records, and other original documents not in my possession; and in the course of procuring the materials for conducting my defence, and obtaining the assistance and advice of counsel, my solicitors employed confidential clerks and other confidential agents, and my said solicitors and the aforesaid clerks and agents, in the course of such employment and for the purposes aforesaid, made and obtained the briefs, D instructions, drafts, notes, memoranda, and copies hereinbefore mentioned, and wrote and received the aforesaid letters and made the aforesaid sketches of pedigrees and procured the photographs hereinbefore mentioned. Every one of the documents which I do as aforesaid object to produce was made, prepared, or procured for the purpose of litigation actually pending with regard to the subject-matter of this action, and in its nature identical therewith." E

I think it was almost conceded that the case was a new one upon this point; but certain authorities were relied upon by counsel for the plaintiff in argument, which it is just as well to get rid of, which he says establish that he is entitled to production of those documents. *Wright v. Vernon* (4) was one of the cases F which was most relied upon, but there the documents in question had not been procured by professional advisers, but, apparently, they had been obtained by the defendant himself. Therefore, there is a complete difference between that case and this. *Storey v. Lord Lennox* (5) was the same kind of case. Here I think I may refer to a passage in the judgment of KINDERSLEY, V.-C.—I am quoting from the judgment in *Wright v. Vernon* (4) (1 Drew. at p. 351):

"Lennox, who was the party interested in the policy, and claiming payment, G had had personal communications with various individuals, for the purpose of obtaining from them information relating to the insurers; that was information obtained from strangers, and for the purpose of the contest, yet he was obliged to produce the documents."

He quotes that as explaining the principle on which he is deciding, and it explains the principle in both cases—that is, that when a man is doing that which is not a H privileged act as a solicitor, whatever he learns, when the proper questions are put to him he must produce or disclose it. *Balguy v. Broadhurst* (6) was another case which was referred to; but that was decided merely on the ground that the privilege was not properly claimed, because the claim was put in informal language, that

"some of the documents had been procured by his solicitor since the institution of the suit, and for the purpose of his defence to it, and that the same were, I as he was advised and insisted, confidential communications."

It may be that they were not protected, and I think in my judgment in *Kenned. v. Lyell* (1) I said they were looked upon simply as matters which would not be within the rule as to professional privilege. There is no decision there which can help the plaintiff in this case.

What ought we to do here? There is litigation about pedigree and the heirship to a lady who died many years ago, and it is sworn by the defendant that, for the

A purpose of defending himself against various claimants, he has made inquiries and has obtained every one of these documents, not personally, but that his solicitors have got them for the purpose of his defence, for instructing his counsel and for conducting this litigation on his behalf. No case has been quoted where documents obtained under such circumstances have been ordered to be produced.

B In my opinion, it is contrary to the principle on which the court acts with regard to protection on the ground of professional privilege, that we should make an order for their production. They were got for the purpose of his defence, and it would be to deprive a solicitor of the means afforded for enabling him fully to investigate a case for the purpose of instructing counsel if we required documents, although perhaps publici juris in themselves, to be produced; because the very fact of the solicitor having got copies of certain burial certificates and other records, and

C having made copies of the inscriptions on certain tombstones, and obtained photographs of certain houses, might show what his view was as to the case of his client as regards the claim made against him.

There is no case, as I have said, which is exactly in point, but *Walsham v. Stainton* (7), though somewhat different in its circumstances, illustrates the principle to which I am referring. In that case *WOOD, V.-C.*, protected the records and extracts from books which had been made for the defendant by an accountant who had collected a number of entries, because the extracts, when put together, showed the view which he took, and which the solicitors of the defendant took, of the particular fraud which they were there investigating; and to order the defendant to produce them would be to give the parties who were asking for production a clue to the advice which had been given by the solicitor—giving

D the benefit of the professional opinion which had been formed by the solicitor, and those who had acted in a professional capacity for the defendant.

In my opinion, therefore, in this case it would not be in accordance with the rules which have guided this court in deciding what is professional privilege in regard to the production of documents to order the production of these documents, and I think that the Vice-Chancellor was right in declining to order any of these

E documents to be produced. As regards the question of costs, I do not look with favour upon the conduct of either of the parties as regards the question we have here to decide, and, in my opinion, therefore, the proper order will be to give no costs of the appeal.

BOWEN, L.J.—I agree substantially, and almost absolutely, with everything which has fallen from *COTTON, L.J.*, and I shall not, therefore, travel over the

G whole of the ground he has covered, but confine myself to making a few remarks upon the points of law.

I think that when an answer or an affidavit is couched in a form which makes it embarrassing—that is to say, which prevents the person who asks for it from using it without having thrust upon him irrelevant matter as part of it—the answer or affidavit is insufficient, and the proper course to pursue is to ask that

H a further answer or affidavit shall be put in, even if it may be dealt with in another way—that is to say, by having the whole of the affidavit taken off the file, for that is a cumbrous and expensive mode of curing the evil. I think an affidavit is not sufficient which is so involved in the answers as not to be capable of being used. In my opinion, that is very well covered by authority on the common law side, in a case which has been followed as good law ever since, that is *Peyton v. Harting* (8), which lays down that answers to interrogatories may be insufficient within the meaning of the Common Law Procedure Act, 1854, s. 53 [repealed], if impertinent or otherwise objectionable matter is contained in them in addition to the information asked for. **BRETT, L.J.**, says there (*L.R.* 9 C.P. at p. 11):

I

“There must be some matter of supererogation which would make an answer insufficient. Whether in any particular case there is such matter as to render the answer insufficient which, without it, would be sufficient, is a question for the discretion of the judge at chambers.”

KEATING, J., says, in the same case (*ibid.* at p. 10) :

"If the judge is satisfied that the answers contain matter which is improper or impertinent, as destroying the effect of the answers or introducing irrelevant topics, all which is matter for his discretion, he has jurisdiction."

In this case I should have thought that a further answer ought to be made but for one consideration, which seems to me to be conclusive. What is the object of interrogatories? It is to get discovery which can be used for the purpose for which the statute intended it to be used. If, indeed, the defendant had replied to the plaintiff by his answers in such a way as to prevent the plaintiff from using them at the trial, I should have said he must answer further; but he cannot do that, however much he may desire it, because by Ord. 31, r. 24 [now R.S.C. (Revision) 1962, Ord. 26, r. 7] :

"Any party may, at the trial of a cause, matter, or issue, use in evidence any one or more of the answers or any part of an answer of the opposite party to interrogatories without putting in the others or the whole of such answer."

Accordingly, the judge at the trial will know perfectly well how to deal with this answer if there is any unfairness with regard to using the residue of the answer which the defendant has sought to thrust upon the plaintiff, and he will only allow such parts of the answer to be used as contain a direct answer to the interrogatories. So these efforts to embarrass are now futile. I pass over what COTTON, L.J., has said as to the other interrogatories to which we have directed an answer to be given. I agree that there ought to be an answer in each of those cases.

I come to the question which has taken up so much time—that is to say, the claim of privilege which has been set up by the defendant. I agree that he must make a further answer, in addition to the allegation that the information has been procured by "his solicitors or agents." That will not do, though I think that might have been a slip, and should certainly have so considered it, if it had not been for the general tenour of the other answers. But still it seems to me that, if his allegations are true, his claim to privilege will be covered by the decision in the House of Lords on the appeal in *Kennedy v. Lyell* (1), and it will be good because he will have insisted upon the facts upon which he ought to be excused. But, says counsel for the plaintiff, "Although he has insisted on the facts upon which, if true, he ought to be excused, I can show that there is a cloud of suspicion about the statement on oath which ought to induce the court to order a further affidavit to be made upon the point." COTTON, L.J., has expressed most happily and lucidly, if he will forgive my saying so in his presence, the law upon this subject.

What ought to be held sufficient to displace the statement on oath upon which, if true, privilege is claimed? It ought not to be open to the opposite party to raise a controversy which, if unsupported, the court has no means of deciding. It may be that the admission may be so clear, either upon the answer of the defendant himself, or upon the other facts of the case, that the court can arrive at the conclusion that it is a mis-statement, either made deliberately or per incuriam; but in laying down the line of definition or demarcation which should teach us what we may look to in particular cases, and what we may not look to, I think the true canon which is always to be borne in mind is that you are appealing to the oath or conscience of the other side, and that you cease to appeal to his oath the moment you begin to contest his accuracy. Therefore, nothing ought to make us order a further answer on the ground that the one put in is insufficient, except upon something which is very clear indeed. Be it observed, that it is impossible that this answer can be so worked as to cause injustice. There is an ample means of obtaining further information by an application for discovery. If the plaintiff can satisfy the judge in chambers that there is reason for thinking that his adversary has answered hastily, or loosely, or untruthfully, he can interrogate him specifically, over and over again, by getting leave to put further interrogatories, and that is the course which ought to have been pursued in this

A case. Instead of our time having been occupied by hearing the learned argument of counsel for the plaintiff as to the way in which we should deal with this answer, and whether it should be treated as insufficient or not, the learned counsel, if he had any cause of complaint or cause to make out upon the documents to which he has called our attention, could have gone to chambers and made such an answer to this affidavit as would have satisfied the judge, and, if the judge had thought fit, there would have been a further answer required. That is very frequently the course adopted at common law, both as regards affidavits of documents and answers to interrogatories. Therefore, it seems to me, in this case, that what the learned judge has said, is not only clear law, but that it cannot possibly work injustice in this case.

Then comes the point as to documents; and, as to the documents, I agree with everything that has been said by COTTON, L.J. We are not dealing now with documents which the defendant has procured himself. We are dealing with documents which have been procured at the instigation of his solicitor, and, bearing in mind the rule of privilege which the law gives in respect of information obtained by a solicitor, it seems to me we cannot make the order asked for without doing very serious injustice. A collection of records may be the result of professional knowledge, research, and skill, just as a collection of curiosities is the result of the skill and knowledge of the antiquarian or virtuoso; and, even if the solicitor has employed others to obtain them, it is his own knowledge and judgment which have probably indicated the source from which they could be obtained. It is his mind, if that be so, which has selected the materials, and those materials, when chosen, seem to me to represent the result of his professional care and skill, and you cannot have disclosure of them without asking for the key which will unlock the treasure of labour which the solicitor has bestowed in obtaining them. I entirely agree, therefore, with what has been said. I am satisfied that we could not make the order asked for without infringing the principle on which the court acts. It is not necessary to say what would be done as to any particular document if a right to inspection were made out.

F **FRY, L.J.**—I agree with the reasons and conclusions which have been stated by my learned brethren.

Order as to further answer varied.

Solicitors: *J. Balfour Allan; Rooke & Sons, for Earle, Sons & Co., Manchester.*

G [*Reported by FRANK EVANS, ESQ., Barrister-at-Law.*]

COLLYER v. ISAACS

[COURT OF APPEAL (Sir George Jessel, M.R., Baggallay and Lush, L.J.J.), November, 16, 1881]

[Reported 19 Ch.D. 342; 51 L.J.Ch. 14; 45 L.T. 567;
30 W.R. 70]

Bankruptcy—Discharge—Prior bill of sale by debtor assigning to creditor all goods in his house and all goods, chattels, and effects which at any time thereafter might be brought thereon to secure a loan and interest—No proof of debt in bankruptcy—Goods brought by debtor into his house after discharge—Liability to seizure by creditor.

The proviso to s. 12 of the Bankruptcy Act, 1869 [repealed], provided that “the power of any creditor holding a security upon the property of the bankrupt to realise or otherwise deal with it” was not affected by the adjudication of bankruptcy. Section 31 provided that future debts and liabilities should be “deemed to be debts provable in bankruptcy.” Section 49, provided that the discharge of the debtor released him from all “debts provable in bankruptcy” with certain exceptions.

The plaintiff executed a bill of sale to the defendant which contained an assignment of all the goods then in the plaintiff's house, and all goods, chattels and effects which at any time thereafter might be brought thereon, to secure a loan of £300 and interest. The plaintiff subsequently filed his petition in bankruptcy. No part of the loan was ever repaid to the defendant, who did not prove for the debt in the bankruptcy. After the plaintiff had obtained his discharge he brought into his house certain goods which the defendant seized. The plaintiff sought an injunction to prevent the defendant from selling the goods.

Held: the proviso to s. 12 of the Bankruptcy Act, 1869, applied only to property which could be realised at the date of the adjudication; the assignment of future property created a debt which was provable in the bankruptcy under s. 31 of the Act, and, therefore, s. 49 of the Act applied to release the plaintiff from the debt when he obtained his discharge; accordingly, he was entitled to the injunction claimed.

Notes. The Bankruptcy Act, 1869, has been repealed. For ss. 12, 31, and 49 of the 1869 Act see now ss. 7, 30, and 28 of the Bankruptcy Act, 1914, respectively. Section 12 of the 1869 Act took effect on the adjudication in bankruptcy; s. 7 of the 1914 Act, however, takes effect on the making of the receiving order.

Considered: *Robinson v. Ommanney* (1882), ante p. 265. Distinguished: *Re Reis, Ex parte Clough*, [1904] 2 K.B. 769. Explained and Distinguished: *Re Lind, Industrials Finance Syndicate, Ltd. v. Lind*, [1914-15] All E.R.Rep. 527. Considered: *King v. Michael Faraday and Partners, Ltd.*, [1939] 2 All E.R. 478. Referred to: *Clements v. Matthews* (1882), 47 L.T. 251; *Joseph v. Lyons* (1884), 15 Q.B. 280; *Aberdare and Plymouth Co. v. Hankey* (1887), 3 T.L.R. 493; *Re Bastable, Ex parte Trustee*, [1901] 2 K.B. 518; *Re Dallas*, [1904] 2 Ch. 385; *Pullan v. Koe*, [1911-13] All E.R.Rep. 334; *Performing Right Society v. London Theatre of Varieties*, [1924] A.C. 1; *Re Wait (Trading as Wait and James), The Trustee v. Humphries and Bobbett*, [1926] All E.R.Rep. 433; *Ditcham v. Miller* (1931), 100 L.J.P.C. 177.

As to assignments of debts in general by a debtor subsequently made bankrupt, see 2 HALSBURY'S LAWS (3rd Edn.) 323-324; and for cases see 5 DIGEST (Repl.) 749 et seq. For the Bankruptcy Act, 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 321.

Cases referred to:

- (1) *Thompson v. Cohen* (1872), L.R. 7 Q.B. 527; 41 L.J.Q.B. 221; 26 L.T. 693; 36 J.P. 822; 4 Digest (Repl.) 186, 1692.

- A (2) *Cole v. Kernot* (1872), L.R. 7 Q.B. 534, n.; 41 L.J.Q.B. 221; 7 Digest (Repl.) 163, 876.

Also referred to in argument:

- Lyde v. Mynn* (1833), 1 My. & K. 683; Coop. temp. Brough. 123; 47 E.R. 44, L.C.; 4 Digest (Repl.) 338, 3075.
- B *Lazarus v. Andrade* (1880), 5 C.P.D. 318; 49 L.J.Q.B. 847; 43 L.T. 30; 44 J.P. 697; 29 W.R. 15; 7 Digest (Repl.) 125, 725.
- Holroyd v. Marshall* (1862), 10 H.L.Cas. 191; 33 L.J.Ch. 193; 7 L.T. 172; 9 Jur.N.S. 213; 11 W.R. 171; 11 E.R. 999, H.L.; 7 Digest (Repl.) 124, 722.
- Re Pain, Ex parte Pain* (1868), 3 Ch. App. 639; 37 L.J.Bey. 21; 18 L.T. 753; 16 W.R. 833, L.J.J.; 4 Digest (Repl.) 634, 5639.

- C **Appeal** from a decision of HALL, V.-C., in an action brought by the plaintiff to obtain an injunction to prevent the defendant from selling the plaintiff's goods which he had seized.

Under the bill of sale which the plaintiff executed in favour of the defendant to secure repayment of the loan and interest there was assigned to the defendant:

- D "all the goods, chattels, etc., enumerated in the schedule hereunder written belonging to the mortgagor now in, upon, or affixed to the messuage and premises Nos. 21 and 22, Charles Street, the place of business of the mortgagor, and all other goods, chattels, and effects which may be therein, or which may at any time hereafter be brought therein in addition thereto, or in substitution thereof, or any of them."

- E The bill of sale was subsequently registered.

E. Cutler and R. Vaughan Williams for the plaintiff.

E. W. Byrne for the defendant.

- SIR GEORGE JESSEL, M.R.**—This is an appeal from a decision of HALL, V.-C., and it is on a very important question as to the law of bankruptcy. The debtor, who is the plaintiff in the present action, executed a bill of sale to the defendant which contained an assignment not only of the goods and chattels then in the plaintiff's house, but of all goods, chattels, and effects which at any time thereafter might be brought thereon, to secure £300 and interest. The plaintiff afterwards, and while money was still due to the defendant under his bill of sale, petitioned for liquidation, and obtained his discharge from the creditors. After such discharge he brought certain other goods into the house. These goods the creditor seized. The debtor then brought the present action for an injunction to prevent the sale of those goods by the creditor, and the Vice-Chancellor decided in the creditor's favour.

- H That decision appears to me to be contrary not only to the spirit and meaning, but to the very words of the Bankruptcy Act, 1869. What was the position of the debtor before the liquidation? He had executed a deed assigning his existing chattels, and purporting to assign property which he might subsequently acquire. That was only a contract by the debtor that the future chattels should, when brought on the premises, belong to the creditor as a further security for the money owing. You cannot assign either in law or equity anything which has no existence, but in equity a contract to assign the future property, and an assignment of such future property, have the same effect. Such a contract passes the property on its being brought in, and becomes then binding on such property. Under a contract by a man, entered into for value, to settle the future real property which his father shall leave him, on such property afterwards being left it is bound by the contract. This assignment of future property is a contract, and under a contract like this there is a liability which is provable as a debt in the bankruptcy of the contractor, under s. 31 of the Bankruptcy Act, 1869. When a debtor obtains his discharge, that discharge has the effect, under s. 49 of the Bankruptcy Act, 1869, of relieving him from his debts. Suppose he owed a debt, and then entered into

a covenant to give a security for it. After the bankruptcy, the bankrupt says, "I am discharged from this and all other liabilities to which I was formerly subject." It would be very queer if you could say that the order of discharge barred the debt but did not bar the ancillary contract.

Suppose, for instance, a man had bound all his future property by such a contract, he would never be able to start free again as before. Section 12 of the Bankruptcy Act, 1869, provides that

"where a debtor shall be adjudicated a bankrupt no creditor to whom the bankrupt is indebted in respect of any debt provable in the bankruptcy shall have any remedy against the property or person of the bankrupt in respect of such debt except in manner directed by this Act."

Clearly this is a remedy in respect of debt only. Then the section goes on :

"But this section shall not affect the power of any creditor holding a security upon the property of the bankrupt to realise or otherwise deal with such security in the same manner as he would have been entitled to realise or deal with the same if this section had not been passed."

That manifestly applies to property which can be realised by the creditor. Section 31 says that future debts and liabilities shall be "deemed to be debts provable in bankruptcy." Then by s. 49 of the Act of 1869 the discharge of the debtor releases him from all "debts provable in bankruptcy," with some exceptions. This is a liability provable in bankruptcy, and in respect of both the principal contract to pay the debt and the ancillary contract as to the future property the debtor is discharged from all liability. Therefore, the property which the debtor brought on the premises after his discharge is not now affected by the bill of sale. It is possible that where a man covenants for value to assign specific future-acquired real estate that may be bound. As to that, however, I desire to give no opinion.

BAGGALLAY, L.J.—Counsel for the defendant relies on that part of s. 12 of the Bankruptcy Act, 1869, which provides that

"the power of any creditor holding a security upon the property of the bankrupt to realise or otherwise deal with it"

shall not be affected by the adjudication. As I understand that proviso, it only applies to property which can be realised at the date of the adjudication. In the present case it only applies to the security so far as regards the goods and chattels which at the time of the liquidation had actually been brought on the premises in question. It does not apply to after-acquired property, whether absolutely assigned in terms or covenanted to be settled. The assignment of the future chattels is a mere contract on which the debtor is liable. Section 31 of the Bankruptcy Act, 1869, has, in most extensive language, provided that future liabilities shall be "debts provable in bankruptcy"; and by s. 49 of the Act of 1869, the order of discharge shall release the bankrupt from "all the debts provable under the bankruptcy," with the exception named in the section. The debt owing to the creditor was certainly released by the debtor's discharge, and it is quite clear, in my opinion, that the debtor's liability was also gone. The decision in *Thompson v. Cohen* (1) was consistent with the law, and the Court of Queen's Bench properly applied the same rule in the case of an assignment in *Cole v. Kernot* (2).

LUSH, L.J.—Without reference to *Thompson v. Cohen* (1)—with the decision in which, however, I agree—and the other cases which have been cited, I think that the present case can and ought to be decided in the language of the Bankruptcy Act alone, to which the attention of the Vice-Chancellor does not seem to have been properly called. No term can be wider than the term "liability," which is used in s. 31 of the Act of 1869. By the same section it is deemed, even when

A a future liability, to be a "debt provable in bankruptcy." From "debts provable under the bankruptcy" the debtor is, by s. 49 of the Act of 1869, relieved on obtaining his discharge. I agree, therefore, that the decision of the Vice-Chancellor must be reversed.

Appeal allowed.

Solicitors: *Grueber & Co.; H. Levy.*

B [Reported by FRANK EVANS, Esq., Barrister-at-Law.]

C

Re JONES. Ex Parte JONES

[COURT OF APPEAL (Sir George Jessel, M.R., Baggallay and Lush, L.JJ.), June 23, 1881]

D [Reported 18 Ch.D. 109; 50 L.J.Ch. 673; 45 L.T. 193;
29 W.R. 747]

Bankruptcy—Adjudication—Infant—Infant trader—No representation of being of full age during trading—Trade debts not necessities.

An infant trader who has not expressly represented himself to be of full age in the course of his trading cannot be adjudicated bankrupt in respect of a trade debt for goods not necessities.

E *Re Lynch, Ex parte Lynch* (1), (1876), 2 Ch.D. 227, overruled.

Re Bates, Ex parte Bates (2) (1841), 2 Mont. D. & De G. 337, disapproved.

Notes. The Bankruptcy Act, 1869, was repealed by the Bankruptcy Act, 1883. The present statute governing bankruptcy matters is the Bankruptcy Act, 1914 (2 HALSBURY'S STATUTES (2nd Edn.) 321). For s. 6 of the Act of 1869 see now
F s. 4 (1) (b) of the Act of 1914.

Considered: *Duncan v. Dixon* (1880), 44 Ch.D. 211. Explained: *Leslie v. Shiell* (1913), 29 T.L.R. 554. Applied: *Re L. A. & B. F. M., Official Receivers v. The Debtors* (1926), 95 L.J.Ch. 258. Considered: *Re Debtor* (No. 564 of 1949), *Ex parte Customs and Excise Comrs. v. Debtor*, [1950] 1 All E.R. 308. Referred to: *Taylor v. Johnson* (1882), 19 Ch.D. 603; *Stock v. Wilson*, [1913] 2 K.B. 235; *Leslie v. Shiell*, [1914-15] All E.R.Rep. 511; *Re McGreavy, Ex parte McGreavy v. Benfleet U.D.C.*, [1950] 1 All E.R. 30.

As to bankruptcy jurisdiction with reference to infants in general, see 2 HALSBURY'S LAWS (3rd Edn.) 257-258; and for cases see 4 DIGEST (Repl.) 28 et seq.

Cases referred to:

- H (1) *Re Lynch, Ex parte Lynch* (1876), 2 Ch.D. 227; 45 L.J.Bcy. 48; 34 L.T. 34; 24 W.R. 375; 4 Digest (Repl.) 29, 235.
- (2) *Re Bates, Ex parte Bates* (1841), 2 Mont. D. & De G. 337; 11 L.J.Bcy. 4, Ct. of R.; 4 Digest (Repl.) 29, 245.
- (3) *Re King, Ex parte Unity Joint Stock Mutual Banking Association* (1858), 3 De G. & J. 63; 27 L.J.Bcy. 33; 31 L.T.O.S. 242; 4 Jur.N.S. 1257; 6 W.R. 640; 44 E.R. 1192, L.JJ.; 4 Digest (Repl.) 29, 246.
- I (4) *Re Charlton, Ex parte Charlton* (1877), 6 Ch.D. 45; 46 L.J.Bcy. 110; 37 L.T. 45; 25 W.R. 800, C.A.; 4 Digest (Repl.) 190, 1724.
- (5) *Miller v. Blankley* (1878), 38 L.T. 527; 28 Digest (Repl.) 518, 358.
- (6) *R. v. Wilson* (1879), 5 Q.B.D. 28; 49 L.J.M.C. 13; 41 L.T. 480; 44 J.P. 105; 28 W.R. 307; 14 Cox, C.C. 378, C.C.R.; 4 Digest (Repl.) 28, 234.

Also referred to in argument:

Re Onslow, Ex parte Kibble (1875), 10 Ch. App. 373; 44 L.J.Bcy. 63; 32 L.T. 138; 23 W.R. 433, L.JJ.; 4 Digest (Repl.) 354, 3225.

Ex parte Watson (1809), 16 Ves. 264; 33 E.R. 985; 4 Digest (Repl.) 29, 248. A

Ketsey's Case (1613), Cro. Jac. 320; 79 E.R. 274; sub nom. *Keteley's Case*, 1 Brownl. 120; sub nom. *Kirton v. Elliott*, 2 Bulst. 69; 28 Digest (Repl.) 542, 576.

Blake v. Concannon (1870), I.R. 4 C.L. 323; 28 Digest (Repl.) 543, *321.

Nelson v. Stocker (1859), 4 De G. & J. 458; 28 L.J.Ch. 760; 33 L.T.O.S. 277; 5 Jur.N.S. 751; 7 W.R. 603; 45 E.R. 178, L.J.J.; 28 Digest (Repl.) 521, B 383.

Chubb v. Griffiths (1865), 35 Beav. 127; 55 E.R. 843; 28 Digest (Repl.) 526, 424.

Lemprière v. Lange (1879), 12 Ch.D. 675; 41 L.T. 378; 27 W.R. 879; 28 Digest (Repl.) 543, 588.

Appeal from a decision of BACON, Chief Judge, affirming a decision of Oldbury County Court judge, on a petition for bankruptcy presented by the Birmingham Corporation against an infant debtor William John Jones. C

The infant carried on the business of trading in coal and breeze. In the course of his trading he bought a quantity of breeze from the Birmingham Corporation which because of financial difficulties he was not able to pay for. On Feb. 21, 1881, the infant filed his own petition for bankruptcy but these proceedings fell through as no resolution was passed by the creditors in favour of liquidation. D On Mar. 22, 1881, Birmingham Corporation presented a bankruptcy petition against the debtor, the alleged act of bankruptcy being the filing of the bankruptcy petition. There was no evidence that the infant had ever in the course of his trading represented to any creditor that he was of full age although it was alleged that he had on one occasion, not in his trading, stated he was of age. The county court judge adjudicated the infant bankrupt and this decision was upheld by the Chief Judge in Bankruptcy. The infant appealed. E

E. C. Willis for the infant.

De Gex, Q.C., and *Finlay Knight* for the petitioners, during the argument referred to *Re Bates, Ex parte Bates* (2), in which a bankrupt sought to have the fiat annulled on the ground of infancy, and it was shown that a year previously he had, on the occasion of his marriage, sworn that he was of age, and the application was refused. SIR GEORGE JESSEL, M.R., disapproved of that decision, saying "I should be sorry to describe that decision in the terms which it deserves." F

SIR GEORGE JESSEL, M.R.—This is an appeal from the decision of the Chief Judge in Bankruptcy, affirming the decision of the county court judge, who considered himself bound, as no doubt he was, by the previous decision of the Chief Judge in *Re Lynch, Ex parte Lynch* (1). The decision of the Chief Judge in the present case amplifies the principle laid down by him in *Ex parte Lynch* (1), to which I will presently refer. G

The facts of the present case are few and very simple. The debtor Jones was and still is an infant, who, fortunately or unfortunately for himself, married a woman who was engaged in trading in coal and breeze. The business was continued after the marriage by the debtor, and he, in the course of his trading, bought a quantity of breeze from Birmingham Corporation, for which he has never paid. Having fallen into difficulties, or being unable to pay claims made on him, he filed a petition for liquidation, so as to be freed from importunity in respect of the sums due, or alleged to be due from him. The proceedings for liquidation fell through, no resolution having been passed by the creditors in favour of liquidation. I Birmingham Corporation accordingly presented a petition in bankruptcy, the ground being that Jones was indebted to them in his trade, and had committed an act of bankruptcy. The Chief Judge made the adjudication, and that adjudication is the subject of the present appeal.

The first point to be considered is, whether the infant is liable at all. If he is not a debtor, the next question which has to be considered is, whether he can

- A petition for liquidation, or be made a bankrupt. It is not suggested that the goods supplied in this case come within the category of necessaries. The breeze was not purchased for the purpose of home consumption, but to be sold again. As he could not contract a debt except for necessaries, the debtor, being an infant, was under no liability at common law. The fact that he had the breeze does not affect the question according to the way in which our law considers it. People supplying goods to an infant must take their chance of obtaining payment. I do not say—it is not my province to say—that that law ought to be altered. The suggested exception to that rule is founded on the equitable doctrine, as to an infant's liability, when he has been guilty of fraud, when he has made a direct misrepresentation, for instance, where he has stated himself to be of full age with intent to obtain goods on credit. The courts of equity have considered the appearance of infants as an element of fraud in such transactions. Where the infant is only ten years old no such element of fraud is possible; but where an infant's appearance leads people to suppose that he is twenty-one years old, he may in some cases be liable for fraud of which that is an element. The representation made by the infant must, to make him liable, be such as to deceive the person to whom it has been made, and must be an express representation that he is of full age. It has been held in such a case that, if the person comes of age afterwards, and then becomes bankrupt, the creditor from whom credit has been so obtained may prove in the bankruptcy, as for an equitable liability.

- It is difficult to see on what principle the courts arrived at that decision, as the adjudication could only in former times be made in respect of debts not of liabilities. The law is different perhaps now; but it is not even now said that this liability is a legal debt. I use the term "legal debt," to explain what I mean. Indeed every debt is a legal debt. It is not a debt unless it is legal. There is no such thing as an equitable debt. There is such a thing as a liability in equity, but that is not a debt, and wherever a debt is by law required on which to found proceedings, this equitable liability will not suffice to support an adjudication. But there is no such mis-statement here. The infant has made no such mis-statement. The argument of the petitioners, therefore, amounts to this, that if a person, apparently an infant, simply carries on trade, without making any representation at all, and in the course of that trading buys goods, he makes a representation which amounts to a fraud. But you are not to impute frauds. Many infants do carry on trades, and it is not illegal for them to do so. The mere fact of the infant trading is not a representation at all. This appears to be clear from what KNIGHT BRUCE, L.J., says in *Re King, Ex parte Unity Joint Stock Mutual Banking Association* (3), where he founds his judgment on actual misrepresentation, although he alludes to the fact of the appearance of the infant being that of an adult. That being so, there is no pretence for saying that the creditor could maintain an action.

- It has been said that the facts shown as to the taking of the goods would be sufficient to found an action; but that is clearly not the law. There is no evidence whatever that there are any debts at all. Counsel for the petitioners said that the infant had represented himself as a debtor; but you cannot describe a man as a debtor when he owes no debts at all; and, not being a debtor, he cannot be adjudicated a bankrupt. It has been said that under the Bankruptcy Act, 1869, s. 125 (12) [repealed] the court may adjudicate a liquidating debtor a bankrupt. But to do this you must have a debtor whom you can adjudicate bankrupt. You cannot adjudicate a man a bankrupt when he has no debts. Moreover, that subsection can only be put in force at the instance of some creditor. There must be some interest in a person in order to give him the right to intervene, and unless some one having such an interest does intervene, the power of the court does not arise. I entirely disagree with the decision of the Chief Judge in *Ex parte Lynch* (1). In the first place, I am not aware of any proposition of law that "if an infant has been held out and dealt with as a trader, he can be made bankrupt in respect of a trade debt." The rule seems to me to be clearly the other way.

In the next place, I do not agree that the Infants Relief Act, 1874, has made no difference as to this. The words of the Act are general, and apply to all contracts, except those referred to in the first section. The Act cannot be held not to apply to trade debts, but is of universal application. The last reason given is, that the creditors have a right to say to the infant, "Be that which you pretend yourself to be." The infant, by filing a petition for liquidation, did not become of full age. He cannot thereby get the advantages or disadvantages of an adult trader, and by taking upon himself to do that which can in reality be only done by an adult trader, the infant does not represent himself to be such a trader. The argument assumes that an infant, while he is an infant, can alter his status. All the reasons for the Chief Judge's decision failing, the decision itself fails, and in my opinion must be reversed.

BAGGALLAY, L.J.—The adjudication in this case was made on a petition filed by Birmingham Corporation in respect of a debt, or alleged debt, owing to them by the infant for coals and breeze. The petition describes the infant as a trader. If there were nothing more in the case it could not be contended for a moment that after the infancy was shown and set up the adjudication could stand. Reliance has, however, been placed on the decision of the lords justices in *Ex parte Unity Joint Stock Mutual Banking Association* (3), and on the decision of the Chief Judge in *Ex parte Lynch* (1). I cannot agree to the first proposition laid down by the Chief Judge in *Ex parte Lynch* (1). I most respectfully dissent from that, if the words "This infant has traded, and in my opinion that was a clear holding out to the world that he was of full age, and capable of contracting debts," are to have their ordinary meaning. If there has been misconduct I do not say that in no case would the infant be liable to the bankruptcy law. But in this case he did not represent himself as of full age. He merely omitted to state that he was an infant. But in *Ex parte Unity Joint Stock Mutual Banking Association* (3), a case in which judgment was reserved and fully considered before delivery, there had been a proper case for proof, but not for adjudication. There the bankrupt expressly represented himself as being of full age when he contracted the loan. Therefore, *Ex parte Unity Joint Stock Mutual Banking Association* (3) is no authority whatever for adjudicating in this case if based on a strictly bankruptcy proceeding.

It is said that the fact of liquidation proceedings having been taken makes a substantial difference. But, although the petition was presented, and the first meeting was held, no resolutions for liquidation were passed. *Ex parte Charlton* (4) has been referred to for the purpose of inducing us to hold that, whatever objections there may be to the debt itself, the creditor is relieved from that by the fact of the liquidation proceedings. But in *Ex parte Charlton* (4) there had been a resolution for liquidation and other proceedings, and in addition the petition was then presented by an undoubted creditor, and what was decided was that it was not necessary to show that an act of bankruptcy had been committed within six months before the filing of the petition. It was held that the same strictness was not necessary when s. 125 (12) [repealed] of the Bankruptcy Act, 1869, was put in force. That is no decision that a petitioning creditor's debt is not necessary. The Chief Judge has acted on his own decision in *Ex parte Lynch* (1). I am unable to agree with his decision, and agree with the Master of the Rolls that it cannot stand.

LUSH, L.J.—The objection to the adjudication in this case is that it is not founded on a good petitioning creditor's debt. The debtor is an infant. It is to be observed that the claim is not a claim for necessities, but for what is alleged to be a trade debt. The law says, although a person under twenty-one does no wrong by carrying on trade, he is not liable for his trade debts. The defence of infancy is a complete answer to a claim for such a debt. That is the objection made. The debt, in order to support an adjudication, must, under s. 6 of the

A Bankruptcy Act, 1869 [see now s. 4 (1) (b) of the Bankruptcy Act, 1914], be a "liquidated sum due at law or in equity." Before that Act all sums were not provable. You could not, for instance, bring an action for a sum declared by a court of equity to be due from a fraudulent trustee. As you could not do so it was not available for the purposes of a commission. A liability of this kind can, since the passing of the Judicature Act, be enforced in any court. I am now speaking of the law as it was before that Act was passed. No action could have been brought at law for this debt. The defendant might have pleaded infancy. It would not have been any good petitioning creditor's debt at law, even if it could in equity. If the infant had made a misrepresentation, that would have made a liability enforceable in equity but not at law. To make it such, even in equity, it must have been an actual misrepresentation. But the infant was doing nothing unlawful in carrying on trade, though he would have been doing so if he had been asked and had said that he was of age. Therefore, there was no case of liability at all.

Then it is said that the infant has estopped himself from setting up his infancy by filing a petition for liquidation, because in it he said that he was unable to pay his just debts, thereby admitting that he had debts including what is now made the subject of this petition. I disagree entirely. The Act relates to debtors. The corporation did not present their petition under s. 125 (12) of the Bankruptcy Act, 1869 [repealed]. The petition was for an independent debt, and based on a statement of inability as to payment of debts. If the court had persisted the infant could have said at any stage, "I am not a debtor and he is not a creditor." There is no debt at law or in equity. At law the infant might even after judgment have obtained a writ of error. An infant cannot be damnified by any fault in pleading. We cannot agree with the decision of the Chief Judge, which will, therefore, be reversed. This involves our overruling of the Chief Judge's decision in *Ex parte Lynch* (1). That case has not only been disapproved of in this court, but in *Miller v. Blankley* (5); and in *R. v. Wilson* (6), where an infant had been convicted for an offence which would not be an offence at all unless committed by a person subject to the law of bankruptcy, the court quashed the conviction. That case is clearly in accordance with the real state of the bankruptcy law.

Appeal allowed.

Solicitors: *Swann & Co.*, for *Jackson & Sharpe*, West Bromwich; *Sharpe, Parkers & Co.*, for *Hayes*, Birmingham.

G [Reported by FRANK EVANS, ESQ., Barrister-at-Law.]

TEMPEST v. LORD CAMOYS

[COURT OF APPEAL (Sir George Jessel, M.R., Brett and Cotton, L.J.J.), August 1, 1882]

[Reported 21 Ch.D. 571; 51 L.J.Ch. 785; 48 L.T. 13; 31 W.R. 326]

Trustee—Powers—Discretionary powers—Exercise—Control by court—Bona fide exercise of discretion—Refusal of court to interfere.

A will gave trustees power to sell the devised property, and contained a direction that the proceeds of sale should be laid out in the purchase of other land, which was to be settled on the same trusts. It also empowered the trustees, in the exercise of their absolute discretion, to raise any money which they might think fit, for effecting any purchase which they might, in the exercise of their absolute discretion, think proper, of any land in the West Riding of Yorkshire. There being a sum of money in court in a suit for the execution of the trusts, which represented the proceeds of sale of the devised property, the court was asked to approve a conditional contract for the purchase of land in the West Riding, for which part of the purchase price was to be provided by using the sum in court, and part by mortgaging the property which it was proposed to purchase. All the family and one of the trustees approved of the proposed purchase, but the other trustee did not. It was not suggested that the trustee who disapproved was not acting bona fide.

Held: the power to invest the proceeds of sale in land amounted to a trust, and, if a trustee declined to execute that trust, the court would interfere and perhaps remove him from his office; in the present case, however, the dissenting trustee had not declined to invest in land, but had only declined to invest in a particular property, and, as the will had given the trustees a discretion as to what property the money was to be invested in and whether money should be raised on mortgage, the court would not interfere with the bona fide exercise of this discretion by the dissenting trustee, and would not approve the proposed purchase against his wishes.

Per SIR GEORGE JESSEL, M.R.: When trustees have a pure discretion as to the exercise of a power, the court will not compel them to exercise it against their wishes, even after suit brought, although it will interfere to prevent them from exercising the power improperly.

Notes. Distinguished: *Re Courtier, Coles v. Courtier, Courtier v. Coles* (1886), 34 Ch.D. 136. Followed: *Re Burrage, Birmingham v. Burrage* (1890), 62 L.T. 752. Considered: *Re Bryant, Bryant v. Hickley*, [1894] 1 Ch. 324. Referred to: *Re Gadd, Eastwood v. Clark* (1883), 23 Ch.D. 134; *Re Hall, Hall v. Hall* (1885), 54 L.J.Ch. 527; *Re Lofthouse* (1885), 29 Ch.D. 921; *Re Radnor's Will Trusts* (1890), 45 Ch.D. 402; *Re Higginbottom*, [1891-4] All E.R.Rep. 1070; *Re Charteris, Charteris v. Biddulph*, [1917] 2 Ch. 379; *Re Whichelow, Bradshaw v. Orpen*, [1953] 2 All E.R. 1558.

As to necessity for concurrence of all trustees, see 38 HALSBURY'S LAWS (3rd Edn.) 971; as to exercise of powers by trustees, see *ibid.* 979-981; as to interference by court in the administration of a trust, see *ibid.* 1033-1034, and 30 HALSBURY'S LAWS (3rd Edn.) 241. For cases see 43 DIGEST 876-881.

Case referred to:

(1) *Tempest v. Lord Camoys* (1868), 21 Ch.D. 576, n.

Also referred to in argument:

Webb v. Earl of Shaftesbury, Earl of Shaftesbury v. Arrowsmith (1802), 7 Ves. 480; 32 E.R. 194, L.C.; 43 Digest 673, 1035.

Bethell v. Abraham (1873), L.R. 17 Eq. 24; 43 L.J.Ch. 180; 29 L.T. 715; 22 W.R. 179; affirmed (1874), 3 Ch.D. 50, n., L.J.J.; 43 Digest 930, 3675.

Gisborne v. Gisborne (1877), 2 App. Cas. 300; 46 L.J.Ch. 556; 36 L.T. 564; 25 W.R. 516, H.L.; 43 Digest 877, 3211.

A **Appeal** by W. J. Tempest, one of the two trustees of the trusts of the will of Sir Charles Robert Tempest, deceased, and by Arthur C. Tempest, one of the beneficiaries, from a decision of CHITTY, J., refusing to accede to their petition that a particular investment ought to be made, notwithstanding that the other trustee, J. Fleming, disapproved.

B Sir Charles Robert Tempest, Bart., by his will dated Mar. 25, 1863, devised his real estate in the counties of York, Lincoln, and Lancaster, to T. E. Stonor and James Fleming, their heirs and assigns, to the use of T. E. Stonor and J. Fleming, their executors, administrators, and assigns, during the life of the testator's nephew, Sir Charles Henry Tempest, for 1,000 years upon certain trusts, and after the death of Sir C. H. Tempest to the use of his first and every other son succeeding in tail male, and for default of issue to the use of Arthur Cecil Tempest
C for life, with remainder to his sons in tail male. The testator empowered his trustees, during the subsistence of the thirdly declared trust of the term of 1,000 years (viz., during the life of Sir C. H. Tempest, and twenty-one years from the day next before his death, unless in certain events, to receive the rents and profits, and pay an increasing proportion not exceeding two-thirds, as to two equal fourths, to Arthur Cecil Tempest for life; as to one other fourth, to T. E. Stonor for life,
D and as to the remaining fourth, to J. Fleming for life, with power to each of them to name a successor by will in respect of his share),

E "in the exercise of their or his absolute discretion, to raise any money which they or he may think proper for the purposes of effecting any purchase they or he may, in the exercise of their or his absolute discretion, think proper, of any lands, tenements, or hereditaments, in the West Riding of the county of York, or in the county of Lincoln, by mortgage in fee, or for any term of years, of all or any part of the hereditaments and premises hereby devised, upon such terms and conditions, as to rate of interest or remedy in the way of power of sale, or otherwise, as the said trustees or trustee shall find expedient, and so far as shall be necessary for giving effect to any such mortgage, and the remedies of the mortgagee thereunder, but not further or otherwise, by the mortgage deed, to revoke all or any of the uses and trusts hereby limited."
F

The will also contained powers of sale and exchange to the trustees of the term at any time during the thereby declared trusts, and a direction that the trustees should

G "lay out the money to be received for any such sale or exchange as aforesaid, in the purchase of other freehold hereditaments in fee simple in possession, situate in England or Wales, and shall settle, or cause to be settled, as well the hereditaments so to be purchased, as the hereditaments and tenements to be acquired by means of any such exchange as aforesaid, to and upon such of the uses and trusts, and subject to such provisions herein expressed, or by
H reference limited or expressed, concerning the hereditaments being settled as shall be subsisting, or as near thereto as may be."

The testator died on Dec. 8, 1865, and his will and a codicil (which is not material) were proved by the executors, Lord Camoys and James Fleming.

I In December, 1865, Arthur Cecil commenced a suit in Chancery (the present action) for the administration of the testator's real and personal estate, and performance of the trusts thereon, and a decree for execution of the trusts was made on Jan. 27, 1866. The testator's Lancashire estates were subsequently sold under an order of the court, and, at the date of the petition presently referred to, the proceeds of sale, represented by a sum of £13,233 2s. 6d. consols, were in colurt. There was also a sum of £21,916 10s. 10d. Reduced Annuities in court, which represented certain accumulations, and both the sums were available for the purchase of real estates to be settled under the will. Arthur C. Tempest, on behalf of himself and all other persons interested in the moneys applicable under the will, entered into a contract, dated June 10, 1882 (and made conditional on the

approval thereof by the court) with Mr. J. T. Hopwood for the purchase of part of the Bracewell Hall estate, in the West Riding of York, for £60,000. A. C. Tempest then presented a petition proposing that £30,000 should be raised (in part payment of the £60,000) out of the two sums in court, and that the remainder of the purchase money should be raised by a mortgage of the purchased premises to J. T. Hopwood for £25,000, and a second mortgage to the petitioner for £5,000, and praying that the contract might be carried into effect, and that Messrs. J. Fleming and W. F. Tempest, the present trustees, might be ordered to sell out the stock in court, and that the proceeds might be applied in the purchase; also, that if the title should be approved, all proper deeds might be executed. Mr. Fleming disapproved of the purchase, but Mr. Tempest, the other trustee, was quite satisfied with it. As the property was the original inheritance of the Tempest family, and for other reasons, the family were anxious to obtain possession of it. The petition was heard by CHITTY, J., on July 11, 1882, who decided that he had no authority to control or to direct the exercise of the power which the trustees had, and declined to accede to the prayer of the petition. The petitioners appealed.

Ince, Q.C., and *G. Henderson* for the petitioners.

Dryden for other persons supporting the petition.

Romer, Q.C., and *N. R. Smart* for Mr. Fleming.

SIR GEORGE JESSEL, M.R.—It is very important that the law of the court on this subject should be understood. It is well settled that when trustees have a pure discretion as to the exercise of a power, the court will not compel them to exercise it against their wishes even after suit brought, although it will interfere to prevent them from exercising the power improperly. The court must be satisfied—as long as the suit is pending—that the power, if exercised at all, is properly exercised. For instance, where persons have a power of appointing new trustees, they may exercise the power even after a suit has been brought for the administration of the trusts and after a decree therein; but that is subject to their being controlled by the court to the extent that they will only be allowed to appoint proper persons.

It is quite plain that there may be cases in which, although there is nominally a discretion in the trustees, there may be evidence on the face of the instrument, or something in the nature of the trust, to show that the power is to be carried into effect within a reasonable time. For instance, there may be, as in the present case, a power amounting to a trust to invest personally in the purchase of lands, with a power of interim investment. Such a trust is binding on the trustees, and one of them would not be allowed to say that he would disregard the trust and not invest in land at all. If the trustee had said that, there would be no difficulty in interfering; and I think that would be sufficient ground for removing the trustee, as being a deliberate assertion of an intention to disregard the trust. But that is a very different thing from saying that we are to take away the discretion of the trustees, as to the time when the investment is to be made, and the particular property to be purchased.

With regard to the time, there might be evidence, from the lapse of time and the refusal of the trustee to make any investment, that he did not intend to invest at all; but, taking it to be a case of bona fide dislike on the part of the trustee to the investment offered, it does not appear to me that the trustee can be compelled to make the investment within any given time. Then, with regard to the particular estate to be purchased, the testator says it is to be in the absolute discretion of the trustees. What right has the court to interfere and alter the words of the will? The testator has directed that what real estate is to be purchased shall be determined by A, B, and C. That is as much a part of his will as the direction to purchase, and it seems to me that the court cannot exercise control over either one or the other. There is this also to be said here, that not only has the testator given absolute discretion, but he has shown that there is a difference between that discretion and an obligation. The will points out the

A distinction that in some cases an instrument must be made, and in other cases it may be made at the discretion of the trustees.

Then there is another difficulty, which is independent of the trust for investment. The estate proposed to be purchased will cost £60,000. The trustees have only £30,000 available for the purchase, and it is proposed that the rest of the money shall be borrowed on mortgage of the estate to be purchased. There is a

B power in the will to mortgage the devised estates at the discretion of the trustees. I assume for the present purpose—and it is the better opinion—that you may mortgage the estate before it is bought, because after it is bought it is to be conveyed to the same uses and trusts, and there can be no doubt as to the power to mortgage it after it is bought. That being so, there is an absolute power in the trustees to mortgage an estate for the purpose of buying another. Is that a

C power which is otherwise than discretionary? That is a clear power, and there is nothing like a trust there. We cannot force Mr. Fleming to take the view that it would be a good thing to mortgage the estate for the purpose of buying more, or to mortgage the estate proposed to be purchased, or that it is better to do this than invest in other things. There might be a risk of the amount in hand, the £30,000, being lost by the mortgagee foreclosing or selling the newly-purchased

D land. Moreover, there is a wide difference of opinion as to the future position of land; and Mr. Fleming may be of opinion, bona fide, that a transaction of this kind is not desirable. It is not suggested that the exercise of his discretion is not bona fide, and, in my opinion, we cannot interfere with it; and the judgment of CHITTY, J., and his reasons for deciding as he has are right.

E **BRETT, L.J.**—As far as my opinion at present goes—although I do not think it necessary to decide it in the present case—the question whether this money shall be invested in the purchase of land is not a question of discretion at all. A trust was imposed on the trustee, and if any trustee had refused to invest in land, I am not at all certain, on the authority of LORD CAIRNS in the previous case under this will (*Tempest v. Lord Camoys* (1)), that the court would have

F enforced the trust, it might be by removing the trustee who refused to join, and appointing another who would exercise the trust. But, assuming all this, there is undoubtedly a discretion in the trustees as to what lands they will purchase. Mr. Fleming has not refused to invest in any land at all, but has only, acting on the authority and discretion given to him by the testator, objected to purchase this particular property. It wants no authority to show

G that the court will not say: “Although you have a discretion as to what property the money shall be invested in, you must invest it in this particular property.” In the same way, there was undoubtedly a discretion in the trustees as to whether they would raise money on mortgage or not, and the application is to take that discretion also away, and direct not only the raising of the money on mortgage, but a mortgage of a certain property. In my opinion both parts of the application

H go beyond the rule, and the judgment of CHITTY, J., is right, and ought to be affirmed.

COTTON, L.J.—The two trustees in this case differ in opinion as to the advisability of purchasing a particular property. The application to the court is for the court to do what the trustees do not agree to do themselves. It is proposed to invest a sum of money in court in part payment of the purchase money, and to raise the remainder of the money required by a mortgage of the purchased estate. As to the first sum, there is, in my opinion, a trust to invest it in land; and I should not say that, when the trustees had a duty to perform, although it was in form a power, the court would not interfere and compel its performance. If the trustee declined to do it, the court would, perhaps, remove him from his office, on the ground that his refusal to act amounted to a breach of trust. But here there is a discretion as to the particular land in which the money is to be invested, and the trustee has never refused to invest in any land, but only declines to invest in a particular property.

Moreover, there is another difficulty. The £30,000 required to be raised is not money to which any trust for investment in land attaches, but only money which is to be raised, if at all, under a discretionary power given to the trustees. There is no trust there at all nor anything in the nature of a trust, and, that being so, the question is, when the trustees differ in the mere exercise of their discretion, will the court interfere to direct the thing to be done? I think it will not. No doubt the court will interfere to prevent trustees from exercising their discretion in an improper way. When trustees come, after a decree, to ask for the sanction of the court to the exercise of discretionary powers, the court may refuse to give its sanction, on the ground that what is proposed to be done is not reasonable, and that will prevent the trustees from acting. But that is a very different thing from putting a control on the exercise of the discretion. It is a different thing when the trustees do not agree, and, therefore, cannot exercise discretion, to do by an act of the court that which the testator has left to the discretion of the trustees. The court ought not, in my opinion, to interfere in the present case. The trustees do not agree to exercise the discretion as to raising the money by mortgage, and they do not agree whether this particular estate is a suitable one.

Appeal dismissed.

Solicitors: *Cole & Jackson*, for *Broadbent*, *Heelis & Broadbent*, Bolton-le-Moors; *Ward, Mills, Witham & Lambert*.

[*Reported by FRANK EVANS, Esq., Barrister-at-Law.*]

WILLIAMS v. WILLIAMS

[CHANCERY DIVISION (Kay, J.), March 7, 8, 1882]

[Reported 20 Ch.D. 659; 51 L.J.Ch. 385; 46 L.T. 275; 46 J.P. 726;
30 W.R. 438; 15 Cox, C.C. 39]

Burial—Duties—Duty of executor to dispose of corpse.

Executor—Corpse—Duty to dispose of corpse.

Will—Corpse—Direction for disposal—Validity.

By a codicil to his will A. directed that within three days after his death, or as soon as conveniently might be, his body should be given to the plaintiff to be dealt with by her in such manner as he had directed in a private letter to her, and that any costs or expenses that might be incurred by her in carrying out and performing the instructions contained in the letter should be paid and discharged by the executors under his will on production of accounts and vouchers within three months after his decease. The private letter referred to contained directions for the cremation of the body. The executors refused to deliver up the body to the plaintiff, and had it buried, two days after his death, in the unconsecrated part of a cemetery. The plaintiff obtained a licence from the Secretary of State for the removal of the body on a representation that she desired to place it in consecrated ground. She then had it conveyed to Italy and cremated, and the ashes brought back and buried in England. In an action by her to recover from the testator's estate the expenses incurred in the cremation of his body,

Held: there being no property in a human dead body, the direction in the testator's will for the delivery of his body to the plaintiff was void; the persons responsible for the burial of a deceased person were his executors, and they

- A had the right to the possession and custody of the body till burial; to use for the purpose of cremation, the licence which was obtained on the representation that it was to be used for burial only, was an illegal act, and, therefore, the plaintiff could not recover the expenses of the cremation; even if the act was not illegal, a court of equity would not allow the plaintiff to recover the expenses as the way in which the licence had been obtained and the cremation carried out was fraudulent; accordingly, the claim failed.

R. v. Sharpe (1) (1857), Dears. & B. 160, applied.

Notes. It is not unlawful at common law to burn a dead body instead of burying it, provided that the burning is done in such a manner as not to amount to a nuisance: see 4 HALSBURY'S LAWS (3rd Edn.) 117, where the statutory regulation of cremation is dealt with.

- C Considered: *R. v. Price* (1884), 12 Q.B.D. 247. Referred to: *Re Dixon*, [1892] P. 386; *Rees v. Hughes*, [1946] 2 All E.R. 47.

As to duty to dispose of body, see 4 HALSBURY'S LAWS (3rd Edn.) 3-5; as to cremation, see *ibid.* 117 et seq.; and for cases see 7 DIGEST (Repl.) 549-551.

Cases referred to:

- D (1) *R. v. Sharpe* (1857), Dears. & B. 160; 26 L.J.M.C. 47; 28 L.T.O.S. 295; 21 J.P. 86; 3 Jur.N.S. 192; 5 W.R. 318; 7 Cox, C.C. 214, C.C.R.; 7 Digest (Repl.) 549, 7.
- (2) *R. v. Fox* (1841), 2 Q.B. 246; 114 E.R. 95; sub nom. *Re Wakefield (Bailiff)*, 1 Gal. & Dav. 566; sub nom. *Ex parte Wakefield (Lord of the Manor)*, 11 L.J.Q.B. 41; sub nom. *Re Jewison*, 5 Jur. 989; 7 Digest (Repl.) 549, 5.
- E (3) *R. v. Scott* (1842), 2 Q.B. 248, n.; 114 E.R. 97, n.; 7 Digest (Repl.) 549, 6.

Also referred to in argument:

Quihampton v. Going (1876), 24 W.R. 917; 44 Digest 244, 707.

Bizzey v. Flight (1876), 3 Ch.D. 269; 45 L.J.Ch. 852; 24 W.R. 957; 44 Digest 287, 625.

- F *R. v. Vann* (1851), 2 Den. 325; T. & M. 632; 21 L.J.M.C. 39; 18 L.T.O.S. 174; 15 J.P. 802; 15 Jur. 1090; 5 Cox, C.C. 379, C.C.R.; 7 Digest (Repl.) 550, 14.
- R. v. Lynn* (1788), 2 Term Rep. 733; 1 Leach, 497; 100 E.R. 394; 7 Digest (Repl.) 594, 394.

Lloyd v. Lloyd (1852), 2 Sim.N.S. 255; 21 L.J.Ch. 596; 19 L.T.O.S. 84; 16 Jur. 306; 61 E.R. 338; 8 Digest (Repl.) 353, 326.

Dawson v. Small (1874), L.R. 18 Eq. 114; 43 L.J.Ch. 406; 30 L.T. 252; 38 J.P. 646; 22 W.R. 514; 8 Digest (Repl.) 402, 930.

- G *Gilbert v. Buzzard* (1821), 2 Hag. Con. 333; 3 Phillim. 335; 161 E.R. 761; 7 Digest (Repl.) 558, 94.

Stag v. Punter (1744), 3 Atk. 119; 26 E.R. 872, L.C.; 7 Digest (Repl.) 555, 61.

- Action** by the plaintiff, Miss Eliza Williams, against T. J. Williams and C. J. Davenport, executors of the will of Henry Crookenden deceased, and against certain beneficiaries under his will (to whom his estate had been distributed) by which the plaintiff claimed payment of £321, the expenses of conveying the testator's body to Italy and having it cremated there, and bringing back the ashes.

- H Henry Crookenden, by his will dated Dec. 6, 1868, appointed executors, and gave his residuary real and personal estate to his two sons. He made another codicil to his will, dated April 8, 1875, in the following terms:

- I "I direct that within three days after my death, or as soon as conveniently may be, my body shall be given to my friend Miss Eliza Williams [the plaintiff in this action], to be dealt with by her in such manner as I have directed to be done in a private letter to her."

He then gave the plaintiff certain prints and pieces of china, and proceeded:

"I direct that a black and red earthenware jar made by Wedgwood and given by my father shortly after marriage to my mother, or any other which may be more suitable, shall be given to the aforesaid Miss Eliza Williams for the

purpose to which I have directed her to apply the same in the private letter to her hereinbefore named. I direct that any costs or expenses that may be incurred by the said Miss Eliza Williams in carrying out and performing the instructions contained in the aforesaid private letter to her shall be paid and discharged by the executors to my will on production of accounts and vouchers within three months after my decease."

The private letter referred to was dated Easter day, Mar. 28, 1875, and contained the following passage:

"I have directed my body to be given up to you as soon as may be after my death. You know my wishes, but I here repeat them, that you may have this letter to produce if need be. I should like to be burnt when I am dead on a, or rather under a, pile of wood. I think the most convenient way would be to lay the body on a layer of dry faggots, and to build up and around them a considerable mass of firewood, what is called cord-wood in some places, then to set fire to the faggots; if the fuel is only tolerably dry it will burn with great fury for hours, and consume whatever is combustible. The calcined bones and fragments of bones can easily be collected when the ashes are cold, and I should like them put in the Wedgwood vase I have named in the codicil, if this would not hold them, then in any other larger vase which my collection may contain, or which could be procured on purpose. Any would do provided it were not metallic, or if metallic, not precious. You know my preference for earthenware. With reference to the ultimate disposal of this vessel and its contents, I leave that entirely to you."

On April 13, 1875, the testator wrote to the plaintiff:

"Wishing that the intention expressed in the codicil to my will should be carried out according to the true meaning of the words, I enclose the codicil to you, as I do not believe my own immediate friends and surroundings would do what I wish when I was no more. You will be so good as to keep this document by you, and produce it when the occasion arises."

The testator, who was a Catholic, died on Dec. 21, 1875, and his executors and family, notwithstanding some protest on the part of the plaintiff, had him buried on Dec. 23 in the unconsecrated part of the Brompton Cemetery. On Mar. 3, 1876, the plaintiff made an application to the Home Secretary stating the codicil and letter, and that the testator had been buried in unconsecrated ground, and continued:

"I now pray that you will grant me a licence to remove the body for the purpose of carrying out the wishes of the testator, either by having it burnt in this country or elsewhere, or if there is any legal impediment or objection to that course for the purpose of having it placed in consecrated ground."

The Home Secretary answered by a letter dated Mar. 20, 1876, stating that the removal could not be permitted for the purpose of cremation, at that period after burial, but requested to be informed to what burial ground it was proposed to remove the remains. On Mar. 22, the plaintiff wrote in reply:

"In answer to your question 'to what burial ground it is proposed to remove the remains,' it is to the churchyard of this parish, Manafan, Montgomeryshire, that they would be removed."

The Home Secretary then granted his licence dated Mar. 23, 1876, "For the removal of the body of the said Henry Crookenden, deceased, from the grave in which it is interred in the unconsecrated portion of Brompton Cemetery," on the conditions therein specified, which were that the body should not be removed until after October and that certain sanitary precautions should be observed. On Mar. 14, 1878, the plaintiff removed the body in pursuance of the said licence, and subsequently had it taken to Italy and burned, and the ashes placed in the vase according to the testator's directions, and buried in Manafan churchyard. Or

A Mar. 20, 1878, the Home Secretary, on the application of the testator's widow and family, revoked the licence for removal.

Higgins, Q.C., and *J. G. Laing* for the plaintiff.

Owen for the brother of Miss Williams, who was one of the executors.

Rigby, Q.C., and *Popham* for the other executor and persons beneficially entitled.

B **KAY, J.**—I do not think it right to delay giving judgment in this case, because from the moment that I knew the facts I have had no doubt about the answer which must be given to the questions raised.

The claim arises in this way: One Henry Crookenden made his will, leaving all his property in a way which I need not refer to, and appointing trustees and executors. Then in April, 1875, he made a codicil to his will in these terms:

C [His LORDSHIP read the codicil set out above.] The private letter there referred to has been produced and admitted. [His LORDSHIP read it.] He afterwards wrote another letter, but altered nothing by it, and he died on Dec. 21, 1875. He was buried by his nearest relatives—I should mention that this Miss Williams was not a relative of his, but a connection of his wife—on Dec. 23, with the consent and approbation of his executors in all respects. This lady was present, and wished for delay, but it seems there were reasons against delay, and the funeral took place. The money claimed in this action is the cost of effecting the cremation of the body, which was obtained in a manner I shall state hereafter.

Several legal points were raised in the argument, on which I never felt a moment's doubt, and I will dispose of them first. It is quite clear that there can be no property in a human dead body by the law of England. That appears from E *R. v. Sharpe* (1). There Sharpe was indicted for a misdemeanour for having entered a burial ground, belonging to a congregation of Dissenters, and removed the body of his mother, which he took to a churchyard at some distance with the intention of burying it with the body of his father. The person having the keys of the ground was induced to admit the defendant into the ground and to the grave by reason of the pretext that the defendant intended to bury his father there, and the jury found that this was only a pretext, and that his real intention from the beginning was to remove his mother's corpse. But the defendant acted through- out without intentional disrespect to anyone, being actuated by motives of affection to his mother and of religious duty. The case was reserved for the consideration of the Court for Crown Cases Reserved, and ERLE, J., delivered the judgment of that court (which consisted besides of POLLOCK, C.B., WILLES, J., BRAMWELL, B., F and WARSON, B.) thus (*Dears. & B. at p. 163*):

G "We are of opinion that the conviction ought to be affirmed. The defendant was wrongfully in the burial ground and wrongfully opened the grave and took out several corpses and carried away one. We say he did this wrongfully, that is to say by trespass, for the licence which he obtained to enter and open from the person who had the care of the place was not given or intended for the purpose to which he applied it, and was as to that purpose no licence at all. The evidence for the prosecution proved the misdemeanour unless there H was a defence. We have considered the grounds relied on in that behalf, and though we are fully sensible of the estimable motives on which the defendant acted, viz., filial affection and religious duty, still neither authority nor principle would justify the position that the wrongful removal of the corpse was I no misdemeanour if the motive of the act deserved approbation. A purpose of anatomical science would fall within that category. Neither does our law recognise the right of any child to the corpse of its parent as claimed by the defendant. Our law recognises no property in a corpse, and the protection of graves at common law as contradistinguished from ecclesiastical protection to consecrated ground depends upon this form of indictment; and there is no authority for saying that relationship will justify the taking a corpse away from the grave where it has been buried. . . . The result is that the conviction will stand."

That case fully justifies what I have stated to be the proposition of law established thereby. A

The second point raised was as to the rights of the executors with regard to burial. SIR E. V. WILLIAMS (EXECUTORS (7th Edn.), p. 968), quoting from BLACKSTONE COMMENTARIES, vol. 2, p. 508), states the law to be that the executor "must bury the deceased in a manner suitable to the estate he leaves behind him." It is argued that that passage only means he will be allowed the expenses of so doing. I cannot agree to that argument. It seems to me to mean more—that the law is, as I understand it to be, that the persons responsible for the burial are the executors. If authority were wanted for that proposition, it is to be found in *R. v. Fox* (2), where the Court of Queen's Bench granted a mandamus peremptory in the first instance to a gaoler to deliver up a body to the executors of the deceased. The decision was founded on that of *R. v. Scott* (3), and it shows not merely that a gaoler may not retain the dead body of a prisoner for debt, but that the executors have so absolute a right to the custody of the body that they may obtain a peremptory mandamus for its delivery against a person who has it in lawful custody. It is clear, therefore, that the executors have the right to the possession and custody of the body till burial. It follows from that that a man cannot dispose of his body by will, and it follows also, as a logical consequence from the proposition, that there is no property in a corpse. I asked for authority that a man might do so, but none was cited, and I believe there is none. The direction, therefore, to deliver over the body to this lady was void. It gave her no right which she could enforce at law. She had no property, and could not obtain possession from the executors. I should be content to say merely that this direction was void in itself, for, if it was absolutely void, it can make no difference what the purpose was for which the body was to be delivered. B

But the purpose here clearly was to have the body burned, and the question has been raised whether that purpose was a legal one. It is not necessary for me to decide that point, and I am not going to decide it; but I think it undesirable that a judge should have a point raised before him and not express his opinion upon it, and my opinion is that the purpose for which this direction was given—cremation—is not legal. C

But there are two other points which are fatal to the plaintiff's claim in this case. The testator was a Roman Catholic, and I am told that the practice of that communion is for the priest to bless the grave, and for a little consecrated earth to be placed in the coffin. All that was done in this case, and the funeral was in all respects quite regular. The plaintiff, however, still desired to carry out the testator's intentions, but neither the family nor the executors would consent to its being done. In March, 1875, the plaintiff wrote to the Home Secretary thus: [His LORDSHIP read the letter set out above.] I wish to preface all I am going to say on this point by saying that I consider this lady thought herself under a paramount obligation to act as she did, and had no intention of doing anything illegal, or contra bonos mores or improper. But the testator clearly intended that cremation should take place before burial; it was not his intention that the body should be disinterred and burned after it had been buried. Nevertheless, this lady applied to the Home Secretary, as I have said. The answer to that letter was that a licence could not be granted for cremation, but the Home Secretary desired to know to what burial ground it was intended to remove the remains. No one could doubt the meaning of that answer. It was beyond all question that no licence would be given for cremation, and that if the burial ground were pointed out, a licence would be given to remove the body only for the purpose of re-burial in consecrated ground. The answer is as clear as the question. The plaintiff wrote as follows: [His LORDSHIP read the letter of Mar. 22.] That can only mean, I will give up the cremation and adopt the other alternative of burying in consecrated ground. Then the licence was granted. That licence proceeded on the assurance which this lady had given, that the purpose for which the remains D

A were to be removed was only burial in consecrated ground at Manafan, and not burning. Then on Nov. 11, 1876, she writes to one of the executors :

"I was advised that it would be an act of courtesy, though not of necessity, to write and tell you that should the time ever arrive when I find it possible to carry out the wishes of the late Mr. Henry Crookenden, as expressed in the codicil to his will, I intend to do so."

B That shows that, after having obtained this licence on the distinct representation that it was to be used for burial only, she still intended to use the licence so obtained for the purpose of carrying out the testator's intention of cremation. I have no hesitation in saying that so to use this licence was an illegal act. If her intention had been brought to the knowledge of the Home Secretary, he would
C no doubt have revoked the licence. That is sufficient to show that the plaintiff could not possibly recover the expenses incurred in doing this act, which, in my opinion, was an illegal one.

But there is still another point. Suppose the act was not illegal. Could anyone recover in a court of equity any expenses for an act so done? The way this licence was obtained, and the cremation carried out, was distinctly fraudulent.
D If that stood alone the plaintiff's claim must fail. While allowing this lady full credit for her intention to carry out what she believed to be her duty, I must say that I am sorry her conception of her duty led her to deceive the Home Secretary in this manner. The action must be dismissed with costs.

Solicitors: *Walker & Mewburn-Walker; Williams, Hollingsworth, Tyerman & Andrews; Hemsley & Hemsley.*

E [Reported by J. R. BROOKE, Esq., Barrister-at-Law.]

F

ANGUS v. McLACHLAN

[CHANCERY DIVISION (Kay, J.), March 6, 1883]

G [Reported 23 Ch.D. 330; 52 L.J.Ch. 587; 48 L.T. 863; 31 W.R. 641]

Inn—Innkeeper—Lien—Extinguishment—Security taken in respect of unpaid bills—Inconsistency with retention of lien.

H The lien which an innkeeper has by the common law upon the goods of his guest is not necessarily destroyed by his taking a security for the payment of his bills. The lien will not be destroyed unless there is something in the facts of the case or in the nature of the security taken which is destructive of or inconsistent with the retention of the lien.

Inn—Innkeeper—Liability for damage to guest's goods—Goods detained because of non-payment of bill.

I An innkeeper who detains goods belonging to his guest in order to obtain payment of his bill is not bound to exercise more care in the keeping of them than he would in keeping his own goods.

Notes. By s. 1 (2) of the Hotel Proprietors Act, 1956: "The proprietor of an hotel shall, as an innkeeper, be under the like liability, if any, to make good to any guest of his any damage to property brought to the hotel as he would be under to make good the loss thereof." It is submitted that this enactment does not affect the present decision which relates to detained goods belonging to a person who had ceased to be a guest at the hotel.

Considered: *Re Morris*, [1908] 1 K.B. 473.

As to innkeepers lien, see 21 HALSBURY'S LAWS (3rd Edn.) 468 et seq.; and for cases see 29 DIGEST (Repl.) 24 et seq. As to extinguishment of lien by taking of security, see 24 HALSBURY'S LAWS (3rd Edn.) 170; and for cases see 32 DIGEST 236.

Cases referred to :

- (1) *Cowell v. Simpson* (1809), 16 Ves. 275; 33 E.R. 989, L.C.; 32 Digest 236, 204.
- (2) *Balch v. Symes* (1823), Turn. & R. 87, 92; 37 E.R. 1028, L.C.; 42 Digest 262, 2960.
- (3) *Hewison v. Guthrie* (1836), 2 Bing.N.C. 755; 2 Hodg. 51; 3 Scott, 298; 5 L.J.C.P. 283; 132 E.R. 290; 32 Digest 236, 205.
- (4) *Dawson v. Chamney* (1843), 5 Q.B. 164; 1 Dav. & Mer. 348; 13 L.J.Q.B. 33; 7 J.P. 689; 7 Jur. 1037; 114 E.R. 1210; 29 Digest (Repl.) 15, 181.

Also referred to in argument :

Re Leith's Estate, Chambers v. Davidson (1866), L.R. 1 P.C. 296; 4 Moo.P.C.C.N.S. 158; 36 L.J.P.C. 17; 12 Jur.N.S. 967; 15 W.R. 534; 16 E.R. 276, P.C.; 32 Digest 229, 136.

Scarfe v. Morgan (1888), 4 M. & W. 270; 1 Horn. & H. 292; 7 L.J.Ex. 324; 2 Jur. 569; 150 E.R. 1430; 32 Digest 233, 180.

Coggs v. Bernard (1708), 2 Ld. Raym. 909; 1 Com. 133; Holt, K.B. 131; 3 Salk. 11; 92 E.R. 107; 3 Digest (Repl.) 64, 52.

Calye's Case (1584), 8 Co. Rep. 32 a, 77 E.R. 520; sub nom. *Windham and Meads Case*, 4 Leon. 96; 29 Digest (Repl.) 2, 1.

Action by the plaintiff, an innkeeper, for a declaration that the amount to be found due to him in respect of unpaid bills should, in accordance with the terms of his security, be a charge on the defendant's shares in the ship *Leonidas*, and for payment of the amount so found due.

The plaintiff was the proprietor of the Angus Hotel, New Bridge Street, Blackfriars. In November, 1880, the defendant, McLachlan, went with his wife to stay at the plaintiff's hotel, and lived there till June 11, 1881. The plaintiff from time to time delivered his bills to the defendant, which the latter at first paid, but after Dec. 11, 1880, the plaintiff was unable to obtain payment from him. In March, 1881, the plaintiff applied to the defendant for payment of his account up to date, but the defendant said he could not then conveniently pay it. He, however, offered to give him a security for the payment of it. He was at that time, the owner of 6-64th shares in a certain ship named the *Leonidas*, and the security which he offered consisted of the following letter purporting to charge his shares in the ship :

"Angus Hotel, Blackfriars, Mar. 8, 1881.—Dear Sir, I hereby charge the bill of sale on the ship *Leonidas* now in the hands of Messrs. Phelps, Sedgwick & Biddle, of 18, Gresham Street, City, with the payment of any account now due or to become due from myself to you.—Yours truly, F. J. McLachlan.—To Mr. Angus, Angus Hotel."

The evidence of what took place on the occasion of the giving of this letter appeared to be conflicting, but the nature of it is sufficiently stated in the judgment. Shortly afterwards the plaintiff on trying to raise money on this letter found out that it was of no value as a security, so he again asked the defendant to pay his bill, and on the latter promising to pay he allowed him to remain at the hotel till June 11, 1881. At that time there was a sum of £83 8s. 11d. due from him. The plaintiff then told the defendant that he must either pay or leave the hotel, and the defendant being still unable to pay, the plaintiff turned him and his wife out, and locked up their rooms and detained their goods. He afterwards removed the goods from the rooms and put them in a cupboard where, according to the evidence, he was in the habit of keeping similar goods belonging to himself. The goods remained there until Sept. 30, 1881, when they were taken out and given over to the defendant. In August, 1881, the plaintiff commenced his action, claiming to have it declared that the amount to be found due from the

A defendant to him was a charge upon the defendant's shares in the ship *Leonidas*, and for payment of the amount so found due. On Aug. 5, 1881, an order was made in the action restraining the defendant from selling or dealing with the shares, and by an order made in September, 1881, a receiver was appointed, and an account directed of what was due from the defendant to the plaintiff. The defendant put in a defence in the action, and a counterclaim by which he claimed the right to set off the damage which he alleged had been sustained by his goods whilst in the keeping of the plaintiff against any claim of the plaintiff.

Graham Hastings, Q.C., and H. Greenwood for the plaintiff.

Yate Lee for the defendant.

C **KAY, J.**—On Nov. 13, 1880, the defendant and his wife went to stay at the plaintiff's hotel. Bills were delivered to the defendant weekly, and he paid the first bill. Then difficulties arose; the defendant was in want of money and could not pay the bills, and a discussion took place upon the subject.

D The evidence as to what occurred is contradictory. The defendant alleges that he told Mrs. Gibson, the plaintiff's manager, that he was not able to pay the bills at that time; that he had difficulty in getting money from Messrs. Patten, and would not be able to realise his shares in the ship for some months. She said she knew his wife's family, and was not anxious about the bills. The plaintiff states that the defendant, in March, 1881, talked about giving security for the amount due from him, and said that his lawyer had given him a letter to write and sign, which he did, and gave to him on Mar. 8. The defendant says that the plaintiff at first seemed satisfied, but afterwards said that the letter was of no value. The defendant's wife tells rather a different story. She says that there was a conversation with Mrs. Gibson, and that Mrs. Gibson said she was content to wait for payment, and the plaintiff said that he wished for a letter, and that if he got the letter, he was agreeable for her and her husband to remain for six months from the date of the letter, or until the action against Messrs. Patten was settled. The husband does not, however, depose to this conversation, and the plaintiff and Mrs. Gibson both distinctly deny this version of the story. The effect of their evidence is this. They say that they were constantly pressing the defendant for payment; that in order to induce the plaintiff to allow him to stay on at all this letter was brought, but that no promise was made to allow him to do so; and that when the defendant's then solicitor refused to advance anything upon the letter, the promises of the defendant induced the plaintiff to allow him to stay on.

F In this state of things I am asked to say that the acceptance of this letter was a waiver of the plaintiff's lien, and thus a question of very considerable importance is raised. It has been said in argument that if an innkeeper, having by common law a lien upon the goods of his guest, accepts any security at all from him, that is ipso facto a waiver of the lien. That, in my opinion, is not the law. *Cowell v. Simpson* (1) was referred to, where a solicitor was held by the acceptance of a security to have waived his lien on the papers of his client, and was relied upon as an authority in support of that contention. As we all know, it was a very common course with LORD ELDON to give a preliminary judgment and afterwards a more considered judgment. In his first judgment in that case he says (16 Ves. I at p. 279):

"Where by the usage of trade a person has a lien on goods in his hands for work performed upon them, and further for work upon other goods not then in his possession, having been delivered over according to the usages of different trades, it is settled by modern decisions that by taking a security the lien is gone, even with regard to the goods in his possession, and cannot accompany that special security which determines the implied contract. It is necessary to see upon what principle that stands. I rather think it is not

regulated by the usage of trade. It has been accounted for in this way: that the lien is gone by the effect of the intention to substitute the special contract for the implied one; the necessities of mankind requiring that the goods should be delivered for consumption, it is not to be presumed that the lien was to be extended through the whole period, which would create much difficulty in the usual course of dealing between tradesmen and their customers. I have, however, heard that denied; and it has been put upon a rule of law that the special contract removes the implied one; but, if that is the ground, this case would deserve much consideration. The solicitor taking a security which has three years to run, as the client may have occasion for his papers, there is as much reason that the lien should not accompany the security through that period as in the instance of a trade; and the conclusion is equally difficult, that the papers, if the client has occasion for them, could be withheld. I am not at present satisfied that this lien exists."

HIS LORDSHIP afterwards delivered a more considered judgment, in which he said (*ibid.* at p. 280):

"Looking through the general doctrine of lien, as applicable to all cases, except the purchase of an estate, with reference to which it has in a series of decisions been extended, it may be described as *prima facie* a right accompanying the implied contract. In the case of a factor, who has a lien both for his expenditure upon the goods in his possession and his general balance upon former transactions, entering into a special contract for a particular mode of payment he loses the lien. In various trades the demand being for work and labour, applied in some instances upon the particular goods, and others upon other goods also, though the possession had been given up, it is universally laid down that, if that takes place under a special agreement, there is no such lien; and if it commenced under an implied contract, and afterwards a special contract is made for payment, in the nature of the thing the one contract destroys the other."

He added later in his judgment (*ibid.* at p. 282):

"My opinion therefore is, that where these special agreements are taken, the lien does not remain; and whether the securities are due or not, makes no difference."

But in that case the special security taken was for three years, and was in its nature such as to be entirely inconsistent with the retention of the lien, and that was the reason why LORD ELDON held the lien to have been lost. In *Balch v. Symes* (2) he says (*Turn. & R.* at p. 92):

"Notwithstanding the Court of King's Bench has expressed a doubt whether my decision was right in the case of *Cowell v. Simpson* (1), I still entertain the opinion that an attorney who takes a security abandons his lien. That doctrine, however, will not apply to sums which are not covered by the security, and as to these sums therefore the lien must be considered to remain."

But I do not understand him to have meant that every security will destroy a lien; and my view of this is strengthened by *Hewison v. Guthrie* (3), where TINDAL, C.J., says (2 Bing.N.C. at p. 759):

"It is well established . . . that if a security is taken for the debt for which the party has a lien upon the property of the debtor, such security being payable at a distant day, the lien is gone."

As I understand the law, it is not the mere taking of a security which destroys the lien, but there must be something in the facts of the case, or in the nature of the security taken, which is inconsistent with the retention of the lien and which is destructive of it. In this case the lien is within the provisions of the Innkeepers Act, 1878, by virtue of which the innkeeper not only has a passive lien, but also the active right to sell the goods upon giving the notice required

A by the Act. Was it probable that he would give up this active lien? The very contract as stated by Mrs. McLachlan, if it was proved, which I hold it was not, was inconsistent with the hypothesis. It was that if the plaintiff got the letter he was agreeable for the defendant and his wife to remain six months. That does not mean that he would have been agreeable for them to go away without paying and take their things. There is nothing in the case inconsistent with

B the continuance of the lien which the plaintiff undoubtedly had before the security was given.

[His LORDSHIP then considered the question of the damage which had been sustained by the goods of the defendants, and, after referring to *Dawson v. Chamney* (4), and stating that the general law was that a bailee such as an innkeeper was not bound to be more careful in keeping the goods of his guest

C than he was as to his own, and after examining the evidence on this head, held that the defendants had failed to show that amount of negligence which would make the innkeeper liable, and, consequently, that the counterclaim must be dismissed, with costs.]

Solicitors: A. H. Holmes; G. H. Finch.

D [Reported by A. B. ELLICOTT, Esq., Barrister-at-Law.]

E

ROBERTS v. DEATH

[COURT OF APPEAL (Brett, Cotton and Lindley, L.JJ.), November 18, 1881]

[Reported 8 Q.B.D. 319; 51 L.J.Q.B. 15; 46 L.T. 246; 30 W.R. 76]

F *Execution—Garnishee order—Trustee—No suggestion by garnishee that money receivable by him trust money—Right of cestui que trust to be heard.*

R. obtained judgment against D. personally, and subsequently D., as trustee for W., obtained judgment against C. R. then took out a garnishee summons to attach all debts due from C. to D. Prior to the hearing R. and C. were informed that the money sought to be attached was trust money. At the

G hearing C. made no suggestion that the money was trust money and in the absence of any such suggestion by C., the garnishee, it was held that W., the cestui que trust, could not be heard and that an order absolute must be made, and C. thereupon paid the money to R. W. then applied by summons to rescind or vary the garnishee order by directing that the sum paid by C. to R. should be paid into court to abide the issue whether it belonged to D. or was trust money. On appeal by W. against dismissal of the summons,

H **Held:** in garnishee proceedings where there was reasonable ground for suggesting that the money was trust money the cestui que trust had a right to come forward and object to an order absolute being made; and, therefore, although no such suggestion had been made by the garnishee, the order absolute should not have been made, the proper order being that the money should be paid into court to abide the issue whether the money was trust

I money or not.

Notes. For R.S.C., 1875, Ord. 45, r. 6 and r. 7, see now R.S.C., Ord. 45, r. 5 and r. 6, respectively.

Considered: *Martin v. Nadel*, [1904-7] All E.R.Rep. 827. Referred to: *Plunkett v. Barclays Bank, Ltd.*, [1936] 1 All E.R. 653; *James Bibby Ltd. v. Woods*, [1949] 2 All E.R. 1.

As to attachment of debts and claims of third parties, see 16 HALSBURY'S LAWS (3rd Edn.) 89; and for cases see 21 DIGEST (Repl.) 729.

Appeal by the claimants from a decision of the Divisional Court affirming the decision of MATHEW, J., dismissing a summons by the claimants for an order that £40 6s. paid over to the judgment creditor by the garnishee under an order absolute should be paid into court to abide the event of the issue whether the money belonged to the judgment debtor or was trust money to which the claimants were entitled. A

In 1879, Roberts obtained judgment against Death personally for £57 14s. 6d. Subsequently Death, as trustee under the settlement of Mrs. Wells, obtained judgment against Castle for £40 6s. A garnishee summons was then obtained by Roberts to attach all debts due to Death from Castle. Prior to the hearing, notice was served upon Roberts and Castle that the money sought to be attached belonged to Mrs. Wells as cestui que trust. At the hearing, Castle, the garnishee, made no suggestion that the money sought to be attached belonged to a trust fund; and the master held that, in the absence of such suggestion on the part of the garnishee, he could not hear the cestui que trust, but must make the garnishee order absolute. The claimants, Mr. and Mrs. Wells, then took out the present summons which was dismissed by MATHEW, J., and, on appeal, by the Divisional Court. The claimants appealed to the Court of Appeal. B

By R.S.C., 1875, r. 6: C

"Whenever in proceedings to obtain an attachment of debts, it is suggested by the garnishee that the debt sought to be attached belongs to some third person, or that any third person has a lien or a charge upon it, the court or judge may order such third person to appear, and state the nature and particulars of his claim upon such debt." D

By r. 7: E

"After hearing the allegations of such third person under such order, and of any other person whom by the same or any subsequent order the court or judge may order to appear, or in case of such third person not appearing when ordered, the court or judge may order execution to issue to levy the amount due from such garnishee, or any issue or question to be tried or determined according to the preceding rules of this order, and may bar the claim of such third person, or make such other order as such court or judge shall think fit, upon such terms, in all cases, with respect to the lien or charge (if any) of such third person, and to costs, as the court or judge shall think just and reasonable." F

Horne Payne for the claimants.

C. Dodd for the judgment creditor. G

Hammond Chambers for the garnishee.

BRETT, L.J.—We think that the sum in dispute here is so small that, if the point had not been one of great importance, whatever our opinions might have been, we should not have interfered with the decision appealed from. But we must decide the point of law, as it may be of great importance in other cases. [His LORDSHIP stated the facts and continued:] H

It seems to me that Castle might have made the suggestion under R.S.C., 1875, Ord. 45, r. 6, that the debt belonged to Mrs. Wells, but he did not, and the garnishee order was made absolute, but with the knowledge on the part of Castle and Death that the judgment was really obtained by Death as trustee, though in his own name. Castle not having made the suggestion he might have. I agree with the argument that there was no power within R.S.C., 1875, Ord. 45, r. 6, to do anything else, and that the master had no choice but to make the garnishee order absolute; and I further agree that, if not within r. 6, it is not within r. 7. But the question is whether, under these circumstances, the master must make the garnishee order absolute. As I have said, he could not abstain from doing so under these rules, but are there no other rules under which he could? I think that there are. The question is, whether a person who sues as trustee for another and recovers judgment should pay over the money so recovered, which I

- A does not belong to him, to a creditor of his own. It is said that what is such an obvious injustice must by law be done by this court. I do not believe that such is the law. These rules were made when the courts of common law could not give such relief as is called for here, but the courts of equity could. I am of opinion that the courts of equity could. Equity would never have allowed such an order as this to stand, that the money of the cestui que trust should be paid away by the trustee. I can see nothing here to prevent a chancery judge from saying, if the facts were made clear to him, that the money should not be paid over under the garnishee order, and that the court would not be made a party to such a wicked injustice. And although, under R.S.C., 1875, Ord. 45, r. 6 and r. 7, the cestui que trust cannot be heard, a court of equity would listen to her, if she came forward at the time of hearing the summons, and would say that this money was not to be paid over.

C The proper order to be made here is, that the money should be paid into court to abide the event of an inquiry whether it is trust money or not. If there was no colour for the suggestion that this was trust money, then I think that such an order ought not be made; but if there is any colour for the suggestion, as I think there is here, that is the order that ought to be made. The point of law which we decide is, that where, in garnishee proceedings, there is reasonable suspicion that the money is trust money, the cestui que trust has a right to come forward and object to an order absolute being made. He is not to be damaged by such an order merely because the garnishee will not act.

E **COTTON, L.J.**—I am of the same opinion. The question here is, whether the judge ought not to have refused to make an order attaching money which he is informed is not a fund out of which the judgment debt can be properly satisfied, the money being trust money, and having been recovered by the judgment debtor only in his character of trustee. A court of equity will protect the cestui que trust, as where it will not allow goods in the hands of a trustee to be taken in execution. It is said that, under R.S.C., 1875, Ord. 45, r. 6 and r. 7, the judge has no discretion as to making the order, in the absence of a suggestion by the garnishee of some conflicting claim. I do not rely upon these rules, although I am not satisfied that the judge has not power, under r. 7, to order any person to appear, although the garnishee has made no suggestion. On general principles, where it is called to the attention of the court that the money is claimed by some third person, I am of opinion that it ought not to be ordered to be paid over to the judgment creditor; and so in this case, that, there being a *prima facie* case that the money is trust money, the claim of Mrs. Wells ought to have been investigated before the money was ordered to be paid over to Roberts. The proper order to make will be that this money should be paid into court to abide the event of an inquiry as to whether it is trust money or not. The question as to costs should be reserved.

H **LINDLEY, L.J.**—I am of the same opinion. This is a point of practice that does not appear to have arisen before. I am not surprised that persons not acquainted with equity procedure should have felt a difficulty about dealing with this summons. It seems that Roberts obtained judgment against Death, and that Death subsequently obtained judgment against Castle. But it is said that the money recovered by Death was recovered by him as trustee, and that, therefore, Roberts has no right to claim it. If it is not Death's money, Roberts has no right; that is clear. The question is how to prevent his getting it. There would have been no difficulty formerly. A bill would have been filed to restrain Castle from parting with the money until the Court of Chancery had decided whether it was a trust fund or not. That can no longer be done. What has happened in this case is, that the garnishee order nisi taken out by Roberts to attach all debts due from Castle to Death has been made absolute, in the absence of any suggestion by Castle of a conflicting claim; and the money in question has, under that order, been paid to Roberts. Then a summons is taken out to rescind or vary

the order so made by directing the money to be paid into court to abide the event of an issue whether it was trust money or not. This was dismissed by the master, and subsequently by the judge at chambers and the Divisional Court. It seems to me rather a narrow construction of R.S.C., 1875, Ord. 45, r. 6 and r. 7 that, because the garnishee holds his tongue, and the information comes from another quarter, the court should not act on it. I think that the court should have made an order under r. 7, which, in my opinion, they had ample power to do. The right order to make is to discharge the rule absolute, and to direct an inquiry as to whether this is trust money or not.

Appeal allowed.

Solicitors: *Yorke & Wharton; W. T. Boydell.*

[Reported by A. H. BITTLESTON, Esq., Barrister-at-Law.]

R. v. MANNING AND ANOTHER

[QUEEN'S BENCH DIVISION (Lord Coleridge, C.J., Stephen and Mathew, JJ.),
December 18, 19, 1883]

[Reported 12 Q.B.D. 241; 53 L.J.M.C. 85; 51 L.T. 121;
48 J.P. 536; 32 W.R. 720]

*Criminal Law—Conspiracy—Two persons jointly indicted and tried together—
Need for identical verdicts.*

Where two persons are jointly indicted and tried together on a charge of conspiracy both must be convicted or both acquitted. It is not possible to convict the one and acquit the other.

Notes. Considered: *R. v. Plummer*, [1900-3] All E.R.Rep. 613. Referred to: *Mogul Steamship Co. v. McGregor, Gow & Co.* (1889), 58 L.J.Q.B. 465.

As to conspiracy, see 10 HALSBURY'S LAWS (3rd Edn.) 310 et seq.; and for cases see 14 DIGEST (Repl.) 121 et seq.

Cases referred to:

- (1) *R. v. Cooke* (1826), 5 B. & C. 538; 7 Dow. & Ry.K.B. 673; 3 Dow. & Ry.M.C. 510; 108 E.R. 201, C.C.R.; 14 Digest (Repl.) 132, 958.
- (2) *R. v. Thompson* (1851), 16 Q.B. 832; 20 L.J.M.C. 183; 17 L.T.O.S. 72; 15 J.P. 484; 15 Jur. 654; 5 Cox, C.C. 166; 117 E.R. 1100, C.C.R.; 14 Digest (Repl.) 128, 894.
- (3) *Robinson v. Robinson and Lane* (1859), 1 Sw. & Tr. 362; 29 L.J.P.M. & A. 178; 31 L.T.O.S. 96; 5 Jur.N.S. 392; 164 E.R. 767; 27 Digest (Repl.) 326, 2705.
- (4) *O'Connell v. R.* (1844), 11 Cl. & Fin. 155; 3 L.T.O.S. 429; 9 Jur. 25; 1 Cox, C.C. 413; 8 E.R. 1061; sub nom. *R. v. O'Connell*, 5 State Tr.N.S. 1, H.L.; 14 Digest (Repl.) 131, 941.
- (5) *Stone v. Stone and Appleton* (1864), 3 Sw. & Tr. 608; 11 L.T. 515; 164 E.R. 1411; 27 Digest (Repl.) 521, 4646.
- (6) *Thody's Case* (circa 1435), Year Book, 14 Hen. 6, 25 b; cited in 5 B. & C. at p. 541.

Also referred to in argument:

R. v. Kinnersley and Moore (1719), 1 Stra. 193; 93 E.R. 467; 14 Digest (Repl.) 112, 777.

R. v. Ahearne (1852), 6 Cox, C.C. 6; 14 Digest (Repl.) 132, *540.

- A *R. v. Kenrick* (1848), 5 Q.B.D. 49; 1 Day. & Mer. 208; 12 L.J.M.C. 135; 1 L.T.O.S. 336; 7 J.P. 463; 7 Jur. 848; 114 E.R. 1166, C.C.R.; 14 Digest (Repl.) 130, 934.
- R. v. Heaps* (1699), 2 Salk. 593; 91 E.R. 502; sub nom. *R. v. Sudbury, Heapes, etc.*, 1 Ld. Raym. 484; 12 Mod. Rep. 262; 14 Digest (Repl.) 360, 3506.
- B *R. v. Niccolls* (1745), 2 Stra. 1227; 13 East, 412, n.; 93 E.R. 1148; 14 Digest (Repl.) 131, 953.

Rule Nisi calling upon the prosecutor to show cause why the verdict found for the Crown at the trial of the prisoner should not be set aside, and a new trial had.

An indictment having been preferred against the two defendants, Manning and Hannam, jointly for conspiracy to cheat and defraud the prosecutor, the case was removed by certiorari and tried on the civil side of the court, before LORD COLERIDGE, C.J., and a special jury, at the last summer assizes at Winchester. The facts of the case were, that the defendant Hannam, having bought certain cattle of the prosecutor, the owner, and given him a cheque in payment of the amount of the price, which cheque, however, was not afterwards paid, subsequently sold the cattle and paid the proceeds of such sale to the other defendant, Manning, and the cheque given to the prosecutor by Hannam was returned, marked "no assets." The case against Hannam rested, and was proved against him, mainly upon his own admission or confession, which was deemed to make the case almost conclusive against him. He however defended himself very vigorously and threw the blame of the transaction entirely upon his co-defendant Manning. LORD COLERIDGE, C.J., told the jury that the confession or admission of Hannam was evidence only against him, and was not evidence against the defendant Manning; and, in answer to a question by one of the jury, he also told them that the evidence might satisfy them as to one prisoner and not as to the other, and that they might on the present indictment find one of the defendants guilty and acquit the other. Thereupon the jury returned a verdict of guilty against the defendant Manning and, being unable to agree as to the other defendant, Hannam, were discharged from giving a verdict in his case. Thereupon Hannam's trial was postponed, and the defendant Manning was bound under recognisances to surrender for judgment in the Queen's Bench Division. Subsequently the above rule was moved for and obtained on his behalf on the ground of misdirection, on the ground that one of two persons jointly charged with conspiracy, the one with the other, and both being tried together, could not be convicted alone and without the conviction of the other, and against that rule.

G *C. W. Mathews* and *B. Coleridge*, for the prosecution, showed cause.
A. Charles, Q.C., and *Warry* for the defendant, in support of the rule.

H **MATHEW, J.**—It is only after considerable doubt, and I am bound to say with much reluctance, that I have come to the conclusion that the verdict in this case cannot be supported, and, therefore, that there must be a new trial. It is, as I have said, with reluctance and regret that I have arrived at that conclusion, for there is no doubt that the defendant had a very fair trial, with a summing-up distinctly favourable to him, and with every care that could possibly be taken to prevent any evidence which could not legitimately be used against him being acted upon by the jury.

I The argument, however, of counsel for the defendant, and the authorities cited by him in the course of them, have satisfied me of the existence of an imperative rule of law against the jury being told, as they were in this case, that it was competent for them, if the evidence satisfied them in that respect, to convict the one and to acquit the other of the two defendants. That rule of law I take to be this, that in a case like the present, where there is a charge of conspiracy against two persons jointly indicted and tried together, the issue raised and the question for the jury is whether both of them are or are not guilty; and that if the jury are not satisfied as to the guilt of both of them, then both must be acquitted, it being

impossible on such a charge to convict one of them and to acquit the other as was done here. The existence of that rule was taken for granted by the Court of King's Bench in *R. v. Cooke* (1) in LORD TENTERDEN's time; for, if it had not been, the judgment in that case could not have been pronounced. So again in the time of LORD CAMPBELL, the Court of Queen's Bench treated the rule in question as an existing rule in *R. v. Thompson* (2), and all the four judges held in that case that a failure to convict both the defendants on a charge of conspiracy would be fatal to the prosecution. Moreover, in addition to these authorities, the rule is treated as perfectly clear in the judgment in the case in the Divorce Court of *Robinson v. Robinson and Lane* (3); and finally, there are the opinions of the judges delivered in the House of Lords in *O'Connell v. R.* (4), clearly implying and distinctly illustrating the existence and application of that rule.

That being so, there was, in my opinion, a misdirection in the present case in the judge telling the jury that they might convict one of these defendants without the other, and therefore the rule for a new trial should be made absolute.

STEPHEN, J.—With the greatest possible reluctance I also have come to the same conclusion, and entirely upon the authority of the opinions of the judges in *O'Connell v. R.* (4), affirmed by the House of Lords. I see no possible escape from the decision in that case, which is one of the highest authority, and one which shows it to be legally impossible, where two or more persons are jointly indicted and tried together for a conspiracy, that some of them should be found guilty of one conspiracy and some of another, or that some should be convicted of the whole of a conspiracy, and others as guilty in a less degree; the rule of law being definite and positive that, on such a charge, all the defendants must be convicted or acquitted of one and the same conspiracy.

As to *R. v. Cooke* (1) and *R. v. Thompson* (2), they are not, in my opinion, so decisive of the question here as my brother MATHEW seems to think them, for they seem to me to leave open the very point of the present case which *O'Connell's Case* (4), I think, decided. With regard to *Robinson v. Robinson and Lane* (3), in the Divorce Court, which has been referred to, I think, that as much of the judgment there as relates to criminal law is merely a dictum; but, as applicable to divorce cases, the rule seems to me to be founded on common sense, and on general principles it might be said to support the contention of the prosecution in the present case.

I feel, however, that no answer can be given to the decision in the House of Lords, and fail to see any distinction between the rule in that case and that which is applicable to the present one, and yielding to that high authority I am of opinion that the jury here were misdirected, and that there must be a new trial.

LORD COLERIDGE, C.J.—During the argument of this case I have come to the conclusion that I misdirected the jury upon the point in question. The cases cited before us today of *R. v. Cooke* (1), and *R. v. Thompson* (2), which I confess I think to be more directly in point, and to have more weight upon the question now at issue than my brother STEPHEN does, were not before me at the trial. I had then in my mind the two cases in the Divorce Court of *Robinson v. Robinson and Lane* (3) and *Stone v. Stone and Appleton* (5), and it seemed to me, at the moment, difficult to recognise any distinction in principle between the rule applicable to the present case and the rule of practice that had been established and prevailed in that court; and which rule is based on the fact that the court could proceed only on evidence, and that what is evidence against one party is by no means of necessity legal evidence against another, and that there might be evidence against one defendant sufficient to convict him, yet not sufficient to convict the other of them; for though it was a joint offence it must be separately proved against each of the defendants. I must say that it seems to me that the principle of the practice of the Divorce Court in this respect is sound; and I am by no means prepared to say that if this matter had been *res integra*, and even as it is if there could have been an appeal from the decision of this court

A to some other tribunal, I might not have adhered to my view, and left the point to be settled by a higher authority; but in a criminal case, with no appeal from our decision, I feel bound by the cases that have been cited, and by what I understand to be the established rule of practice. The older cases are stated shortly, and without much detail; and it is possible that if all the facts of them were before us they might prove to be less in point than they now appear to be; but still

B from the time of *Thody's Case* (6), it has been taken for granted, and laid down by the judges, that in cases of conspiracy, where two persons are jointly indicted and tried together (for different considerations would arise if they are not tried together) the inflexible rule is that both must be convicted, or both acquitted.

Coming down to later times, the same rule must evidently have been present to the minds of the judges who decided *R. v. Cooke* (1) and *R. v. Thompson* (2).

C There are distinctions no doubt which prevent either of these cases from being directly in point here, but in the former of them, the Court of King's Bench, consisting at that time of LORD TENTERDEN, C.J., and BAYLEY, HOLROYD, and LITLEDALE, JJ., though it did not decide, yet seems to have assumed as the underlying principle of the whole matter the existence of the rule which has been contended for on behalf of the present defendant; and consequently the direction

D which I gave to the jury could not be right.

In the other of those two cases, ERLE, J., although differing on a particular point from the other three members of the court, differed from them only on a purely technical point of pleading, and not as to the principle assumed and laid down by the rest of the court in that case. In fact, ERLE, J., said not a word to the contrary of that principle, but rather assumed its existence, for he endeavoured to support the conviction there on the technical point that "persons unknown" might be construed to mean the two individuals as to whom the jury were unable to agree.

E Then comes the case in the House of Lords of *O'Connell v. R.* (4), in which all the judges assumed this point to be the rule of practice, and although they differed in opinion upon some other points, they all agreed upon that one. The principle

F underlying that decision is, that where two or more persons are charged with conspiracy the count is a single and complete one and cannot be separated into parts. The principle is the same in the present case. Without doubt, therefore, in directing the jury as I did contrary to that rule I misdirected them, and therefore this rule for a new trial must be made absolute.

I wish to say that I have not forgotten the rule (*R.S.C. (1883)*, Ord. 39, r. 2 [revoked]) with regard to hearing applications for a new trial; but criminal proceedings are an exception from the operation of that rule, and this being a criminal proceeding I have thought it right to take part in this judgment.

G

Solicitors: *Sole, Turner & Knight* for *H. R. Hooper*, Newport, Isle of Wight; *John Turner & Son* for *F. P. Henry*, Newport, Isle of Wight.

[Reported by H. LEIGH, Esq., Barrister-at-Law.]

H

A

EDGINGTON v. FITZMAURICE AND OTHERS

[COURT OF APPEAL (Cotton, Bowen and Fry, L.JJ.), February 27, 28, March 2, 7, 1885]

[Reported 29 Ch.D. 459; 65 L.J.Ch. 650; 53 L.T. 369; 50 J.P. 52;
33 W.R. 911; 1 T.L.R. 326]

B

Company—Prospectus—Issue of debentures—False representation as to objects of loan—Erroneous belief of plaintiff that issue entitled him to charge on company's property—Liability of directors.

Misrepresentation—Deceit—Matters which must be proved—Statement made recklessly—Object with which statement made—Misrepresentation of intention.

C

To sustain an action for deceit it is necessary to prove (i) that there was a statement as to facts which was false; (ii) that it was false to the knowledge of the maker or that he made it not caring whether it was true or false; and (iii) that the plaintiff relied and acted upon it, and sustained damage by so doing. It is immaterial whether the statement is made with knowledge of its falsity, or recklessly without care as to its truth, for to make a statement recklessly for the purpose of influencing another is dishonest. It is also immaterial with what object the statement is made, but it is material that the maker should intend that it should be relied on by the person to whom he makes it. It is unnecessary to show that the mis-statement was the sole cause of the plaintiff's injury, and if it materially contributed to his actions it is immaterial that he was also influenced by an erroneous supposition of his own. A misrepresentation as to a person's intentions involves a misrepresentation as to an existing fact, for the state of a man's mind is as much a fact as is his digestion, and, if it is acted upon by another to his detriment, an action for deceit will lie.

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E

The defendants, directors of a company, issued a prospectus inviting subscriptions for debentures and stating that the debentures were issued with the object of obtaining money to purchase horses and vans, to complete alterations in the company's premises, and to develop the business of the company. The true object of the loan was to pay off pressing liabilities and little money was in fact spent on the stated objects. The plaintiff, relying on the statements in the prospectus, advanced money on some of the debentures under the erroneous belief that the prospectus offered him a charge on the property of the company, and evidence was given that he would not have done so if he had not had that belief.

F

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Held: the mis-statement as to the objects of the loan was a material misrepresentation of intention involving a mis-statement of fact upon which the plaintiff had acted to his detriment, and, therefore, the directors were liable to an action for deceit even though the plaintiff was also influenced by his belief that he was entitled to a charge on the company's property.

H

Notes. For civil and criminal liability for mis-statements in a prospectus, see now the Companies Act, 1948, ss. 43, 44 (3 HALSBURY'S STATUTES (2nd Edn.) 493 et seq.).

I

Considered: *Re London and Leeds Bank, Ex parte Carling, Carling v. London and Leeds Bank* (1887), 56 L.J.Ch. 321. Distinguished: *R. v. Dent*, [1955] 2 All E.R. 806. Referred to: *Derry v. Peek*, [1886-90] All E.R.Rep. 1; *Oliver v. Bank of England*, [1902] 1 Ch. 610; *Yorkshire Insurance v. Craine*, [1922] All E.R.Rep. 505; *Short v. Poole Corpn.*, [1925] All E.R.Rep. 74; *Herod v. Herod*, [1938] 3 All E.R. 722; *Henderson v. Henderson*, [1944] 1 All E.R. 44.

As to misrepresentations in a prospectus, see 6 HALSBURY'S LAWS (3rd Edn.) 184 et seq.; and for cases see 9 DIGEST (Repl.) 124 et seq. As to what constitutes a

A representation, see 26 HALSBURY'S LAWS (3rd Edn.) 820 et seq.; and for cases see 35 DIGEST (Repl.) 5 et seq.

Cases referred to:

- (1) *Smith v. Chadwick* (1884), ante p. 242; 9 App. Cas. 187; 53 L.J.Ch. 873; 50 L.T. 697; 48 J.P. 644; 32 W.R. 687, H.L.; 35 Digest (Repl.) 18, 107.
- B (2) *Clarke v. Dickson* (1859), 6 C.B.N.S. 453; 28 L.J.C.P. 225; 33 L.T.O.S. 136; 23 J.P. 326; 5 Jur.N.S. 1029; 7 W.R. 443; 141 E.R. 533; 35 Digest (Repl.) 18, 101.

Also referred to in argument:

- Arkwright v. Newbold* (1881), 17 Ch.D. 301; 50 L.J.Ch. 372; 44 L.T. 393; 29 W.R. 455, C.A.; 35 Digest (Repl.) 20, 115.
- C *Jorden v. Money* (1854), 5 H.L.Cas. 185; 23 L.J.Ch. 865; 24 L.T.O.S. 160; 10 E.R. 868, H.L.; 35 Digest (Repl.) 5, 11.
- Maddison v. Alderson* (1883), ante p. 742; 8 App. Cas. 467; 52 L.J.Q.B. 737; 49 L.T. 303; 47 J.P. 821; 31 W.R. 820, H.L.; 35 Digest (Repl.) 58, 518.

Appeal by the defendants from a decision of DENMAN, J., in an action brought by the plaintiff, the Rev. C.N. Edgington, against the defendants, Hon. Captain D Fitzmaurice, Colonel Rich, Colonel Snow, General Taylor, and Major Clench, directors of the Army and Navy Provision Market, Ltd., and against Mr. Hunt, the secretary, and Mr. Hanley, the manager, asking for the repayment by them of a sum of £1,500, advanced by the plaintiff on debentures of the company, on the ground that he was induced to advance the money by the fraudulent misrepresentations of the defendants.

E Early in November, 1880, the plaintiff, who was a shareholder of the company, received a prospectus or circular which had been issued by order of the directors, inviting subscriptions for debenture bonds to the amount of £25,000, with interest at 6 per cent., which contained the following statements:

F "The society purchased for their market, at the price of £44,500 the valuable property known as Newman's Yard, comprising more than a quarter of an acre, situate in and with a frontage to Regent Street. This property it held direct from the Crown, under a lease from the Commissioners of Woods and Forests, for a term of ninety-nine years from April 5, 1824, at a ground-rent of £196 11s. 1d., and £15 6s. 9d. yearly in lieu of land tax, and subject to the half-yearly payment of £500 in redemption of a mortgage, of which £21,500 is outstanding."

G It also stated that the company had expended £20,679 on the property, and £2,943 in fittings. It was stated that the object of the issue of these debentures was as follows:

H "(1) To enable the society to complete the present alterations and additions to the buildings, and to purchase their own horses and vans, whereby a large saving will be effected in the cost of transport.

(2) Further to develop the arrangements at present existing for the direct supply of cheap fish from the coast, which are still in their infancy.

I The changes contemplated in the transport service of this society are the results of past experience, which proves that dealing with contractors is not only expensive but unsatisfactory; for, the society being often at their mercy, they may almost with impunity horse the vans in such an inefficient manner as to render faulty deliveries unavoidable. With sound horses at the command of the transport department, the many evils at present inseparable from employing horses under contract will be prevented.

The society now consists of upwards of thirteen thousand members, and since the altered management the numbers have been daily increasing."

These statements were impeached in the following particulars: (i) That the statement that the property was subject to the half-yearly payment of £500 in redemption of the mortgage of £21,500 omitted the fact that on April 5, 1884, the

whole of the balance then due, amounting to £18,000, was liable to be called in; (ii) that a second mortgage of £5,000 to Messrs. Hores and Pattisson was suppressed; (iii) that the object of the issue of the debentures was to pay off pressing liabilities, and not to complete the buildings or to purchase horses and vans, or to develop the business of the company; (iv) that the prospectus was so framed as to lead to the belief that the debentures would be a charge on the property of the company. The mortgage of £21,500 was a subsisting charge on the property when the society purchased; the mortgage of £5,000 was contracted by the society on Aug. 10, 1880. The first issue of debentures took place on Feb. 18, and amounted to about £8,000. On Nov. 8, the plaintiff, under the belief that the debentures would be a charge upon the Regent Street premises, inquired of Hunt whether such debentures would be a first charge on the property, and on Nov. 10, Hunt replied by letter, in which he said :

"The debentures will be a first charge on this property after providing for the interest payable in respect of the existing mortgage for £21,000, the redemption of which is spread over a period of twenty-one years, and it cannot be called in except at the rate of £1,000 a year."

The plaintiff was also informed verbally by Mr. Hanley, the general manager, that the debenture-holders would have the security of the company's property.

The plaintiff thereupon applied for fifteen debenture bonds, and paid £1,500 to the society, and they were allotted to him on Nov. 18, 1880, and were delivered on Feb. 19, 1881. They were in the form of a covenant by the company to pay the bearer the amount advanced with interest, and contained no charge on the property of the company.

On July 22, 1881, the company was ordered to be wound-up and the assets were only sufficient to pay the debenture-holders a small dividend. On July 7, 1882, the plaintiff commenced the present action claiming repayment of the sum advanced by him with interest, on the ground that it had been obtained from him by the fraudulent statements and omissions in the prospectus, and the fraudulent misrepresentations of Hunt and Hanley; or, in the alternative, £2,000 damages for the non-fulfilment of the agreement to give the plaintiff a charge on the property; or, in the alternative, repayment of the £1,500 advanced by him on the promise and representation that it would be secured by debentures specifically charging it on the property of the company, subject only to a mortgage then existing, whereas the debentures did not specifically charge it on any property, and were made subject to various other charges which were fraudulently concealed from the plaintiff by the defendants. The defendants appeared separately, but their defence was substantially the same, namely, that the mortgage for £5,000 was a temporary charge only, and was intended to be paid off before the issue of the debentures, and therefore it was not considered necessary to mention it in the prospectus; that they did not know that the mortgage of £21,000 could be called in in 1884; that they had a fair expectation that they would be able to apply the money raised by the debentures for the objects stated in the prospectus, and that some of it was so expended; and that they did not authorise Hunt and Hanley to represent to intending subscribers that the debentures were to be a charge upon the property of the company. Major Clench also relied upon the fact that he had tendered his resignation on Aug. 12, 1880, and that he subsequently attended board meetings only upon special invitation.

The plaintiff, when giving evidence, alleged that he understood the prospectus as holding out that he would have a charge on the property, and that he would not have applied for the debentures unless he had understood that he was to have a charge on it; and that he relied on the fact that the company wanted the money for the objects stated in the prospectus. He did not read the bonds when he received them, but only looked at the amounts, and he only discovered that they did not contain a charge on the property after the winding-up.

A It appeared from the minutes of the board of directors that the company was in financial difficulties both at the date of the prospectus and of the issue of the debentures and that their banking account with Messrs. Ransom, Bouverie & Co. was overdrawn to the extent of £5,000. The advance by Messrs. Hores and Pattisson had been expended in altering and improving the building in which the business had been carried on and the money raised by the debentures was, with
B the exception of a small part which was expended in improving the premises and in the purchase of horses and vans, applied in the payment of pressing liabilities, including the mortgage debt of £5,000 due to Hores and Pattisson.

DENMAN, J., gave judgment in favour of the plaintiff against the five directors for £1,500, less £45 received as interest on the debentures, on the grounds that the statements as to the half-yearly payments of £500, and as to the power of
C calling in the balance of the mortgage for £21,500 did not show that it might be called in at the end of four years, and this fact had been fraudulently omitted from the prospectus. In his Lordship's opinion the statement as to the objects of the issue of debentures was illusory and misleading as very little money had in fact been spent on the stated objects. The action against the secretary and manager was dismissed on the ground that they were merely servants of the
D company and not liable. The defendants appealed.

Davey, Q.C., Crossley, Q.C., and A. Young for the defendants.

Sir Farrer Herschell, Q.C., Rigby, Q.C., and Willis Bund for the plaintiff.

COTTON, L.J.—This case has been very fully and ably argued. It is what is
E called an action of deceit, the plaintiff alleging that statements were made by the defendants which were untrue, and that he had acted on the faith of these statements so as to incur damage for which the defendants are liable. In order to sustain such an action the plaintiff must show that the defendants intended that people should act on the statements, that the statements are untrue in fact and that the defendants knew them to be untrue, or made them under such circum-
F stances that the court must conclude that they were careless whether they were true or not.

The statements in question were made in a prospectus or circular issued by the defendants for the purpose of getting subscribers to a loan, and the plaintiff alleges that he understood from them that the advances were to be secured on leasehold property of the company. In my opinion there was no good ground
G for his so believing. There was nothing in the prospectus to lead him to such a conclusion. The debentures were merely bonds, and the plaintiff made no objection to their form at the time when he received them. Therefore, if the question had rested on that alone, there could be no difficulty. But it does not end there. The plaintiff also complains that the circular referred to one mortgage, and stated that it was to be paid off by half-yearly instalments of £500, but did not state
H that the mortgage money could be demanded in a lump sum in a few years; and further, that it omitted to state another mortgage for £5,000, which was not to be paid off by instalments, but was payable in two months.

I do not think it necessary to go into the consideration of these statements. As regards the first mortgage the defendants say that they had reasonable grounds for making the statement which they made, and as to the second mortgage they
I say that they did not mean to imply that there was no other mortgage affecting the company's property. But it is not necessary to give any decision respecting these statements, because, giving credit to the defendants for having made them fairly, there are other statements which follow, which in my opinion cannot be justified. I allude to statements respecting the objects for which the loan was effected. [His LORDSHIP read the passage from the prospectus in which the objects of the issue of the debentures were stated, and proceeded:] It was argued that this was only the statement of an intention, and that the mere fact that an intention was not carried into effect could not make the defendants liable to the

plaintiff. I agree that it was a statement of intention, but it is nevertheless a statement of fact; and if it could not be fairly said that the objects of the issue of the debentures were those which were stated in the prospectus, the defendants were stating a fact which was not true, and if they knew that it was not true, or made it recklessly not caring whether it was true or not, they would be liable. A

Did the defendants know or believe that the company was in a flourishing condition? I think they must have thought that it would turn out well and that the loan could be paid back, for they had shown their confidence in the company by advancing money of their own. But the question is, whether they did not make a statement of fact which was not correct, and which they knew to be not correct, when they stated the objects for which the loan was asked. I do not say that it was necessary to show that they intended that all the money raised should be applied in carrying out these particular objects, but certainly they ought to show that it was to be spent in improving the property and business of the company. C
What is the fact? The financial state of the company was openly discussed at the board meetings at which the defendants were all present, and it is clear that they were in great financial difficulties at the time. Although I should not, as I have said, have held the defendants liable merely for not referring to the second mortgage in the prospectus, yet the existence of that mortgage was strong evidence of their financial difficulties, and, considering all the other evidence and the admissions of the defendants in their cross-examination, I cannot doubt that the real object of the issue of debentures was to meet the pressing liabilities of the company and not to improve the property or develop the business of the company. I cannot but come to the conclusion that, however hopeful the directors may have been of the ultimate success of the company, this statement was such as ought not to have been made. D E

It was said, how could those who advanced the money have relied on this statement as material? I think it was material. A man who lends money reasonably wishes to know for what purpose it is borrowed, and he is more willing to advance if he knows that it is not wanted to pay off liabilities already incurred. But it is urged by the counsel for the defendants that the plaintiff himself stated that he would not have taken the debentures unless he had thought they were a charge upon the property, and that it was this mistaken notion which really induced the plaintiff to advance the money. In my opinion this argument does not assist the defendants if the plaintiff really acted on the statement in the prospectus. It is true that, if he had not supposed he would have a charge, he would not have taken the debentures; but, if he also relied on the mis-statement in the prospectus, his loss none the less resulted from that mis-statement. It is not necessary to show that the mis-statement was the sole cause of his acting as he did. If he acted on that mis-statement, though he was also influenced by an erroneous supposition, the defendants will be still liable. Did he act upon that mis-statement? He states distinctly in his evidence that he did rely on the defendants' statements, and the learned judge found as a fact that he did, and it would be wrong for this court, without seeing or hearing the witness, to reverse that finding of the judge. F G
We must therefore come to the conclusion that the statements in the prospectus as to the objects of the issue of the debentures were false in fact and were relied upon by the plaintiff. H

With respect to the defendant Clench we are not called on to express an opinion on the points in which his case differs from that of the other directors. I am not influenced by the mis-statement as to the mortgage. The point on which I rely is the mis-statement as to the objects of the loan in which the defendants all joined, and for which they are equally responsible. The judgment must be affirmed. I

BOWEN, L.J.—This is an action for deceit, in which the plaintiff complains that he was induced to take certain debentures by the misrepresentation of the

A defendants, and that he sustained damage thereby. The loss which the plaintiff sustained is not disputed. In order to sustain his action he must first prove that there was a statement as to facts which was false; and, secondly, that it was false to the knowledge of the defendants, or that they made it not caring whether it was true or false. For it is immaterial whether they made the statement knowing it to be untrue, or recklessly without caring whether it was true or not, because
B to make a statement recklessly for the purpose of influencing another person is dishonest. It is also clear that it is wholly immaterial with what object the lie is told. That is laid down in LORD BLACKBURN's judgment in *Smith v. Chadwick* (1), but it is material that the defendant should intend that it should be relied on by the person to whom he makes it. But, lastly, when you have proved that the
C statement was false, you must further show that the plaintiff has acted upon it, and has sustained damage by so doing; you must show that the statement was either the sole cause of the plaintiff's act or materially contributed to his so acting. So the law is laid down in *Clarke v. Dickson* (2), and that is the law which we have now to apply.

D The alleged misrepresentations were three: First, it was said that the prospectus contained an implied allegation that the mortgage for £21,500 could not be called in at once, but was payable by instalments. I think that upon a fair construction of the prospectus it does so allege, and therefore that the prospectus must be taken to have contained an untrue statement on that point, but it does not appear to me clear that the statement was fraudulently made by the defendants. It is therefore immaterial whether the plaintiff was induced to act as he did by that statement.

E Secondly, it is said that the prospectus contains an implied allegation that there was no other mortgage affecting the property except the mortgage stated therein. I think there was such an implied allegation, but I think it is not brought home to the defendants that it was made dishonestly; accordingly, although the plaintiff may have been damaged by the weight which he gave to the allegation, he cannot rely on it in this action, for in an action of deceit the plaintiff must prove
F dishonesty. Therefore, if the case had rested on these two allegations alone, I think it would be too uncertain to entitle the plaintiff to succeed.

But when we come to the third alleged mis-statement, I feel that the plaintiff's case is made out. I mean the statement of the object for which the money was to be raised. These were stated to be to complete the alterations and additions to the buildings, to purchase horses and vans, and to develop the supply of fish.
G A mere suggestion of possible purposes to which a portion of the money might be applied would not have formed a basis for an action of deceit. There must be a mis-statement of an existing fact; but the state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else. A misrepresentation as to the state of a man's
H mind is therefore a mis-statement of fact. Having applied as careful consideration to the evidence as I could, I have reluctantly come to the conclusion that the true objects of the defendants in raising the money were not those stated in the circular. I will not go through the evidence, but, looking only to the cross-examination of the defendants, I am satisfied that the objects for which the loan was wanted were mis-stated by the defendants. I will not say knowingly, but so
I recklessly as to be fraudulent in the eye of the law.

The question remains. Did this mis-statement contribute to induce the plaintiff to advance his money? The argument of counsel for the defendants has not convinced me that it did not. He contended that the plaintiff admits that he would not have taken the debentures unless he had thought they would give him a charge on the property, and therefore he was induced to take them by his own mistake, and the mis-statement in the circular was not material. But such mis-statement was material if it was actively present to his mind when he decided to advance his money. The real question is what was the state of the plaintiff's

mind, and if his mind was disturbed by the mis-statement of the defendants, and such disturbance was in part the cause of what he did, the mere fact of his also making a mistake himself would make no difference. It resolves itself into a mere question of fact. I have felt some difficulty about the pleadings, because in the statement of claim this point is not clearly put forward, and I had some doubt whether this contention as to the third mis-statement was not an after-thought. But the balance of my judgment is weighed down by the probability of the case. What is the first question which a man asks when he advances money? It is, what is it wanted for? Therefore I think that the statement is material, and that the plaintiff would be unlike the rest of his race if he was not influenced by the statement of the objects for which the loan was required. The learned judge in the court below came to the conclusion that the mis-statement did influence him, and I think he came to a right conclusion.

FRY, L.J.—I am of the same opinion. I do not think it necessary to refer to the alleged mis-statements as to the mortgages, because I do not rely on that portion of the case. But with respect to the statement of the objects for which the debentures were issued I have come to the conclusion that there was a mis-statement of fact, that the statement contained in the circular was false in fact, and false to the knowledge of the defendants. Was the statement true in fact? The circular was adopted at a meeting of the board, when all the defendants were present. The financial state of the company was considered. They owed £5,000 to their bankers, and £5,000 to Hores and Pattisson. They owed large sums to tradesmen and other persons. They were under an obligation to pay £3,500 in instalments on the mortgage for £21,500 before April, 1884, and they knew that if they did not pay the instalments the whole would be called in. The necessity of raising money must have been discussed at the meeting. It is clear that their object in raising the money was to meet their pressing liabilities. But the defendants say that the mortgage for £5,000 to Hores and Pattisson was only a temporary loan, and that the greater part of it was expended in alterations and additions to the buildings, and therefore the mortgage was merely an anticipation of the loan for the objects stated in the prospectus. But the statement in the prospectus was that a large sum of money had been already expended in improving the building (and that included the greater part of the advance by Hores and Pattisson), and that the directors intended to apply the money raised by the debentures in further improving the buildings. This statement was, therefore, false. It is not necessary to call attention to the evidence that the defendants knew at the time that a large proportion of the loan would have to be expended in paying pressing liabilities. It is hardly denied by the defendants. I come, therefore, to the conclusion with regret that this false statement was not only false in fact, but was false to the knowledge of the defendants.

The next inquiry is, whether this statement materially affected the conduct of the plaintiff in advancing the money. He has sworn that it did, and the learned judge who tried the action has believed him. On such a point I should not like to differ from the judge who tried the action, even though I were not myself convinced; but in this case the natural inference from the facts is in accordance with the judge's conclusion. The prospectus was intended to influence the mind of the reader.

Then this question has been raised. The plaintiff admits that he was induced to make the advance, not merely by this false statement, but by the belief that the debentures would give him a charge on the company's property, and it is admitted that this was a mistake of the plaintiff. Therefore it is said the plaintiff was the author of his own injury. It is quite true that the plaintiff was influenced by his own mistake, but that does not benefit the defendant's case. The plaintiff says: 'I had two inducements, one my own mistake and the other the false statement of the defendants. The two together induced me to advance the money.'

A But in my opinion, if the false statement of fact actually influenced the plaintiff, the defendants are liable, even though the plaintiff may have been also influenced by other motives. I think, therefore, the defendants must be held liable. The appeal must therefore be dismissed.

B Solicitors: Markby, Stewart & Co.; Crowdy, Son & Tarry; Last & Sons; J. Holmes; Lewin & Co.; A. E. Copp.

[Reported by W. C. Biss, Esq., Barrister-at-Law.]

C

FORBES v. JACKSON

[CHANCERY DIVISION (Hall, V.-C.), January 12, 16, 1882]

D [Reported 19 Ch.D. 615; 51 L.J.Ch. 690; 48 L.T. 722;
30 W.R. 652]

Guarantee—Surety—Payment of debt by surety—Right to stand in creditor's place—Right to transfer of securities, held by creditor, not burdened by further advances.

E S. mortgaged leasehold premises and a policy of insurance on his own life to W. as security for repayment of a loan of £200 and interest, the deed providing that on repayment W. would re-assign the premises and policy to S., his executors, administrators, or assigns, or as he or they should direct. F. joined as surety in the indenture of mortgage, assigned a policy on his own life, and covenanted with S. for payment of the interest during his (F.'s) life, and to keep up the premiums on both policies. W. made further advances to S. on mortgage of the same leasehold premises without the knowledge of F. W. having died, and his executors having made a demand upon F. for payment of arrears of interest, F. offered payment of what was due for principal, interest, and costs upon the original mortgage.

G **Held:** a surety was entitled to have all the securities preserved for his benefit which were taken by the creditor at the time of his suretyship, or even subsequently in respect of the same debt; where the creditor had taken a further security for further advances made by him to the principal debtor the surety was still entitled to the benefit of the original security, and to have it transferred to him on his paying off the whole amount due in respect of the original debt; accordingly, on making such payment, F. was entitled to have a transfer of all the securities and to hold them as securities for the repayment to him of the sums so paid to the executors.

Newton v. Chorlton (1) (1853), 10 Hare, 646, applied.

Williams v. Owen (2) (1843), 13 Sim. 597, and *Farebrother v. Wodehouse* (3) (1856), 23 Beav. 18, disapproved.

I **Notes.** Considered: *Leicestershire Banking Co. v. Hawkins* (1900), 16 T.L.R. 317. Referred to: *Lowes v. Maughan and Fearon* (1884), Cab. & El. 340; *Nicholas v. Ridley*, [1904] 1 Ch. 192.

As to rights of surety after payment, see 18 HALSBURY'S LAWS (3rd Edn.) 467-474; as to securities held by creditor, see *ibid.* pp. 516-518. For cases see 26 DIGEST (Repl.) 120-121.

Cases referred to:

(1) *Newton v. Chorlton* (1853), 10 Hare, 646; 2 Drew. 333; 1 W.R. 266; 68 E.R. 1087; 26 Digest (Repl.) 117, 822.

- (2) *Williams v. Owen* (1843), 13 Sim. 597; 13 L.J.Ch. 105; 7 Jur. 1145; 60 E.R. 232; 26 Digest (Repl.) 120, 846. A
- (3) *Farebrother v. Wodehouse* (1856), 23 Beav. 18; 26 L.J.Ch. 81; 28 L.T.O.S. 94; 2 Jur.N.S. 1178; 5 W.R. 12; 53 E.R. 7; on appeal (1857), 26 L.J.Ch. 240, L.J.J.; 26 Digest (Repl.) 121, 852.
- (4) *Lake v. Brutton* (1856), 8 De G.M. & G. 440; 25 L.J.Ch. 842; 27 L.T.O.S. 294; 2 Jur.N.S. 839; 44 E.R. 460, L.J.J.; 26 Digest (Repl.) 118, 827. B
- (5) *Pledge v. Buss* (1860), John. 663; 6 Jur.N.S. 695; 70 E.R. 585; 26 Digest (Repl.) 118, 823.
- (6) *Pearl v. Deacon* (1857), 24 Beav. 186; 26 L.J.Ch. 761; 29 L.T.O.S. 289; 3 Jur.N.S. 879; 5 W.R. 702; 53 E.R. 328; on appeal, 1 De G. & J. 461; 26 L.J.Ch. 763; 3 Jur.N.S. 1187; 5 W.R. 793, L.J.J.; 26 Digest (Repl.) 118, 828. C
- (7) *Drew v. Lockett* (1863), 32 Beav. 499; 8 L.T. 782; 9 Jur.N.S. 786; 11 W.R. 843; 55 E.R. 196; 26 Digest (Repl.) 115, 798.
- (8) *Mayhew v. Crickett* (1818), 2 Swan. 185; 1 Wils. Ch. 418; 36 E.R. 585, L.C.; 26 Digest (Repl.) 208, 1596.
- (9) *Duncan, Fox & Co. v. North and South Wales Bank* (1879), 11 Ch.D. 88; 48 L.J.Ch. 376; 40 L.T. 371; on appeal (1880), 6 App. Cas. 1; 50 L.J.Ch. 355; 43 L.T. 706; 29 W.R. 763, H.L.; 26 Digest (Repl.) 118, 829. D
- (10) *Green v. Wynn* (1869), 4 Ch. App. 204; 38 L.J.Ch. 220; 20 L.T. 131; 17 W.R. 385, L.C.; 26 Digest (Repl.) 135, 967.
- (11) *Wheaton v. Graham* (1857), 24 Beav. 483; 53 E.R. 444; 35 Digest (Repl.) 764, 4398.

Also referred to in argument:

Hopkinson v. Rolt (1861), 9 H.L.Cas. 514; 34 L.J.Ch. 468; 5 L.T. 90; 7 Jur.N.S. 1209; 9 W.R. 900; 11 E.R. 829, H.L.; 35 Digest (Repl.) 498, 1858. E

Bowker v. Bull (1850), 1 Sim.N.S. 29; 20 L.J.Ch. 47; 16 L.T.O.S. 503; 15 Jur. 4; 61 E.R. 11; 35 Digest (Repl.) 494, 1809.

Dawson v. Bank of Whitehaven (1877), 6 Ch.D. 218; 46 L.J.Ch. 884; 37 L.T. 64; 26 W.R. 34, C.A.; 35 Digest (Repl.) 402, 983. F

Special Case, by which it appeared that by an indenture of mortgage dated Dec. 28, 1854, made between William Spence of the first part, the plaintiff J. S. Forbes of the second part, and A. Weir of the third part, William Spence assigned certain leasehold premises to Weir to secure the repayment of £200 and interest, and he also assigned a policy of assurance on his own life for £250. The proviso for redemption was, that on payment by Spence, his heirs, executors, administrators, or assigns, of the sum of £200 and interest to Weir, his executors, administrators, or assigns, he or they would re-assign the premises and policy

“unto W. Spence, his executors, administrators, or assigns, or as he or they should direct.” G

By the same indenture the plaintiff, for himself only, and not so as to bind his executors, covenanted with Weir, his executors, administrators, and assigns, that while the sum of £200 or any part thereof should remain owing he would pay unto Weir, his executors, administrators, and assigns, interest at 5 per cent., and also pay the premiums on the policy of assurance; and as a further security for the payment of the interest and premiums the plaintiff assigned to Weir a policy of assurance on his own life for £100, and covenanted to pay the premiums. The plaintiff joined in the indenture as surety for Forbes. Subsequently to the date of the mortgage Forbes borrowed of Weir sums of money amounting in all to £530, and by four successive indentures he charged the same leasehold premises with the amounts of these further loans and interest. These advances were not known to the plaintiff. Spence paid the interest and the premiums on his own policy until June 28, 1867, from which time he fell into arrear. From the year 1868 the plaintiff had kept up the policy of assurance on Spence's life, and he had paid certain costs in connection with the mortgage. H I

- A In September, 1878, Weir died, having appointed the defendants his executors. In the same month they made a demand on the plaintiff for the arrears of interest due on the £200, which the plaintiff accordingly paid, and had continued to pay interest up to the present time. On Dec. 22, 1879, the plaintiff gave notice to the defendants that he intended to pay off the £200, and on June 28, 1880, he accordingly tendered to them the £200 and interest, and offered to pay any costs properly payable in respect of the mortgage, and requested them to transfer to him all the securities comprised in the mortgage. They refused to accept this tender, and required the plaintiff also to pay off the £530 and arrears of interest thereon; in the alternative they offered to accept the tender, and to assign to the plaintiff the two policies, but claimed to retain the leasehold premises as security for the further advances. The question was whether the plaintiff was entitled to have the whole of the securities assigned to him on payment of the principal, interest, premiums, and costs.

Kekewich, Q.C., and Hornell for the plaintiff.

W. Pearson, Q.C., and L. Field for the defendants.

Theobald for the defendant Spence.

- D **HALL, V.-C.**—The arguments which have been submitted on behalf of the executors do not affect the conclusion which I, in the course of them, intimated that I had come to; nor do they affect the principle laid down in *Newton v. Chorlton* (1) to which I referred during the argument. I consider that the decision in that case is perfectly good law, subject to this observation, that Wood, V.-C., expressed an opinion that where an additional security was taken by the creditor after the original security was given and the contract of suretyship entered into, the right of the surety as regards the securities given to the principal creditor did not extend to the additional securities. The Vice-Chancellor did not think that the cases went so far as to give a surety the benefit of the security subsequently taken by the creditor.

- E That is a view which never commended itself to me, and it was certainly not adopted by KNIGHT BRUCE and TURNER, L.JJ., in *Lake v. Brutton* (4), and I may observe that Wood, V.-C., himself, in *Pledge v. Buss* (5), stated that his judgment in that case had been disapproved of by those lords justices, although not absolutely overruled. The Vice-Chancellor added (John. at p. 668):

“I am as much bound to submit to their opinion as if the decision had been reversed on appeal before them.”

- G The Vice-Chancellor did not mention the name of the case to which he referred, but I may state that some twenty years ago, in my copy of JOHNSON'S REPORTS, I noted against *Pledge v. Buss* (5) the case of *Lake v. Brutton* (4) as being the one which the Vice-Chancellor had in his mind; and there is also another case of *Pearl v. Deacon* (6) which I thought was referred to by him. That was an appeal from a decision of SIR JOHN ROMILLY, M.R. It was the case of a subsequent security; but it is not material for my purpose to consider the general question whether there has been a release, or what is the effect of taking an additional security, and then whether that additional security should be held available for the benefit of the surety.

- H There has never been, so far as I know, any disapproval of the general principle which was laid down by the Vice-Chancellor in *Newton v. Chorlton* (1) except so far, if at all, as the Master of the Rolls may have dealt with it in *Farebrother v. Wodehouse* (3), where he seems to have followed the case relied upon here of *Williams v. Owen* (2), which certainly, if it were law, would be an authority in favour of the executors. In *Newton v. Chorlton* (1) the principle laid down by Wood, V.-C., was, that a surety was to have the benefit of all securities, “whether by way of suretyship or mortgage,” and he afterwards added (10 Hare, at p. 652):

“The surety has a right at any moment to every security held by the creditor at the date of the contract. It has never yet gone beyond that; and he has

further a right to say, you must always hold yourself in a position to be put in motion, at my request, against the principal debtor." A

I consider that the decision in *Newton v. Chorlton* (1) was carried higher by the decision of the lords justices in *Lake v. Brutton* (4), which, as I have said, the Vice-Chancellor himself recognised in *Pledge v. Buss* (5), and I consider the decision must be applicable to securities taken subsequently to the original mortgage.

The Master of the Rolls in *Farebrother v. Wodehouse* (3) appears to have followed *Williams v. Owen* (2), as it applies to a subsequent security taken by the original creditor, that he could make advances to the debtor, and that they would prevail over the right of the surety. That principle is entirely at variance with the decision in *Newton v. Chorlton* (1), and it is a singular circumstance that in a subsequent case of *Drew v. Lockett* (7) before him, although he had followed *Williams v. Owen* (2), SIR JOHN ROMILLY, M.R., said (32 Beav. at p. 505): C

"I am of opinion that a surety who pays off the debt for which he became surety must be entitled to all the equities which the creditor whose debts he paid off could have enforced, not merely against the principal debtor, but also as against all persons claiming under him."

It was odd that SIR JOHN ROMILLY, M.R., should agree with the principle laid down in *Newton v. Chorlton* (1), and yet come to a conclusion in *Farebrother v. Wodehouse* (3) which seems to be at variance with it. The principle on which WOOD, V.-C., proceeded was the same as laid down by LORD ELDON in *Mayhew v. Crickett* (8), which I consider a leading authority, and also laid down in earlier cases, that the surety is entitled to have all the securities preserved for him, which were taken at the time of the suretyship, or, as I think it is now settled, subsequently. Nor does it matter at all in principle whether the creditor takes a further security for further advances made prior to the time when the surety makes payment of the debt. They have nothing to do with the surety. He is entitled to the benefit of the securities, though his payment be not made until after the time when the further advances were made by the creditor. The principle is, that the surety, in effect, bargains that the securities which the creditor takes shall be for him, if and when he shall be called upon to make any payment, and it is the duty of the creditor to keep the securities intact; not to give them up, or to burden them with further advances. D

The same principle was enunciated in *Duncan, Fox & Co. v. North and South Wales Bank* (9), when SIR GEORGE JESSEL, M.R., on the hearing upon appeal from the judgment of LITTLE, V.-C., said (11 Ch.D. at pp. 95, 96): E

"It cannot be said that in every instance a surety is entitled to stand in the place of the principal creditor as regards other securities. That is true as regards securities given by the debtor, but it is not true as regards securities given by co-sureties." F

The House of Lords, though they reversed the judgment of the Court of Appeal, did not say anything which affected the principle referred to by the Master of the Rolls, and which is all that I desire to notice. I consider that the principle laid down in that case is perfectly plain and right; and also that the decision in *Williams v. Owen* (2) is not law now, and cannot, after the cases to which I have referred, be followed. I decline to recognise it. There is another case to which I desire to refer, that of *Green v. Wynn* (10), in which there was a surety, and LORD HATHERLEY said (4 Ch. App. at p. 207): G

"But where there is a mortgage of course any person under a liability to pay interest would be at liberty to redeem." H

I am of opinion, therefore, that the plaintiff was right in his offer to pay off the debt, and that he is entitled to have the securities, and to say that the further charges for the sums subsequently advanced are inoperative as against him. The defendants, the executors, having refused the offer made, and being wrong in insisting on retaining the securities for the subsequent advances, must pay the I

- A costs of the action. The declaration will be, that on payment to the executors of what shall be found due for principal, interest, and costs in respect of the mortgage of Dec. 28, 1854, the plaintiff is entitled to have the securities comprised in the deed transferred to him, and to hold them as securities for the repayment to him of the sums which may be paid to the executors by him. The costs of the plaintiff will be deducted from the sum which he may be required to pay, as in
- B *Wheaton v. Graham* (11), but the interest will not be stopped as from the date when the offer of payment was made.

Solicitors: *Peters & Robins; John White.*

[*Reported by J. G. ALEXANDER, ESQ., Barrister-at-Law.*]

C

D

Re LINTON. Ex Parte LINTON

[COURT OF APPEAL (Sir Baliol Brett, M.R., Baggallay and Bowen, L.JJ.), May 15, 22, 1885]

[*Reported* 15 Q.B.D. 239; 54 L.J.Q.B. 529; 52 L.T. 782;
33 W.R. 714; 49 J.P. 597; 2 Morr. 179]

E

Bankruptcy—Proof—“Debts and liabilities”—Arrears of alimony.

Divorce—Alimony—Arrears—Enforcement of order—Committal—Debtors Act, 1869 (32 & 33 Vict., c. 62), s. 5.

The failure of a husband to pay under an order for the payment of alimony to his wife is not a debt or liability provable in bankruptcy, and an order for committal for non-payment may be made under the Debtors Act, 1869, s. 5.

F

Notes. By the Maintenance Orders Act, 1958, s. 7 (38 HALSBURY'S STATUTES (2nd Edn.) 463), the High Court or county court has power to make attachment of earnings orders where proceedings are brought under s. 5 of the Debtors Act, 1869, in respect of a default in making payments under a maintenance order.

G

The Matrimonial Causes Act, 1866, s. 1, has been repealed. See now the Matrimonial Causes Act, 1950, ss. 19, 20, 22, as extended by the Matrimonial Causes (Property and Maintenance) Act, 1958 (38 HALSBURY'S STATUTES (2nd Edn.) 440). The Bankruptcy Act, 1883, ss. 9 and 37 have been repealed. See now the Bankruptcy Act, 1914, ss. 7 and 30 (2 HALSBURY'S STATUTES (2nd Edn.) 336, 364).

H

Considered: *Re Fryer, Ex parte Fryer* (1886), 17 Q.B.D. 718. Distinguished: *Re Hinks, Ex parte Verdi* (1886), 3 Morr. 218. Explained: *Morgan v. Hardy* (1887), 18 Q.B.D. 778. Distinguished: *Re Tatham, Bensaude v. Hastings* (1892), 37 Sol. Jo. 27. Applied: *Re Hawkins, Ex parte Hawkins*, [1894] 1 Q.B. 25. Considered: *Watkins v. Watkins*, [1896] P. 222. Applied: *Kerr v. Kerr*, [1895–9] All E.R.Rep. 865. Distinguished: *Victor v. Victor*, [1911–13] All E.R.Rep. 959. Considered: *Tangye v. Tangye*, [1914] P. 201; *Re Stillwell, Brodrich v. Stillwell*, [1916] 1 Ch. 365; *Re Blanchard, Ex parte Blanchard*, [1932] All E.R.Rep. 543. Followed: *Re Hedderwick, Morten v. Brinsley*, [1933] All E.R.Rep. 73. Considered: *Findlay v. Findlay*, [1947] 2 All E.R. 71; *Re Bidie, Bidie v. General Accident Fire and Life Assurance Corp., Ltd.*, [1948] 1 All E.R. 885. Referred to: *Haddon v. Haddon* (1887), 18 Q.B.D. 778; *Re Otway, Ex parte Otway* (1888), 58 L.T. 885; *Re Henderson, Ex parte Henderson* (1888), 20 Q.B.D. 509; *Campbell v. Campbell*, [1922] P. 187; *Re Pascoe, Trustee in Bankruptcy v. His Majesty's Treasury Lords Comrs.*, [1944] 1 All E.R. 593; *Coles v. Coles*, [1956] 3 All E.R. 542; *W. v. W.*, [1961] 1 All E.R. 751.

I

As to debts provable in bankruptcy, see 2 HALSBURY'S LAWS (3rd Edn.) 464 et seq.; and for cases see 4 DIGEST (Repl.) 329. As to enforcement of payment of permanent alimony, see 12 HALSBURY'S LAWS (3rd Edn.) 430; and for cases see 27 DIGEST (Repl.) 675 et seq.

Cases referred to:

- (1) *Prescott v. Prescott* (1868), 20 L.T. 331; 4 Digest (Repl.) 329, 2991.
- (2) *Bailey v. Bailey* (1884), post; 13 Q.B.D. 855; 53 L.J.Q.B. 583, C.A.; 27 Digest (Repl.) 682, 6515.
- (3) *Hewitson v. Sherwin* (1870), L.R. 10 Eq. 53; 22 L.T. 576; 18 W.R. 802; 5 Digest (Repl.) 1108, 8948.
- (4) *Re Robinson* (1884), 27 Ch.D. 160; 53 L.J.Ch. 986; 51 L.T. 737; 33 W.R. 17, C.A.; 27 Digest (Repl.) 106, 786.

Also referred to in argument:

- Cobham v. Dalton* (1875), 10 Ch. App. 655; 44 L.J.Ch. 702; 23 W.R. 865, L.J.J.; 4 Digest (Repl.) 197, 1777.

Appeal by the husband from an order of CAVE, J., for committal under s. 5 of the Debtors Act, 1869, for non-payment of alimony.

On April 15, 1883, an order was made by the Divorce Court under the Matrimonial Causes Act, 1866, s. 1, that the husband should pay £1 15s. a week to the wife as alimony. The husband presented a petition in bankruptcy, on which, on May 16, 1884, a receiving order was made, and he was adjudged bankrupt. The alimony being in arrear, a judgment summons was taken out, on which CAVE, J., made an order for committal under the Debtors Act, 1869, s. 5. The husband appealed.

By the Debtors Act, 1869, s. 5:

"Subject to the provisions hereinafter mentioned, and to the prescribed rules, any court may commit to prison, for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt, or instalment of any debt, due from him in pursuance of any order of that or any other competent court . . .

"Where it is proved to the satisfaction of the court that the person making default either has, or has had since the date of the order or judgment, the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects, to pay the same."

By the Bankruptcy Act, 1883, s. 37:

"(3) Save as aforesaid, all debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order, shall be deemed to be debts provable in bankruptcy. . . . (8) 'Liability' shall, for the purposes of this Act, include any compensation for work or labour done, any obligation, or possibility of an obligation, to pay money or money's worth on the breach of any express or implied covenant, contract, agreement, or undertaking, whether the breach does or does not occur, or is or is not likely to occur, or capable of occurring before the discharge of the debtor; and generally it shall include any express or implied engagement, agreement, or undertaking to pay, or capable of resulting in the payment of money, or money's worth, whether the payment is, as respects amount, fixed or unliquidated; as respects time, present or future, certain or dependent on any one contingency, or on two or more contingencies, as to mode of valuation capable of being ascertained by fixed rules, or as matter of opinion."

Cooper Willis, Q.C. (*F. Cooper Willis* with him), for the husband.
Yate Lee for the wife.

A

Cur. adv. vult.

May 22, 1885. **SIR BALIOL BRETT, M.R.**—In this case an order was made on the bankrupt under The Matrimonial Causes Act, 1866, s. 1, for payment of alimony. The moment that order was served upon him he made up his mind that he would not pay. He was in possession of ample means, but nevertheless he caused himself to be adjudged bankrupt on his own petition. His contention is that the arrears of alimony and the future weekly payments could be provided for under the bankruptcy. A summons was taken out to attach him for non-payment, and the question is whether instalments of alimony, which would become due after the bankruptcy, can be got rid of by a self-imposed bankruptcy.

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No one can doubt that the course of conduct pursued by the debtor in this case is discreditable and disgraceful, but the question is whether it is successful. The statute under which the order for payment of alimony was made (the Matrimonial Causes Act, 1866, s. 1) was passed in order to meet the case of a man who has no realised property, but who is earning a certain income. By that statute the court is not empowered to impose a liability to pay a lump sum, but can only order weekly or monthly payments, and has power to alter the time or amount of those payments. The order is irrespective of realised property, and the payments are to be made out of earnings, and that shows what this kind of alimony is. The personal earnings of a bankrupt after his bankruptcy do not go to his creditors, but go into the pocket of the bankrupt, notwithstanding his bankruptcy. Therefore, in the present case, the wife takes nothing from the creditors, for the order for payment of alimony applies only to future payments, which cannot go to the creditors. If it is held that the order for attachment cannot be made, the result is that by a self-imposed bankruptcy the debtor sets the order of the High Court at defiance. It would be strange if, in consequence of any oversight, he were able to do so.

F

G

It was urged that the future instalments can be valued; but I fail to see how this can be done, for the alimony is not necessarily payable for life, because the order may be rescinded or varied; and if, as has been suggested, the parties did make a stipulation that no further order should be made, that stipulation is not binding, and the alimony may at any time be stopped, or altered, or increased by a further order of the court; and, therefore, it cannot be valued. On the ground that it was not intended that such an order as this should be interfered with by bankruptcy, and on the ground that the alimony cannot be valued, and, therefore, the debtor is obliged to pay it notwithstanding his bankruptcy, I am of opinion that CAVE, J., had power to make the order for attachment, and this appeal fails.

H

BAGGALLAY, L.J.—I am of the same opinion. The substantial question raised is whether the obligation to pay under an order for the payment of alimony is a debt or liability which is provable in bankruptcy under the Bankruptcy Act, 1883, s. 37. I entertain a strong opinion that it is not. It was held in *Prescott v. Prescott* (1) that because the amount might be varied, or the alimony might be withdrawn by a subsequent order, therefore there were no means of putting a value on it. It is not in the nature of an annuity or payment of a fixed amount, for it might cease or vary at any time.

I

BOWEN, L.J.—I am of the same opinion, and I entirely concur with the view of the Master of the Rolls as to the moral aspect of the case. The legal question is whether arrears of alimony come within the Debtors Act, 1869, s. 5. Down to the date of that Act payment of such arrears was enforced under the Matrimonial Causes Act, 1857, by attachment. Unless payment can now be enforced under the Debtors Act there are no means of enforcing it. I think it is not too wide a construction to hold that there is a debt due in pursuance of the order of a court within the meaning of s. 5. It is not disputed that there is a debt due which is to be enforced in pursuance of the order of the court, and it was so held in *Bailey v.*

Bailey (2). It has been the practice of the Divorce Court to enforce payment by an order for attachment. The decision of JAMES, V.-C., in *Hewitson v. Sherwin* (3), dealing with an order for payment of costs, shows that s. 5 of the Debtors Act, 1869, includes debts which are not debts at common law. The only question here is whether the debtor can ask his wife to take a dividend and starve. *Prescott v. Prescott* (1) is opposed to the view that he can. In *Re Robinson* (4) the judgments of SIR BALIOL BRETT, M.R., and COTTON and LINDLEY, L.JJ., show what alimony is. It seems to me to be a wild idea to suppose that the liability to pay alimony is a liability capable of being proved in bankruptcy. If it were so it must be capable of being estimated in some way or other, which this liability is not. I wish to point out that in such cases as the present it is important that the order should be properly drawn up.

Appeal dismissed.

Solicitors: *W. Gordon Place, Leicester; Field, Roscoe & Co.*

[Reported by P. B. HUTCHINS, ESQ., Barrister-at-Law.]

IN THE GOODS OF GUNSTON. BLAKE *v.* BLAKE

[COURT OF APPEAL (Sir George Jessel, M.R., Brett and Holker, L.JJ.), February 13, 14, 1882]

[Reported 7 P.D. 102; 51 L.J.P. 36; 51 L.J.Ch. 377;
46 L.T. 641; 30 W.R. 505]

Will—Execution—Signature—Acknowledgment—Need for witnesses to see, or be given opportunity of seeing, signature—Need for testator to state that document is his will—Wills Act, 1837 (7 Will. 4 and 1 Vict., c. 26), s. 9.

To constitute a sufficient acknowledgment within the Wills Act, 1837, s. 9, by the testator of his signature to a will the witnesses must both see, or have the opportunity of seeing, the testator's signature on the document, and the testator must say in their presence something equivalent to: "That is my will. That is my signature." Where the attesting witnesses cannot see the signature and have no opportunity of seeing it, it is immaterial what the testator says.

Dictum of LORD PENZANCE in *Beckett v. Howe* (1) (1869), L.R. 2 P. & D. at p. 5, not followed.

Notes. Distinguished: *Daintree v. Butcher and Fasulo* (1888), 13 P.D. 102. Explained and Distinguished: *Neal v. Denston* (1932), 48 T.L.R. 637. Applied: *Re Gibson*, [1949] 2 All E.R. 90. Referred to: *Ford v. Kettle* (1882), 9 Q.B.D. 139; *Wright v. Sanderson* (1884), 9 P.D. 149; *Whiting v. Turner* (1903), 89 L.T. 71; *Pearman v. Charlton* (1928), 44 T.L.R. 517; *Re Linley, McDonnell v. Linley* (1949), 207 L.T.Jo. 372; *In the Estate of Bercovitz*, [1961] 2 All E.R. 481.

As to formal validity of wills, see 39 HALSBURY'S LAWS (3rd Edn.) 875-883; and for cases see 44 DIGEST 262-266. For the Wills Act, 1837, s. 9, see 26 HALSBURY'S STATUTES (2nd Edn.) 1332; and for the Wills Act (Amendment) Act, 1852, see *ibid.* 1354-1356.

Cases referred to:

- (1) *Beckett v. Howe* (1869), L.R. 2 P. & D. 1; 39 L.J.P. & M. 1; 21 L.T. 400; 33 J.P. 807; 18 W.R. 75; 44 Digest 265, 932.
- (2) *Hudson v. Parker* (1844), 1 Rob. Eccl. 14; 3 Notes of Cases, 236; 8 Jur. 786; 163 E.R. 948; 44 Digest 258, 850.

- A (3) *Gwillim v. Gwillim* (1859), 3 Sw. & Tr. 200; Sea. & Sm. 26; 29 L.J.P. & M. 31; 23 J.P. 825; 164 E.R. 1251; 44 Digest 261, 877.

Also referred to in argument:

- Cooper v. Bockett* (1843), 3 Curt. 648; 2 Notes of Cases, 391; 7 Jur. 681; 163 E.R. 855; on appeal (1846), 4 Moo.P.C.C. 419, P.C.; 44 Digest 268, 981.
- B *Lloyd v. Roberts* (1858), 12 Moo.P.C.C. 158; 14 E.R. 871, P.C.; 44 Digest 283, 1155.
- In the Goods of Huckvale* (1867), L.R. 1 P. & D. 375; 36 L.J.P. & M. 84; 16 L.T. 434; 16 W.R. 64; 44 Digest 258, 843.
- In the Goods of Swinford* (1869), L.R. 1 P. & D. 630; 38 L.J.P. & M. 38; 20 L.T. 87; 33 J.P. 231; 17 W.R. 536; 44 Digest 281, 1137.
- C *Pearson v. Pearson* (1871), L.R. 2 P. & D. 451; 40 L.J.P. & M. 53; 24 L.T. 917; 19 W.R. 1014; 44 Digest 264, 928.

Appeal by the plaintiff from a decision of SIR JAMES HANNEN, P., refusing to grant probate of a purported will of Mrs. Mary Gunston on the ground that it was not validly executed.

- The plaintiff, as executor of Mrs. Mary Gunston, of Holderness House, Brixton Road, Surrey, propounded a will alleged to have been executed by her on Aug. 12, 1880. She died on Mar. 14, 1881, possessed of property amounting to £30,000. Probate of the will was opposed by certain of her relatives, and the question was whether the will was signed by the testatrix in the presence of two persons whose names appeared as attesting witnesses, or whether, if not signed in their presence, the signature was duly acknowledged as hers by the testatrix in their presence,
- E so as to comply with the requirements of the Wills Act, 1837. The testatrix had consulted a Mr. Chillingworth, a friend of her family, who had been a clerk in the Probate Office, about making her will, and it appeared that he had given her written directions as to the form in which a will should be drawn and executed. He also gave her a form of attestation clause, which she herself copied out at the foot of the will. The clause stated that the will had been signed by the testatrix
- F in the presence of the two witnesses, but it did not say that it had been acknowledged. The attesting witnesses were two domestic servants in the employment of the testatrix. The effect of the evidence given by the two attesting witnesses was that, although the testatrix called them into the room to affix their names to the document which was after her death propounded as her will, they did not see her sign the same, nor did they see her signature when they signed their own names; and that they did not distinctly understand that what they were signing
- G was her will.

- SIR JAMES HANNEN, P., came to the conclusion that there was no evidence that Mrs. Gunston attached her signature to the paper in the presence of the attesting witnesses, or that she acknowledged to them that her signature was attached to it, or that the document was her will. He, therefore, refused to
- H grant probate of the instrument. The plaintiff appealed.

By the Wills Act, 1837, s. 9:

- "No will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned; (that is to say,) it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction, and such signature shall be made and acknowledged by the testator
- I in the presence of two or more witnesses present at the same time, and such witnesses shall attest and subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

Dr. Deane, Q.C., and *H. F. Dickens* for the plaintiff.

Inderwick, Q.C., *C. A. Middleton* and *T. Lee Roberts* for the defendants.

SIR GEORGE JESSEL, M.R.—I regret that I am unable to come to the conclusion that the will in this case has been duly executed. I regret it, because from a mere defect in form this lady's last wishes cannot be carried out. But

the real question is whether what the law requires for the due execution of a will has been complied with. Upon the evidence I am of opinion that the will has not been signed by the testatrix in the presence of the attesting witnesses; it shows that the signature of the testatrix had been affixed before they came into the room. A

The question, therefore, is, whether the signature of the testatrix has been duly acknowledged by her in the presence of the witnesses. I agree in the statement of the law on this point contained in JARMAN ON WILLS (4th Edn.), p. 108: B

"There is no sufficient acknowledgment unless the witnesses either saw or might have seen the signature, not even though the testator should expressly declare that the paper to be attested by them is his will."

I will add that, in my opinion, it would not be sufficient if the testator said: "My signature is inside the will," unless the witnesses had had an opportunity of seeing the signature. C

There is a great deal of authority on the point, but it will only be necessary to mention three cases. The first is *Hudson v. Parker* (2). There DR. LUSHINGTON says (1 Rob. Eccl. at p. 25):

"How is it possible that the witnesses should swear that any signature was acknowledged unless they saw it? They might swear that the testator said he acknowledged a signature, but they could not depose to the fact that there was an existing signature to be acknowledged. It is quite true that acknowledgment may be expressed in any words which will adequately convey that idea, if the signature be proved to have been then existent; it would be quite sufficient to say, 'That is my will,' the signature being there and seen at the time, for such words do import an owning thereof." D E

That is quite clear.

In *Beckett v. Howe* (1), however, a different rule was undoubtedly laid down by LORD PENZANCE. He said (L.R. 2 P. & D. at p. 5):

"The doctrine of *Gwillim v. Gwillim* (3) is this, that if the testator produces a paper and gives the witnesses to understand it is his will, and gets them to sign their names, that amounts to an acknowledgment of his signature, if the court is satisfied that the signature of the testator was on the will at the time. Whether that decision was right or wrong, I have not to determine; it was founded on other cases. Provided the testator acknowledges the paper to be his will, and his signature is there at the time, it is sufficient." F G

I dissent from this proposition, and agree with DR. LUSHINGTON. The argument is founded on the notion that a statement made by a testator: "This is my will," implies that his signature is affixed to it. That is not so, for until the document has been attested, it is not a valid will; it is only what the testator intends to be his will. He may intend to sign it afterwards, just as he means it to be attested afterwards; the statement that it is his will does not necessarily involve signature. LORD PENZANCE, however, does not intend to lay down the proposition himself; he only intends to follow what he supposed to be the decision of SIR CRESSWELL CRESSWELL in *Gwillim v. Gwillim* (3). I, however, think that SIR CRESSWELL CRESSWELL did not really intend to decide anything of the kind, though I do not mean to say that it is not possible to read his judgment as LORD PENZANCE has done. But in that case, if the signature was on the will, it was impossible under the circumstances that the witnesses should not have had an opportunity of seeing it, and the argument turned on the question whether the name of the testator was or was not there at the time of the attestation. I cannot find a word in the judgment of SIR CRESSWELL CRESSWELL to show that he was of opinion that, if the attesting witnesses could not see testator's signature, his saying to them "This is my will" would be a sufficient acknowledgment. The supposed doctrine, therefore, rests entirely on the statement of LORD PENZANCE in *Beckett v. Howe* (1) H I

A of the effect of *Gwillim v. Gwillim* (3), and when that case is examined it appears that the doctrine has really no foundation at all.

The only remaining point, then, is this: Did the witnesses in the present case see the signature of the testatrix? I am of opinion on the evidence that they did not. It seems to me to be most satisfactorily—or, I would rather say, most unsatisfactorily—proved that the witness did not and could not see the signature of the testatrix. Most reluctantly, therefore, I am obliged to say that the will has not been duly executed.

BRETT, L.J.—There can be no doubt that the testatrix signed the document intending it to be her will, and that it contained her last intentions as to her property. No one, therefore, can be astonished that the court has made every effort to uphold it, and one must feel distressed, and more than distressed, that its validity is to depend on the mere accident whether the testatrix placed a piece of blotting paper a quarter of an inch higher or lower. But the case must be decided on the proper interpretation of the Wills Act. I think that the learned President of the Probate Division must be taken to have come to the conclusion from the evidence, and the conclusion seems borne out by the appearance of the document itself, that blotting paper was so placed that the witnesses, not only did not, but could not, see the signature of the testatrix. The question then raised is whether it is a sufficient acknowledgment of her signature if a testatrix, when two witnesses are present for the purpose of attesting a document, should say in their presence: "This document is my will," if at the time the witnesses did not and could not see the signature. That is a point of law, and on this point we must give our judgment. There seem to be conflicting decisions, and we must, accordingly, exercise our own judgment on the question independently almost, if not quite, of every former decision.

It is clear that *Hudson v. Parker* (2) dealt exhaustively with the very point, and the opinion of DR. LUSHINGTON was that under the Wills Act, 1837, where a will has not been signed by the testatrix in the presence of two witnesses, and where it is necessary, therefore, to rely on an acknowledgment under the statute, then, even though the signature be there, and whatever is done in the presence of two witnesses together at the same time, if they do not have an opportunity of seeing the signature, whatever the testator may say there is not an acknowledgment in the meaning of the words of the statute. To make it such an acknowledgment they must see or have the opportunity of seeing the signature. When witnesses are required to attest the signature, they must see or have the opportunity of seeing the testator signing the document. The doctrine is the same where the testator has to acknowledge his signature. When, in order to constitute a valid attestation, the witness must see the testator sign, so when a signature is to be acknowledged they must see that there is a signature, and the testator must in their presence say something equivalent to: "That is my signature." If they do not have the opportunity of seeing the signature, even if he say before them: "My signature is in this instrument," that will not do. That I take to be the decision of *Hudson v. Parker* (2).

It is said that *Gwillim v. Gwillim* (3) before SIR CRESSWELL CRESSWELL, and *Beckett v. Howe* (1) before LORD PENZANCE are to the contrary. As to the latter case there is no doubt that it is. It is said that LORD PENZANCE decided it on the authority of *Gwillim v. Gwillim* (3) and that that case does not decide what his Lordship thought it did. As regards this proposition I feel very great difficulty. There has never been, certainly not in our time, so great a master of what I would call transparently lucid exposition as SIR CRESSWELL CRESSWELL, and, therefore, when I find that learned judge saying this: "I am, therefore, at liberty to judge from the circumstances of this case, whether the name of the testator was on the will at the time of the attestation or not," I cannot bring my mind to think that the proposition which he thought he had to solve was only whether the signature was or not on the will at the time of the attestation. Moreover, if

there is a judge who is less likely to make a mistake as to what another judge has said, that judge is LORD PENZANCE. A clearer mind does not exist; and, therefore, when he comes to the conclusion that SIR CRESSWELL CRESSWELL meant what he says he meant, it strengthens my view as to the meaning of SIR CRESSWELL CRESSWELL in that case. Therefore, we are reduced to the misfortune that we are differing from both those judges. It may be said that in *Gwillim v. Gwillim* (3) the point was not raised or was not argued, and *Hudson v. Parker* (2) was not even cited—the argument went on another line—but I do think that SIR CRESSWELL CRESSWELL did intend to lay down the proposition of law which LORD PENZANCE understood him to lay down. A

On mature consideration, all I can say is that I differ on this question from those judges, and I feel bound to say that I entertain much more doubt as to the propriety of my decision than of theirs. But it is our duty to decide to the best of our powers, and I am of opinion that, according to the true construction of this statute, for there to be a valid acknowledgment the witnesses must see, or have the opportunity of seeing, the signature. Where the witnesses cannot see, or have no opportunity of seeing, the signature, it is immaterial what the testator says. There cannot be an acknowledgment. But when the signature is there and the witnesses see or have the opportunity of seeing it, then, if the testator says: "This is my will," or words to that effect, that is sufficient acknowledgment, although he does not say this is my signature. I, therefore, think that this will cannot stand. B C D

HOLKER, L.J.—I also regret that the court is constrained to come to a conclusion which will invalidate the will, but the court must be relentless and must judge according to law and fact, without regarding the possible consequences of the decision it feels bound to give. E

The appeal has been argued on two grounds—first, that the evidence was not enough to show that the testatrix did not sign her will in the presence of two witnesses; and, secondly, that, if she did not, she acknowledged her signature before other witnesses. The first ground was put forward by the plaintiff rather on the suggestion of the court. The will is, on the face of it, in due form; the lady who made the will was properly instructed as to what she had to do; she knew that it was necessary to sign it before the witnesses, and that they should sign in her presence; the attesting clause was in proper form. It is said that all these matters being strictly correct, the maxim of law, *omnia præsumuntur rite esse acta*, must apply. It is further said that the result should be the same, even though this finding would not be quite in accordance with the testimony of the witnesses. That might be the case if the witnesses who came forward to prove the will had been in doubt or could not remember whether they did or did not see the testatrix sign. The fact that everything appears to have been rightly done would entitle the court to come to the conclusion that they did in fact see her sign. But when you have to prove a will strictly, and if the witnesses say, or one of them says, they did not see her sign, it is impossible to hold that there is proof of due execution. Therefore, where as here one positively says that she did not see the testatrix sign, and the other doubts, it is clear that that kind of testimony is not sufficient to establish the validity of the will. F G H

The other ground which was relied on was that there was here a sufficient acknowledgment of the signature of the testatrix to her will made to the two witnesses. What sort of acknowledgment is enough? According to the statute the signature is to be made in the presence of two witnesses, or the signature is to be acknowledged in the presence of two witnesses. For what purpose? To enable them to testify to the signature or to the acknowledgment of the signature. It is clear that good sense requires that the acknowledgment to which the witnesses are to bear testimony should be an acknowledgment of a signature seen or capable of being seen by the witnesses. Although the words of the statute are, "such witnesses shall attest the will" and not "the signature," it seems to me that it I

A comes to the same thing, for when the document is properly signed or acknowledged in the presence of the witnesses, it becomes a will. So to my mind, to bear testimony to a will is the same thing as to bear testimony to the signature.

It was decided in *Hudson v. Parker* (2) that the true view of the section was that, to constitute an acknowledgment sufficient within the statute, the witnesses must see, or be able to see, the signature of the testator. If that is so, there is
 B no such acknowledgment in the present case, because, according to the evidence, the signature of this testatrix was carefully concealed. Certainly both witnesses did not see the signature. Putting that difficulty out of the way, I should think it was not enough to prove that the witnesses saw the signature; they should also know what the document which is signed really was. The evidence goes to this, that this lady never said: "This is my will." According to one witness she said:
 C "We have all our little wishes and this is one of mine." According to the other she said: "It is a little whim of mine." It is not very extraordinary that this lady, getting these two servants to attest, should not care for them to know that this was her will. She might be afraid of exciting curiosity. At any rate one witness says in her evidence that, if the testatrix had said that it was her will, she would have taken more notice. The testatrix did not say that it was her will,
 D she did not say even that her signature was under the blotting-paper. Therefore, even if *Hudson v. Parker* (2) were out of the way, it would be a difficult thing to say that her signature was acknowledged in the presence of two witnesses. I am, therefore, of opinion that this decision of the learned President was right and must be affirmed.

Appeal dismissed.

E Solicitors: W. H. Orchard; Lucas & Son; Bell, Brodrick & Grey; Cooper & Walker.

[Reported by E. S. ROCHE, Esq., Barrister-at-Law.]

F

TATE & SONS v. HYSLOP

G

[COURT OF APPEAL (Sir Baliol Brett, M.R., Baggallay and Bowen, L.JJ.), June 12, 1885]

[Reported 15 Q.B.D. 368; 54 L.J.Q.B. 592; 53 L.T. 581;
 1 T.L.R. 532; 5 Asp.M.L.C. 487]

H *Insurance—Marine insurance—Proposal—Non-disclosure of material fact—*
"Material"—Fact affecting decision of insurer to accept risk and on what
terms—Insurance of cargo unloading into lighters—Agreement between cargo
owner and lighterman—Lighterman liable only for negligence—Agreement not
disclosed to underwriter.

I

In effecting a policy of insurance the assured must disclose to the insurers all material facts which are known to him and not known to the insurers, or which they are not bound to know. The test whether a fact is material is whether a prudent and experienced insurer would take that fact into consideration in deciding whether to accept the risk, and, if so, on what terms, in particular, in arriving at the premium to be charged.

The defendant underwrote a policy of insurance on the plaintiffs' goods, including risk in lighters. The plaintiffs had entered into an arrangement with a lighterman by which he was to land their goods on the terms that he was not to be liable for loss unless caused by negligence. This arrangement was not

disclosed to the defendant, and he was not aware of its existence. It was proved that a higher premium was usually charged where goods were landed on such terms than that charged where lightermen undertook the liability of common carriers. A

Held: as the extent of the lighterman's liability would affect the rate of premium, the nature of the arrangement between the plaintiffs and the lighterman ought to have been disclosed to the defendant, and, therefore, the plaintiffs were not entitled to recover on the policy. B

Notes. Considered: *The Bedouin*, [1894] P. 1. Referred to: *Price v. Union Lighterage Co.* (1903), 8 Com. Cas. 155.

As to non-disclosure when effecting insurance policy, see 22 HALSBURY'S LAWS (3rd Edn.) 110-118, 185 et seq., and ss. 17-20 of the Marine Insurance Act, 1906, 13 HALSBURY'S STATUTES (2nd Edn.) 23-25; and for cases see 29 DIGEST (Repl.) 63-65, 191 et seq. C

Cases referred to:

(1) *Harrower v. Hutchinson* (1870), L.R. 5 Q.B. 584; 10 B. & S. 469; 39 L.J.Q.B. 229; 22 L.T. 684; 3 Mar.L.C. 44, Ex. Ch.; 29 Digest (Repl.) 200, 1407.

(2) *Ionides v. Pender* (1874), L.R. 9 Q.B. 531; 43 L.J.Q.B. 227; 30 L.T. 547; 22 W.R. 884; 2 Asp.M.L.C. 266; 29 Digest (Repl.) 149, 870. D

Also referred to in argument:

Tennant v. Henderson, Henderson v. Fettes (1813), 1 Dow. 324; 3 E.R. 716, H.L.; 29 Digest (Repl.) 196, 1359.

Vallance v. Dewar (1808), 1 Camp. 503, N.P.; 29 Digest (Repl.) 196, 1364.

Bates v. Hewitt (1867), L.R. 2 Q.B. 595; 36 L.J.Q.B. 282; 15 W.R. 1172; 29 Digest (Repl.) 193, 1338. E

Rivaz v. Gerussi (1880), 6 Q.B.D. 222; 50 L.J.Q.B. 176; 44 L.T. 79; 4 Asp.M.L.C. 377, C.A.; 29 Digest (Repl.) 124, 679.

Appeal by the plaintiffs from a decision of the Divisional Court (DAY and A. L. SMITH, JJ.), setting aside an order in favour of the plaintiffs made by MANISTY, J., in an action brought by the plaintiffs, sugar refiners in London, against the defendant, an underwriter at Lloyd's, to recover in respect of the loss of sugar which occurred in the Thames while the sugar was being conveyed from a steamship to the plaintiffs' refinery. F

The sugar was insured in steamer or steamers,

"and in boats and lighters while loading and unloading, and until finally delivered at any wharves, docks, landing places, vessels, or refinery at Silver-town, as ordered by the assured." G

The risks insured included

"all risks of transhipment and storage on the route, and of rafts, craft, and lighters in loading and unloading, the transhipment, and particularly of any special lighterage, and while in craft waiting transhipment or landing, or delivery to other vessels after arrival and until delivered at any wharves, docks, landing places, vessels, or elsewhere, as ordered by the assured or their agents, each raft, lighter, or other craft to be considered as separately insured." H

The defence was that when the policies in question were effected the plaintiffs did not disclose a material fact, namely, the existence of an agreement between them and their lighterman, named Hooper, by which the latter was exempted from liability for any loss in craft except such as might be caused by his own negligence. I

At the trial before MANISTY, J., it was shown that before April, 1882, in cases where underwriters had paid for losses occurring while the goods were in lighters, they had been in the habit of suing the lighterman in the name of the assured, and recovering the amount of the losses so paid. In consequence of this an association of the Thames master lightermen caused a notice to be published stating that

- A they would not take upon themselves the liability of common carriers, but would only be liable for loss of or damage to goods resulting from the negligence or wilful acts of their servants. After this, in policies including risk on lighters, the premium charged was higher where the goods were carried on the terms that the lightermen should only be liable for negligence or misconduct than it was where the lightermen were liable as common carriers. On May 20, 1882, shortly before
- B the policies sued on were effected, the plaintiffs' brokers had written a letter to the plaintiffs respecting another loss which had taken place shortly before that date. Their letter was as follows :

C "We have sent the papers relating to craft loss to Messrs. Powell and Jupp, average adjusters, to make up a statement. Of course you have seen the notices in 'The Times' about lightermen's liability, including a letter to-day. Merchants are now insuring the craft risks excluded by lightermen, which seem to comprise all but negligence, at risks varying from 1s. to 2s. 6d. p.c., depending on the distance allowed in the Thames. The rate seems high; but it is not out of proportion to the risks as explained by lightermen. Have you any instructions to give?"

- D The policies sued on were effected through the brokers who had written this letter, without any additional premium for craft risk, and without communicating to the underwriters the terms of the arrangement between the plaintiffs and Hooper. The defendant stated at the trial that he had no knowledge of the existence of this arrangement until some time after the policies had been effected; but it was known to his solicitor, who had conducted an action against Hooper in respect of
- E the previous loss referred to in the broker's letter. The following are the questions which were left to the jury, and their answers :

F "(1) Was the fact communicated to the underwriters that by the existing arrangement between Hooper and the plaintiffs Hooper was liable only in case of negligence?—Answer : It was not communicated direct to the underwriters, but it was disclosed to the defendant's solicitors on Aug. 5. (2) Was the fact of the plaintiffs having that arrangement with Hooper material to the risk; that is to say, was it a fact which a prudent and experienced underwriter would have taken into consideration in estimating the premium?—Answer : Yes. (3) if it was material, was it concealed?—Answer : No. (4) When the insurances were effected on July 21 and 25, and on Sept. 5 and 23, was it the usual usage for merchants to employ lightermen on the terms of the resolution of the Association of Lightermen in April, 1882?—Answer : Yes. (5) Was that usage generally known?—Answer : Yes. (6) Were the underwriters reasonably justified under the circumstances of the case in assuming without inquiry that there would be recourse against lightermen with the liability of a common carrier?—Answer : No, they were not."

- G
- H On these findings, MANISTY, J., gave judgment for the plaintiffs. The Divisional Court set aside the judgment, and entered judgment for the defendant. The plaintiffs appealed.

Webster, Q.C., and Reid, Q.C. (Hollams with them), for the plaintiffs.

Russell, Q.C., and Cohen, Q.C. (Barnes with them), for the defendant.

- I **SIR BALIOL BRETT, M.R.**—In this case the plaintiffs effected a policy with the defendant and others upon goods on board ships or in boats, craft, and lighters. The policy was to include all risks incidental to navigation, and all risks of rafts, craft, and lighters in loading, unloading, and transhipping, and in particular of any special lighterage, and while in craft waiting transhipment or landing or delivery to other vessels after arrival, and until delivered at any wharves, docks, landing places, or elsewhere as ordered by the assured.

The goods arrived in the Thames in a ship, and were put on board a lighter which belonged to a man named Hooper, whose business it was to let lighters.

He had a running agreement with the plaintiffs, as to the construction of which there has been some contention, but which was one of two things—either an agreement which, as between the plaintiffs and Hooper, obliged the plaintiffs at the risk of becoming liable for breach of contract to allow him to carry all goods which were carried for them in ships and were to be taken to a wharf, or an agreement whereby, whenever Hooper should lighter goods for the plaintiffs, certain conditions were to be part of the contract. In either case it was part of the contract that Hooper should only be liable to the plaintiffs in the case of negligence—that is, that, whatever may be the liability of a lighterman under ordinary circumstances, the liability here was so limited that Hooper could only be liable if he were guilty of negligence. A B

The loss is admitted, and the defence is that of concealment of a material fact. Concealments are of two kinds, viz., fraudulent concealment and non-disclosure. Here it is charged against the plaintiffs that from ignorance of what was necessary for them to do under the law, or from carelessness, they did not disclose to the underwriters that which they ought to have disclosed. MANISTY, J., left to the jury certain questions which they have answered specifically. It was not a general verdict, and upon their answers he directed verdict and judgment to be entered for the plaintiffs. The Divisional Court entered verdict and judgment for the defendant, and the plaintiffs now appeal. D

The first finding of the jury is of no value. The defendant's solicitors were not standing agents for their clients to receive mercantile notices in respect of mercantile business. It may be doubted whether there was a disclosure on Aug. 5, but whether there was or not is immaterial. The substantial arguments before us were these. First, whether the jury were justified in answering the second question in the affirmative; and, secondly, if so, whether they were justified in answering the fourth and fifth questions in the affirmative; and, thirdly, if so, whether the answers to those questions materially affect the plaintiffs' case. I have come to the conclusion that the jury were justified in answering the second question as they did, and that the direction on that point was right. It is said that the plaintiffs should have disclosed that they had an arrangement with Hooper which minimised his liability in case of loss. The only effect which it was suggested that could have upon the money position of the underwriters is that, assuming a loss for which they would be liable under the policy to pay the plaintiffs, they would not, by reason of this minimisation of liability have the same valuable recourse over against the lighterman as they otherwise would have in the name of the assured. It is obvious that it could only affect the salvage which the underwriters might have, and if there were nothing else in the case I should have thought that the mere minimisation of the right to salvage would not have been a material fact. E F G

But something else has happened, for there is evidence that it had become more or less publicly known that some lightermen, at all events, would not carry goods unless their liability was minimised by arrangement, and, therefore, it was obvious that two states of things might arise so as to affect the underwriters' right to salvage where there was a loss on board lighters. It is not disputed that upon such a policy as this the underwriters would be liable for loss whether the lighter belonged to the owner of the goods or to another person, or whatever might be the arrangement for lighterage between the lighterman and the person for whom the goods are carried. Therefore, it signifies not to whom the lighter belonged, for the underwriters would be equally liable for loss on board the lighters. It was disputed whether, if the lighter belonged to wharfingers, they would have that liability in the absence of a special contract. To my mind, they would. If goods are lost in the lighter of a dock company, the company are carriers of goods on the water, and, therefore, are subject to the full liability unless by arrangement that is restricted. Therefore, the underwriters finding that in the one case they would have the advantage of using the name of the assured against the persons who were under full liability, and that in the other case there was that arrange- H I

A ment, came to the conclusion that the two positions were different as to their mercantile interest, and that they ran greater risk of money loss in the one case than in the other. Upon that they decided that in the one case they would charge a larger premium, and that where they had full protection they would charge less, i.e., that they would have two rates of insurance. They made known that such was their resolution, so as to inform people that, if they insured with them, B they would have to pay different premiums according to the different states of circumstances.

There is evidence that this had become known to the plaintiffs, either personally or by their brokers, before they took out these policies. It seems to me that the moment they knew that there were two rates of insurance which would arise in consequence of their taking one position or another with regard to the landing C of their goods, it became material to the underwriters to know what was the plaintiffs' intention at the time. Certainly, if the plaintiffs had bound themselves, it became material for the underwriters to know that fact, but, even if the contract did not bind the plaintiffs to land their goods by Hooper's lighters, yet it seems to me that where there is a difference in the premium known to the assured, and where they have the intention at the time when they insure of D landing their goods under circumstances which they know would, if disclosed, cause the underwriters to require a larger premium, this is a matter which a prudent and experienced underwriter would take into consideration in estimating the premium, or in deciding whether he would accept the risk, and is, therefore, a material fact to be made known. Therefore, that question being rightly left to the jury, they were justified in coming to the conclusion to which they came.

E The authorities show that the materiality is not as to the risk, but whether the fact, if disclosed, would influence the underwriters as to entering upon the insurance or as to the terms upon which they would insure. The case most like this is *Harrower v. Hutchinson* (1). There the vessel and the goods insured were lost in returning from a port which was not known to the underwriters. An underwriter is bound to know the mercantile geography of the countries to which F the voyage is insured—that is, he is bound to have the knowledge which underwriters of ordinary skill have. But if there are any circumstances with regard to a port, which, although it exists, is not so well known that all careful underwriters must be taken to know about it, then the case may be brought under the definition which requires the assured to disclose any peculiarity of the port. As a fundamental rule, an assured has to disclose any circumstance which would G affect the determination of a prudent and experienced underwriter, and is known to the assured and not known, and ought not to be known, to the underwriter. In *Harrower v. Hutchinson* (1) it was proved that the port existed, but by reason of it not having been sufficiently frequented it was not to be assumed against any underwriter that he was bound to know of it, and it was proved that the particular underwriter did not know. The port, to which the insured vessel had H to go to complete loading, was a rather more dangerous port than other ports, facts known to the assured. Therefore, that was a case where the assured knew of a larger danger, and the underwriter did not know, and was not bound to know it, and, accordingly, the court held that the assured ought to have disclosed the fact that he was sending the ship to that port. The difficulty in that case was whether the underwriter ought not to be taken to know the condition of that port; I but it was held that, under the particular circumstances of the case, the port being not so largely frequented as to make it known to the generality of careful underwriters, the underwriter was not bound to know.

Applying that doctrine here, the assured knew that they had made up their minds at the time of the insurance to land the goods by this lighterman. That was not disputed. They knew that they had a particular arrangement with him, and that, if he did carry their goods, he would be only under a limited liability. It is clear that the underwriter did not know of this arrangement. Therefore there is here a matter which the assured knew and the underwriter did not know.

Then comes the question whether the underwriter ought to have known. That question presents greater difficulty. The evidence which justifies the second finding is that there was a diversity of practice, and that some goods are carried by lightermen with full liability and others with limited liability, caused in some cases by agreement and in others by circumstances. If the fourth finding means that the practice is so general that almost every merchant employs a lighterman with limited liability, it seems to me to destroy and cut away the very ground on which the second finding was based. It leaves only one mode of landing goods. Is it true to say that there is only one mode of landing goods, that is, under limited liability? It seems to me from the evidence on both sides, that it is not true to say that there was a general usage to employ lightermen only under one set of circumstances. The evidence shows nothing which can support and make reasonable the finding of the jury upon the fourth question, and if the fourth falls the fifth also falls. Therefore the case must be decided on the footing that there was no evidence to support the findings on the fourth and fifth questions. It must rest upon the second finding. I come to the conclusion that the judgment of the Divisional Court must be affirmed, and that the verdict must be entered for the defendant. I take the third answer to mean "was not disclosed." I do not think the fact was concealed in any other way, for there is no symptom of fraudulent concealment.

BAGGALLAY, L.J.—I am of the same opinion. The ground of my conclusion is that there was evidence to support the second finding, but there was no evidence to support the third and fourth.

BOWEN, L.J.—I am of the same opinion. The first question is what is the legal test to be applied to the evidence. It is established law that a person who deals with underwriters must disclose to them all material facts known to him and not known to the insurers, or which they are not bound to know. In order to make that proposition clear, of course it becomes necessary to understand what one means by a material fact. That definition also has been conclusively established by reason and authority. It is the duty of the assured to communicate to the underwriter all facts in his own knowledge which would affect the mind of the underwriter, either as to taking the contract or as to the premium. The question of materiality depends upon the effect which the communication would have upon the underwriter at the time when the policy is made. Therefore, in answering the question whether a fact is material, one may shortly dispose of it by saying that it depends upon whether or no a prudent underwriter would take that fact into consideration in arriving at the premium to be charged. The rule has been laid down over and over again, and is stated clearly in *Ionides v. Pender* (2).

That being the law, what are the facts to which we have to apply it? The importers of this produce, which is to be landed in the Thames, use lighters for the purpose of discharging the cargoes. Down to the year 1882 no importance seems to have been attached by the underwriters to the way in which importers dealt with lightermen. Owing to a previous litigation, in 1882 the lightermen came together and combined for the purpose of insisting upon being discharged from the liability which is known as that of common carriers. Their combination was known to merchants, and was also known to underwriters, who thought the determination of the lightermen to resist the liability of common carriers was of sufficient gravity to affect the underwriting of policies and the premiums to be charged. As long as it remained uncertain down to the time when the ship arrived whether the cargo would be landed by a lighterman who remained subject to common law liability or by one who took the goods upon the terms of being exempted, then, unless the underwriters made it part of the terms of the bargain between them and the assured, and insisted that the goods should be landed one way or the other, there was nothing which the assured in such a case knew and the underwriters did not know, and, therefore, there could be nothing which the

- A assured was bound to disclose, the non-disclosure of which was material, because the underwriters would be bound to know the ordinary course of trade. But the moment the merchant makes an arrangement which determines the uncertainty in one direction, and either binds himself by agreement (as seems to have been the case here) with a lighterman that the latter shall carry the goods without being liable to the common law liability, or even supposing the merchant does
- B not bind himself by a binding agreement to employ a lighterman, and that the arrangement in this case falls short of that mutual contract which at first sight I was inclined to think it did, it only amounts to this, that a merchant has made an arrangement which for business purposes practically governs the future, and which at the time when he makes the policy he intends to carry out; then a fact exists which is in the knowledge of the assured and not in the knowledge of
- C the underwriters.

Is it then material that such a fact should be disclosed? The evidence here was that from and after May, 1882, premiums were affected by the existence or non-existence of such an arrangement, and if one wishes for a conclusive finding upon the question whether this arrangement and intention on the part of the merchant was material, one finds it in the brokers' letter which gave a conclusive

D indication to their principals that in their minds, as well as in the minds of the underwriters, such an arrangement should be disclosed. It is impossible under such circumstances, having regard to the true definition of materiality, to doubt that the finding of the jury must stand which says that the fact of the arrangement having been made was material to the risk; i.e., was a fact which a prudent underwriter would have taken into consideration in estimating the premium.

- E With regard to the question whether the mere existence of facts which would lessen the salvage are facts which should be disclosed, I offer no opinion. It seems to me that, although an arrangement lessening salvage is not necessarily material, it may be so, and that the real test is whether the underwriter would be affected in estimating premium. The arrangement here between the merchants and the lightermen is not a mere lessening of salvage, for the existence of such an arrangement may affect the danger of the goods being lost. I found my judgment upon this—that at the time when the policy was effected there was an existing arrangement between the assured and the lighterman, which was intended by the assured to be acted upon, and the existence of which would materially affect the underwriters in estimating the premium. If that is a true view of the case, the remaining answers to the questions seem to me to be embarrassing.
- F

- G It is within the rights of a merchant to employ a lighterman upon any terms, provided he has not at the time of the policy elected to take a particular course, but, if there is a fixed agreement at the time of the policy, that should be disclosed. If that should be disclosed, how can it be said that underwriters should never assume that there would be recourse against the lighterman, or that there was a general usage when the goods did arrive to deal with them in one way or the
- H other? The complaint is not that that recourse has been taken away in the events which happened, but that the underwriters were not told of the special agreement at the time when the policy was made. I am of opinion that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Hollams, Son & Coward; Waltons, Bubb & Johnson.*

[*Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.*]

LETTERSTEDT v. BROERS AND ANOTHER

[PRIVY COUNCIL (Lord Blackburn, Sir Robert Collier, Sir Richard Couch and Sir Arthur Hobhouse), February 27, 28, 29, March 22, 1884]

[Reported 9 App. Cas. 371; 53 L.J.P.C. 44; 51 L.T. 169]

Trustee—Removal—Ground for removal—Continuance in office detrimental to proper execution of trust—Friction between trustee and cestui que trust—Regard for welfare of beneficiaries.

It is the duty of a court of equity to see that trusts are properly executed, and, therefore, even though no charge of misconduct is made out against a trustee, the court will remove him if satisfied that his continuance in office would be detrimental to the proper execution of the trust. Friction or hostility between the trustee and the immediate possessor of the trust estate is not of itself a reason for the removal of the trustee, but it will not be disregarded by the court when grounded on the mode in which the trust has been administered. It must always be borne in mind that trustees exist for the benefit of those to whom the creator of the trust has given the trust estate, and the main guide for the court, when considering whether a trustee should be removed, must be the welfare of the beneficiaries.

Notes. Referred to: *Ewing v. Orr Ewing* (1885), 10 App. Cas. 453; *De Montmort v. Broers* (1887), 13 App. Cas. 149; *Re Wrightson, Wrightson v. Cooke*, [1908] 1 Ch. 789; *Re Cotter, Jennings v. Nye*, [1915] 1 Ch. 307.

As to the removal of trustees, see 38 HALSBURY'S LAWS (3rd Edn.) 941-943; and for cases see 43 DIGEST 755-758.

Appeal from two judgments and an order of the Supreme Court of the Cape of Good Hope in an action brought by the appellant against the respondents.

The appellant was the only daughter of Jacob Letterstedt, who died in 1862, and the first respondent was the secretary of the "Board of Executors of Cape Town," an incorporated joint-stock company established for the purpose, among others, of administering estates to which they were appointed executors, for which service they charged a commission. Jacob Letterstedt was possessed of considerable real and personal property, and he appointed the board and two other persons executors of his will. The other executors had died, and this action was brought against Broers, as secretary of the board, which was the sole remaining executor, for an account, and to have the board removed from the executorship on the ground of breach of trust in carrying on the business of the testator and charging excessive and improper commissions, and for misconduct and malversation in the trusts and administration of the estate. The other respondent, Giddy, was added as a nominal defendant, by order of the court, to represent the interests of the reversioners after the death of the appellant.

H. Davey, Q.C., Jeune and Elgood for the appellant.

H. Matthews, Q.C., Rigby, Q.C., and H. D. Greene for the respondent Broers.

E. W. Byrne for the respondent Giddy.

Mar. 22, 1884. **LORD BLACKBURN.**—This is an appeal against part of a judgment of the Supreme Court of the Colony of the Cape of Good Hope, dated July 11, 1879, an order dated Sept. 14, 1880, and a judgment of July 2, 1881. These judgments and order were made in an action commenced by the appellant in June, 1878, against the defendant Broers, in his capacity of secretary to "the Board of Executors of Cape Town," who were the principal defendants below, and are respondents now. This is a body incorporated by an Ordinance of the Cape of Good Hope. It is not necessary to say more of them than that, by the terms of their deed, they might act as executors and trustees, on the terms that they were to have remuneration for so acting. The other respondent was added during

A the litigation by directions of the court below. It is not necessary to notice him further until the costs of this litigation are to be disposed of.

It is desirable, before proceeding to discuss the judgments and order, to state so much of the facts as is necessary to make them intelligible. The appellant is the only daughter of Jacob Letterstedt. She was born on May 13, 1853, and, consequently, attained the age of twenty-one, on May 13, 1874, and the age of B twenty-five on May 13, 1878. Jacob Letterstedt, her father, died on Mar. 10, 1862, leaving a will. This appeal does not require their Lordships to construe that will, and it is not necessary to state its provisions further than is required to make intelligible the questions which their Lordships are called upon to decide. The testator carried on in his lifetime a brewing, distillery, and malting business, at two places, Mariedahl and Cape Town, and he directed in his will that this C business should be carried on after his death as the same was carried on by him, and that his executors should advance a sufficient capital for the purpose, not exceeding in all £10,000. He makes rather elaborate provisions as to how the business should be carried on by managers; and he directs that the profits of the business should, until his child or children should attain the age of twenty-five years, be divided into six shares, "whereof four shares shall be for the benefit of D my child or children, one share to the manager of the business at Mariedahl, and one share to the manager of Cape Town." He appoints David Thompson to be manager at Mariedahl. At Cape Town he appoints Per Oscar Hedelius, and failing him Tobias Spengler. And he directs that in case of a vacancy the executors shall, when requisite, appoint a fit person to be manager. If the manager at Cape Town prefers it, he is to receive an annual salary of £350, with a further allowance of E £150 for a clerk, instead of a share in the profits. So long as the business is carried on in the above manner, the executors are to appoint two persons to inspect the property and examine the accounts twice in every year, receiving two guineas a day for their trouble.

The testator also at the time of his death carried on a business in partnership with Per Oscar Hedelius under the firm name of Jacob Letterstedt & Co. There F is no direction in the will as to this business, but, under the terms of the deed of partnership, it is clear that the testator was not bound to carry on that business after Jan. 1 next ensuing after the death of Per Oscar Hedelius; that is, as he died on July 6, 1863, after Jan. 1, 1864. What might be the obligations of the testator's executors under that deed during the twenty-one months between the death of the testator in March, 1862, and Jan. 1, 1864, it is not necessary to G consider, but, after that date, they had no authority to carry on the business.

The following parts of the will may conveniently be read :

"I declare that, in case my said daughter shall marry and have a son or sons, such son or the eldest son shall, upon his attaining the age of twenty-one years, be absolutely entitled to the house and premises situated No. 5, Heeren Gracht, including the stores, Nos. 3, 4, and 5, Castle Street; or, in case the H same shall have been sold, the proceeds of the sale of the said house, premises, and stores, provided that, until such son of my said daughter shall attain the age of twenty-one years, my said daughter shall receive the rents of the said property, or the interest of the proceeds thereof, if sold as aforesaid. And I declare that the second son or such other younger son of my said daughter as I shall take my name shall be entitled to the amount of a certain policy effected with the Alliance Life and Fire Assurance Co., London, upon my life for the sum of £3,000, executed in the year 1850, with the interest which shall have accrued thereon from my death when he shall have attained the age of twenty-one years. And, in case there shall be no such son, the same shall fall into and become part of my general estate. And I declare that my said executors shall be entitled to administer the said house, premises, and stores in the Heeren Gracht and Castle Street, or the proceeds thereof, until the same shall devolve upon my grandchildren, and shall also administer the amount

of the said policy of insurance and accumulations until my grandson herein mentioned shall become entitled thereto, or until the same shall fall into my general estate."

The importance of this is that it shows that some, at least, of the trusts to be administered by the executors did not terminate on the appellant attaining the age of twenty-five years, and, in the possible event of her dying before her children attain twenty-one, the question who are to be the trustees during their minority may be of practical importance.

After giving some legacies, the testator proceeds :

"And I devise and bequeath all the rest, residue, and remainder of my estate, property, and effects, as well movable and immovable, and wheresoever situate, and whether the same be in possession, reversion, remainder, or expectancy, which shall remain after payment of my just debts and funeral and testamentary expenses, and not hereby otherwise disposed of, unto my said daughter if and when she shall attain the age of twenty-five years, or marry under that age, the same to be bound with fidei commissum, so that my daughter may enjoy the interest, dividends, and annual income thereof to be paid to her annually upon her receipt, or, in case of her absence from the place of residence, of my executors upon a power of attorney to be executed by her, and, with interest, dividends, or annual income, shall not be under the control of any husband whom she may marry, but shall be applied solely for her use and benefit, and after her death the said residue shall be paid and belong to her child and children upon such child or children attaining the age of twenty-one years being male, or attaining twenty-one years or marrying with consent of parents or guardians being female; and, if she shall die without leaving any child or children who, being a son or sons, shall live to attain the age of twenty-one years, or, being a daughter or daughters, shall live to attain that age or marry, I devise and bequeath my estate, property, and effects, subject to the legacies and bequests hereby given, to the person or persons who, according to the law at the Cape of Good Hope, would be entitled thereto if I died intestate and unmarried. If I should leave any child or children hereafter born, who, being a son or sons, shall attain the age of twenty-five years, or, being a daughter or daughters, shall attain that age or marry under it, I declare that such child or children shall participate in all the legacies, bequests, and benefits hereby given to my said daughter in equal shares with her, and in that case I revoke and withdraw from this will the last clauses hereinbefore contained. And I direct that all moneys and effects which shall accrue by way of rent, profits of business, or otherwise, shall be paid to the Board of Executors, as follows, that is to say, the said rent within six months after the same shall become due, and the said profits within six months after the books shall be closed, and the profits of the business ascertained. I appoint Stads Kadet Carl Johan Malmsten, of Stockholm, Iven Gustav Letterstedt, and Rich Antiquarian B E Hildebrand, guardians of my daughter and of any other child I may leave during their minority; and in case of the death, resignation, or incapacity of any such guardians, or of any guardians to be appointed under this power, I empower the surviving or continuing guardian or guardians, or the executors or administrators of the last surviving or last acting guardian, to appoint a new guardian or guardians in the place of the guardian or guardians so dying, resigning, or becoming incapable. It is my wish that my said daughter, or any other child I may have, shall be educated in the Lutheran religion, and shall reside in Sweden after she or they shall have attained the age of thirteen years. I appoint Tobias Spengler, Per Oscar Hedelius, and the Board of Executors, Cape Town, the executors of my will and testament, and administrators of my estate, with all such power and authority as is required in law, and especially the power of assumption, substitution, and surrogation. I give to the said Board of Executors an annuity of £100 sterling so long as the

- A business at Mariedahl shall be carried on. I declare that if any dispute should arise between the executors hereby appointed the same shall be decided by the vote of the majority, the Board of Executors having in such case one vote as if consisting of one person. I desire that an inventory shall be made of my estate within six weeks after my death, or if I shall die while absent from the Cape of Good Hope within six weeks after information of my death shall be received within the colony. I direct that my executors shall render to the guardians a full and particular annual account of all receipts and payments in respect of my estate, with proper vouchers for the same."

- The will was proved on May 19, 1862, by the three executors, Per Oscar Hedelius who died in 1863, Tobias Spengler who died in 1866, and the board. No fresh executors were appointed under the power of assumption, substitution, and surrogation which the testator especially conferred on his executors, and so in 1866 the board were the sole executors and trustees under the will. After the death of Spengler, certain directors of the board took the management of the Cape Town business. The testator, who was by birth a Swede, and by his will desired that his daughter, after attaining the age of thirteen, which she did in 1866, should reside in Sweden, appointed as guardians Swedish gentlemen, no one of whom resided in the colony, or had, as far as appears, any connection with it. It can hardly be supposed that, if the testator had foreseen what was going to happen in 1866, he would have wished the trusts of his will to be administered thus; and it is not surprising that in 1871, when the appellant was growing up, the state of things became such that she was, or her advisers were, discontented. On April 11, 1872, the guardians announced to the board that, one of the guardians having resigned, they had appointed Madame Lydia de Jouvencel, the mother of the appellant, to be co-guardian in his room. This information was conveyed in a long and ably argued letter, which, though signed by and in the name of Mr. Malmsten, one of the Swedish guardians, bears internal evidence of having been, in part at least, drawn up by a lawyer, probably Mr. C. A. Fairbridge, who represented the appellant in the subsequent litigation. This letter may be considered as the commencement of the litigation between the appellant and the respondent.

- In October, 1872, the other guardians resigned, leaving Madame Jouvencel sole guardian. An action was commenced in the name of Mr. C. A. Fairbridge as curator ad litem of the appellant, then a minor. On her attaining the age of twenty-one it was amended, so as to make the appellant herself the plaintiff. The object of the action was to surcharge the executors with sums stated as amounting to £28,512 2s. 4d., which they had allowed themselves in the accounts of the business carried on by them. Had that action been tried out to the end and a regular judgment obtained, the plaintiff and defendant would have been bound by its result as to the matters involved in that action, but either might, if so advised, have brought other actions for other matters. But a compromise was come to, the terms of which were sanctioned by the court. The Board of Executors rendered liquidation accounts subsequent to Dec. 31, 1872, which have been investigated in this action. The appellant, during the interval between the compromise and the commencement of this action, succeeded in establishing a claim to "her legitimate portion." The effect of this was greatly to reduce the amount subject to the trusts of the will.

- The appellant, on attaining the age of twenty-five, commenced the action in which the judgments and order now appealed against were made. By the first eighteen paragraphs of the declaration the appellant sought an investigation of the accounts from the date of the appointment of the executors, and relief thereupon, and she claimed the right of conducting the testator's business. By para. 19 she charges the board with various acts of misconduct and malversation, mostly before 1873, and these are so expressed as to impute to the board, or at least to those for whom the board was civilly responsible, that they were instigated by

a corrupt motive. In para. 20, she prays that the board may be removed from the office of executors under the will, and that proceedings for the appointment of another executor or executors in the place of the board may be directed to be taken. A

[The judgments appealed from were dealt with in detail, and the judgment of the Judicial Committee continued:] The final judgment of July 2, 1881, directs that the prayer for the removal of the executors be refused, plaintiff to have her costs out of the estate up to the first hearing, the defendants (the executors) up to that time to pay their own costs. The curator to have his costs out of the estate. Their Lordships have felt much anxiety about this judgment. The whole of the matters which have been complained of, and the whole that, if this judgment stands, may yet have to be done by the board, are matters which they had to do, as having accepted the burthen of carrying out the trusts which on the true construction of the will were imposed upon them, and so became trustees. What they had to do as executors, merely, such as paying debts, collecting assets, etc., have long ago been over, and the plaintiff cannot now say they have not been done properly. There may be some peculiarity in the Dutch colonial law, which made it proper to make the prayer in the way in which it was done to remove them from the office of executor; if so, it has not been brought to their Lordships' notice. D The whole case has been argued here, and as far as their Lordships can perceive in the court below, as depending on the principles which should guide an English court of equity when called upon to remove old trustees and substitute new ones.

It is not disputed that there is a jurisdiction "in cases requiring such a remedy," as is said in STORY'S EQUITY JURISPRUDENCE, s. 1287, but there is very little to be found to guide us in saying what are the cases requiring such a remedy—so little that their Lordships are compelled to have recourse to general principles. STORY E says, s. 1289 :

"But in cases of positive misconduct, courts of equity have no difficulty in interposing to remove trustees who have abused their trust; it is not indeed every mistake or neglect of duty; or inaccuracy of conduct of trustees, which will induce courts of equity to adopt such a course. But the acts or omissions must be such as to endanger the trust property or to show a want of honesty, or a want of proper capacity to execute the duties, or a want of reasonable fidelity." F

It seems to their Lordships that the jurisdiction which a court of equity has no difficulty in exercising under the circumstances indicated by STORY is merely ancillary to its principal duty—to see that the trusts are properly executed. This duty is constantly being performed by the substitution of new trustees in the place of original trustees for a variety of reasons in non-contentious cases. Therefore, though it should appear that the charges of misconduct were either not made out, or were greatly exaggerated, so that the trustee was justified in resisting them, and the court might consider that in awarding costs, yet, if satisfied that the continuance of the trustee would prevent the trusts being properly executed, the trustee might be removed. It must always be borne in mind that trustees exist for the benefit of those to whom the creator of the trust has given the trust estate. G H

The reason why there is so little to be found in the books on this subject is probably that suggested in argument. As soon as all questions of character are as far settled as the nature of the case admits, if it appears clear that the continuance of the trustee would be detrimental to the execution of the trusts, even if for no other reason than that human infirmity would prevent those beneficially interested, or those who act for them, from working in harmony with the trustee, and if there is no reason to the contrary from the intentions of the framer of the trust to give this trustee a benefit or otherwise, the trustee is always advised by his own counsel to resign, and does so. If, without any reasonable ground, he refused to do so, it seems to their Lordships that the court might think it proper I

A to remove him; but cases involving the necessity of deciding this, if they ever arise, do so without getting reported. It is to be lamented that the case was not considered in this light by the parties in the court below, for, as far as their Lordships can see, the board would have little or no profit from continuing to be trustees, and as such coming into continual conflict with the appellant and her legal advisers, and would probably have been glad to resign, and get out of an onerous and disagreeable position. But the case was not so treated.

B In exercising so delicate a jurisdiction as that of removing trustees, their Lordships do not venture to lay down any general rule beyond the very broad principle above enunciated, that their main guide must be the welfare of the beneficiaries. Probably it is not possible to lay down any more definite rule in a matter so essentially dependent on details often of great nicety. But they proceed to look carefully into the circumstances of the case. The first and most obvious fact that arrests the attention is the entire change which events made in the position of the board from that which the testator assigned to it. His will is marked by much caution. He appointed three executors. If they differ the majority is to prevail, the board voting as one person. The different branches of the business are to have each its own manager, with a substantial remuneration. Paid commissioners are D to examine the stock and the accounts at frequent intervals. On failure of executors powers are given to appoint new ones. It is quite conceivable that the testator thought that, with such safeguards, it would be for the benefit of all that the board should perform, and be paid for performing, the necessary work. But it is difficult to suppose that he would wish it to be the sole executor, as it became and remained, managing one branch of the business through its own directors, and E appointing no examining commissioners except persons connected with itself. It is true that at the present time the functions of the trustees are of a simple character, perhaps extending little further than the safe custody of the trust estate. But the death of the plaintiff leaving infant children would alter that state of things; and questions might then arise both concerning the brewery business and the rest of the estate, not far differing from those which have caused so much F dissatisfaction.

From the course which has been pursued below there has been no full inquiry into what took place before Jan. 1, 1873, and the charges of mala fides and corrupt motive, cannot, perhaps, be said to be disproved, but they certainly are not proved, and are such as ought not to be assumed without proof to be well founded. The terms of the compromise bind the plaintiff to treat the result of the breaches of G trust to have been such that she elected as most for her benefit to adopt them, and take the things as they stood, rather than undo the whole and take an account. Their Lordships see no reason to doubt that her advisers exercised a sound discretion in advising her to take that course, but it is enough to say that she elected to take it. The compromise equally binds the defendants in so far as they admit that a very considerable sum beyond what they were entitled to had been taken by H them. The accounts rendered to the guardians were not so full as they ought to have been, and did not disclose the amount of commission taken by the board, though before the first action, which resulted in the compromise, or at all events before the compromise itself, the appellant and her advisers had the deficient information supplied.

I As regards the accounts after 1872, their Lordships find it difficult to understand how it was possible for men of business to think themselves entitled to the large sums charged by them in the liquidation accounts for commission, and disallowed. Again, it is impossible to suppose that the executors could really have thought themselves entitled to the sums charged by them, but never paid, for taxation in the master's office. It has been imputed to the executors at the Bar that the disallowed charges for commission have been entered in the accounts in such a way as to amount to concealment and bad faith. Their Lordships do not accept that imputation. But though their Lordships acquit the board of concealment in these accounts, the spirit which permits such charges is naturally offensive to the

appellant and unfair towards the trust estate. They can only be made by persons who are themselves exasperated by the course pursued towards them, and determined to try somehow or other to get remuneration of which they conceive themselves to have been unjustly deprived. The making of such charges, and the vexatious course pursued by the board in opposing the perfectly reasonable inquiry which the plaintiff asked are calculated to introduce additional irritation into a relation which was disturbed enough before, and they have an important bearing on the question whether, in view of the future welfare of the trust estate, it is expedient that the board should remain trustees. It is quite true that friction or hostility between trustees and the immediate possessor of the trust estate is not of itself a reason for the removal of the trustees. But where the hostility is grounded on the mode in which the trust has been administered, where it has been caused wholly or partially by substantial overcharges against the trust estate, it is certainly not to be disregarded.

Looking, therefore, at the whole circumstances of this very peculiar case, the complete change of position, the unfortunate hostility that has arisen, and the difficult and delicate duties which may yet have to be performed, their Lordships can come to no other conclusion than that it is necessary, for the welfare of the beneficiaries, that the board should no longer be trustees. Probably if it had been put in this way below they would have consented. But for the benefit of the trust they should cease to be trustees, whether they consent or not. Their Lordships think, therefore, that the portion of the final judgment which is: "That the prayer for removal of the executors be refused," should be reversed, and that in lieu of it the court below should be directed to remove the board from the further execution of the trusts created by the will, and to take all necessary and proper proceedings for the appointment of other and proper persons to execute such trusts in future, and to transfer to them the trust property in so far as it remains vested in the board. Their Lordships will humbly advise Her Majesty in accordance with this opinion.

Solicitors: *Venning, Sons & Mannings; Flux, Son & Co.; Watney, Tilleard & Freeman.*

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

A

Re FRESTON

[COURT OF APPEAL (Sir Baliol Brett, M.R., Lindley and Fry, L.JJ.), May 24, 1883]

[Reported 11 Q.B.D. 545; 52 L.J.Q.B. 545; 49 L.T. 290;
31 W.R. 804]

B

Solicitor—Arrest—Privilege—Contempt of court—Disobedience of a court order.

A solicitor who is attached for contempt for disobeying an order of the court is not entitled to privilege from arrest when he is returning from a court where he has been acting as an advocate since a solicitor is an officer of the court and his disobedience of a court order amounts to a contempt of a criminal nature.

C

Notes. Followed: *Re Dudley* (1883), 12 Q.B.D. 44. Applied: *Harvey v. Harvey* (1884), post p. 1129. Considered: *Re Wray* (1887), 36 Ch.D. 138. Applied: *Re Gent, Gent-Davis v. Harris* (1888), 40 Ch.D. 190; *Re Grey*, [1892] 2 Q.B. 440. Considered: *Seldon v. Wilde*, [1911] 1 K.B. 701; *Scott v. Scott*, [1911-13] All E.R.Rep. 1; *Re Hunt*, [1959] 2 All E.R. 252. Referred to: *Re Wickham, Marony v. Taylor* (1887), 35 Ch.D. 272; *Re Evans, Evans v. Noton*, [1893] 1 Ch. 252; *Seaward v. Paterson* (1897), 66 L.J.Ch. 267; *Haydon v. Haydon* (1911), 104 L.T. 477.

D

As to a solicitor's privileges in general, see 36 HALSBURY'S LAWS (3rd Edn.) 50 et seq.; and for cases see 42 DIGEST 45 et seq. For the Debtors Act, 1869, see 2 HALSBURY'S STATUTES (2nd Edn.) 292 et seq.

E

Cases referred to:

- (1) *Re M'Williams* (1803), 1 Sch. & Lef. 169, 174; 16 Digest (Repl.) 10, *16.
- (2) *Wellesley v. Duke of Beaufort, Long Wellesley's Case* (1831), 2 Russ. & M. 639; 39 E.R. 538; sub nom. *Re Long Wellesley*, 2 State Tr.N.S. 911, L.C.; 16 Digest (Repl.) 7, 10.
- (3) *Marris v. Ingram* (1879), 13 Ch.D. 338; 49 L.J.Ch. 123; 41 L.T. 613; 28 W.R. 434; 5 Digest (Repl.) 1094, 8818.
- (4) *A.-G. v. Leathersellers' Co.* (1844), 7 Beav. 157; 2 L.T.O.S. 306; 49 E.R. 1023; 42 Digest 46, 372.
- (5) *Eyre v. Barrow* (1858), 27 L.J.Ch. 784; sub nom. *Eyre v. Barrow, Re Barrow*, 31 L.T.O.S. 281; 4 Jur.N.S. 652; 6 W.R. 767; 42 Digest 46, 363.
- (6) *Cobham v. Dalton* (1875), 10 Ch. App. 655; 44 L.J.Ch. 702; 23 W.R. 865, L.JJ.; 4 Digest (Repl.) 197, 1777.

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Also referred to in argument:

- Mountague v. Harrison* (1857), 3 C.B.N.S. 292; 27 L.J.C.P. 24; 6 W.R. 43; 140 E.R. 753; sub nom. *Montague v. Harrison*, 30 L.T.O.S. 135; 22 J.P. 86; 4 Jur.N.S. 29; 22 Digest (Repl.) 437, 4755.
- Re Ludlow Charities, Lechmere Charlton's Case* (1837), 2 My. & Cr. 316; 6 L.J.Ch. 185; 40 E.R. 661, L.C.; 16 Digest (Repl.) 8, 14.
- Re Jewitt* (1864), 33 Beav. 559; 4 New Rep. 315; 33 L.J.Ch. 730; 10 L.T. 556; 28 J.P. 628; 10 Jur.N.S. 814; 12 W.R. 945; 55 E.R. 486; 42 Digest 46, 368.
- Newton v. Constable* (1841), 2 Q.B. 157; 9 Dowl. 933; 1 Gal. & Dav. 408; 10 L.J.Q.B. 349; 6 Jur. 317; 114 E.R. 62; 41 Digest 104, 556.
- Dodd v. Holbrook, Re Pittman* (1865), 35 L.J.Ch. 175; 13 L.T. 426; 11 Jur.N.S. 969; 14 W.R. 125; 41 Digest 103, 544.
- Re Ball* (1873), L.R. 8 C.P. 104; 42 L.J.C.P. 104; 42 Digest 360, 4105.
- Jackson v. Mawby* (1875), 1 Ch.D. 86; 45 L.J.Ch. 53; 24 W.R. 92; 16 Digest (Repl.) 102, 1158.
- Micklethwaite v. Fletcher* (1879), 27 W.R. 793; 5 Digest (Repl.) 1095, 8831.
- Re Hope* (1872), 7 Ch. App. 766; 41 L.J.Ch. 797; 27 L.T. 670; 20 W.R. 1026, L.JJ.; 42 Digest 39, 220.

H

I

Persse v. Persse (1856), 5 H.L.Cas. 671; 27 L.T.O.S. 224; 10 E.R. 1064, H.L.; A 41 Digest 104, 582.

Ex parte Byne (1813), 1 Ves. & B. 316; 1 Rose, 451; 35 E.R. 123; 5 Digest (Repl.) 669, 5872.

Spence v. Stuart (1802), 3 East, 89; 102 E.R. 530; 41 Digest 106, 610.

Appeal from an order of the Queen's Bench Division (GROVE and STEPHEN, JJ.), on a summons by W. A. Freston, solicitor of the Supreme Court, for an order that he might be discharged from custody for contempt on the grounds that he was privileged from arrest as he was an advocate returning from a police court at the time of his arrest. B

Freston had been ordered on Mar. 18, 1882, by NORTH, J., in chambers, at the instance of Messrs. Benn, solicitors, to deliver up to their agents in London certain deeds and documents, and to pay a sum of £10 and costs. Freston delivered up the documents, but did not pay the sum of £10 or the costs, and on April 19, 1882, DENMAN, J., at chambers, issued an attachment to enforce the order of the court. The sum of £10 was eventually paid by Freston, but the costs remained unpaid. In October, 1882, the writ of attachment was renewed. On April 26, 1883, Freston was arrested upon the attachment by an officer of the Sheriff of Middlesex, while he was returning to his offices from the Bow Street police court, where he had been attending before SIR JAMES INGHAM, the chief magistrate, as solicitor and advocate retained to defend certain persons charged with treason felony. C D

Bowen Rowlands, Q.C., and Wyatt Hart for W. A. Freston.

A. T. Lawrance for Messrs. Benn. E

SIR BALIOL BRETT, M.R.—In this case an order was made at chambers upon Mr. Freston, a solicitor, to deliver up certain deeds, and to pay the sum of £10 which was in his hands, and to pay the costs. This order was disobeyed, and thereupon an order was made by DENMAN, J., to attach the solicitor. At the time this order was made the solicitor had not delivered up all the deeds, but under pressure of the order of attachment he did everything except pay the costs. The attachment was then put into effect by arrest, and it is now said that at the time the arrest was effected the solicitor was privileged from arrest inasmuch as he was returning from a police court where he had been acting as advocate on behalf of certain persons. The question is, is that plea of privilege to be allowed to be good? F

It was suggested by counsel for Messrs. Benn that even if privilege would in this case have existed in the case of any other court of justice, yet it did not exist in the case of a police court, because the proceedings there are merely preliminary. As to this I have not the smallest doubt. I should be sorry to hold that in this respect a police court differed from any other court of justice, and I think it plain that the privilege did exist provided that the process upon which the arrest was made was of a merely civil nature. But the case is difficult with regard to other matters, the question being whether this was a kind of arrest on which any privilege at all could be claimed. That there are some arrests—as, for instance, arrests upon a criminal charge—upon which no privilege at all can be claimed, is very clear. It is equally clear that there are some to which privilege does apply, as, for instance, arrests upon mesne process or on a judgment debt, or on a civil judgment upon a merely civil dispute; in these cases it is clear that privilege from arrest exists in the case of members of Parliament, witnesses going from and coming to courts of justice, and solicitors and barristers discharging their professional duties. Then we come to a more difficult case—the case of an arrest under an order of attachment, the cause of the issuing of the writ of attachment being a contempt of court. G H

The first point argued was that all orders of attachment issued for contempt of court are the same and have the same incidents. I do not agree with this. I I

A think they are different because the kinds of contempt are different. It depends upon the kind of contempt. In the Court of Chancery an attachment for contempt, for non-obedience to an order of the court, was practically equivalent to a *capias* to enforce a judgment upon a civil dispute between parties. In the case of arrest upon an attachment, issued for such a contempt as this, I think privilege would apply. But then there are other kinds of attachment, which are issued for the purpose of enforcing a decree of the court against an individual, and for preventing a breach of the law, and for maintaining the discipline and power of the court over its servants and others. The question is whether an arrest upon an attachment of this nature is to be considered as more like an arrest upon a criminal charge, or more like an arrest for the purpose of enforcing a judgment in a civil suit between parties. In *Re M'Williams* (1) LORD REDESDALE said (1 Sch. & Lef. at C p. 174):

D "There can be no doubt that the thing to be considered is not the form of process but the cause of issuing it. If the ground of the proceeding be a debt, it is a process of debt; if the ground be a contempt, as for instance, disobedience of some order of the court, where the object was not to recover a debt by means of the process, the consequences of such a process are in some degree of a criminal nature."

This passage seems to me to show the difference between the two kinds of attachment.

I now turn to the judgment of LORD BROUGHAM in *Long Wellesley's Case* (2). The Lord Chancellor there said (2 Russ. & M. at pp. 665, 666):

E "The line, then, which I draw is this: that against all civil process privilege protects; but that against contempt for not obeying civil process, if that contempt is in its nature or by its incidents criminal, privilege protects not; that he who has the privilege of Parliament, in all civil matters, matters which, whatever be the form, are in substance of a civil nature, may plead it with success, but that he can in no criminal matter be heard to urge such privilege; that members of Parliament are privileged against commitment, qua process, to compel them to do an act—against commitment for breach of an order of a personal description, if the breach be not accompanied by criminal incidents, and provided the commitment be not in the nature of punishment, but rather in the nature of process to compel a performance—that in all such matters members of Parliament are protected; but that they are no more protected than the rest of the king's subjects from commitment in execution of a sentence, where the sentence is that of a court of competent jurisdiction, and has been duly and regularly pronounced."

H I do not say that I feel bound by the exact words there used but I feel bound by the principle there enunciated. That principle is, that process to enforce civil obligations is subject to privilege, but process for acts in the nature of offences is not. Where, therefore, an attachment has issued for contempt, that contempt being a neglect of obedience to an order made for the purpose of enforcing a judgment upon a civil dispute between parties, there privilege exists. But the moment you show that the attachment has issued for a breach of the law, or for an act or omission in the nature of an offence against the law, then I no privilege can be claimed. If so, then the question in this case is whether, when an order has been made by the court upon a solicitor in his character of solicitor, by virtue of a power which the court has over him by reason of his being a solicitor, the disobedience to that order is an offence of a criminal nature, or merely renders him liable to civil process.

Before the passing of the Debtors Act, 1869, the court exercised a peculiar power with regard to solicitors; peculiar duties were confided to them, they had peculiar privileges, but were subject to a peculiar jurisdiction. Inasmuch as confidence and trust were reposed in them, they also had peculiar duties, and they

were bound to act with peculiar good faith and strictness of conduct; if they failed to do this the courts exercised a disciplinary authority over them in respect of acts done by them in their character of solicitors. Therefore, it seems to me that the moment you use the words discipline and duty in this sense, it directly follows that the breach of these is in its nature an offence. The Debtors Act, 1869, in s. 4 (4), recognises this principle; for the power of arrest was retained against solicitors, and apart from this principle there could be no reason for excepting solicitors from the abolition of arrest for debt. It was argued that, in this case the order made could not be in the nature of a punitive or disciplinary order, because the moment the solicitor did the acts required of him he would be released as a matter of course. I do not feel convinced that this argument is correct. If mere obedience would entitle him to his release, I am not sure that that is a proof that the order is not in its nature disciplinary, but here it does not seem to me that compliance with the order would necessarily entitle him to be released *ex debito justitiæ*. He must apply to the court for an order to release him, and whether, as a matter of practice, that order could be made as of course or not, yet it seems to me that it is more than a mere process, because the solicitor can always be ordered to pay the costs of the application. Moreover, I think that the Debtors Act, 1878, s. 1, also shows that the legislature recognised that the court had a discretion as to discharge from imprisonment of persons in custody for contempt.

The Debtors Acts, 1869 and 1878, were much discussed in *Marris v. Ingram* (3). In that case SIR GEORGE JESSEL, M.R., took a strong view as to the effect of the provisions of the earlier Act, and also stated the reasons for the passing and the effect of the later Act. He referred to the case of fraudulent trustees who fall within the Debtors Act, 1869, s. 4 (3). The statute punishes their misconduct as a criminal offence. He referred also to the case of defaulting solicitors in language which shows that he had an equally strong opinion as to them. Without adopting the language of SIR GEORGE JESSEL, M.R., I entirely agree with his reasoning, and I agree that the statutes go a very long way to show that a default by a solicitor is an act of a criminal nature, for which he may be punished as for a contempt. In this case then I think the contempt of W. A. Freston was in the nature of an offence, and no privilege can be claimed on his behalf; for the attachment is a mode of curing or punishing the offence. The order of the Queen's Bench Division was, therefore, right and the appeal must be dismissed.

LINDLEY, L.J.—I am of the same opinion. As regards the protection from arrest I draw no distinction between a police court and any other court, but in order to decide the question of privilege we must look a little closely at the history of the case. In March, 1882, a summons was taken out in chambers, and an order was made upon W. A. Freston, a solicitor, to deliver up certain deeds and pay a sum of £10 and costs. He appealed to the judge and the order was affirmed. He neither obeyed nor appealed from that order of the judge, and a writ of attachment was applied for and was issued by DENMAN, J., for contempt, and upon that attachment he was arrested. Is that attachment mere civil process or something more? If it is merely civil process this solicitor ought to be discharged.

It is certainly familiar that all contempts are not of the same nature; LORD REDESDALE pointed out in *Re M'Williams* (1) that they are different in their character, some being merely theoretical and others wilful. Of which kind is this? It seems to me that this attachment was granted for something more than a mere theoretical contempt, and that wilful disobedience to an order to deliver up documents is in the nature of an offence, against which the process issued to enforce the order is more than a mere civil process, and that therefore no privilege can be claimed. This view is strengthened by the language of the Debtors Act, 1869, s. 4 (4), which assumes that a solicitor who fails to pay a sum of money when ordered to do so by the court, is guilty of misconduct and also of an offence for which he may be punished by imprisonment; this tends very much to show

A that this attachment was not a mere civil process. The cases cited during the argument do not conflict with our decision. *A.-G. v. Leathersellers' Co.* (4) turned upon the ground whether the privilege had been lost by a deviation from the direct route to the court; and *Eyre v. Barrow* (5) was a case of formal contempt and not of wilful disobedience amounting to misconduct. In this case the practical question is whether Freston shall be discharged from custody without paying the costs.

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FRY, L.J.—It is plain that where attachment is mere process there privilege exists, where it is punitive or disciplinary, there it does not exist. This distinction was laid down in *Long Wellesley's Case* (2), and if there is any difference between a member of Parliament and a solicitor in this respect, it is not to be drawn in favour of the solicitor. The question, therefore, is whether the attachment here was mere process or not. The court when granting the order of attachment was proceeding against its own officer, on the ground of his misconduct, and it seems to me under these circumstances to be impossible to say that the court was not exercising a punitive and disciplinary authority. Further, if the attachment was mere process, Freston would be entitled to be discharged *ex debito justitiæ* on showing that he had fully complied with the master's order; but I do not think that would have been so in the present case, the court would have been able in the exercise of its discretion to punish him further. There was, therefore, no privilege.

E
I only wish to add one word as to *Cobham v. Dalton* (6), which was much pressed upon us in argument in consequence of a remark of JAMES, L.J., that he was disposed to think that the defendant would have

F
“been entitled to have the attachment discharged, on the ground that he was privileged from arrest while returning from the court.”

But this point was not seriously argued in that case, and in reality JAMES, L.J., came to no conclusion upon it. I may also remark that in that case the attachment was not against a solicitor as an officer of the court, but against a party to the proceedings in the Court of Chancery.

Appeal dismissed.

Solicitors: *Brownlowe & Howe; W. Maynard; W. A. Freston.*

[*Reported by A. A. HOPKINS, ESQ., Barrister-at-Law.*]

MILLER v. HUDDLESTONE

[CHANCERY DIVISION (Fry, J.), December 7, 1882]

[Reported 22 Ch.D. 233; 52 L.J.Ch. 208; 47 L.T. 570;
31 W.R. 138]*Execution—Sequestration—Order for payment into court of balance standing to credit of party against whom sequestration directed.*

The court has jurisdiction, at the instance of a sequestrator, to order payment into court of the balance standing in a banker's books to the credit of the party against whom the sequestration is directed.

Notes. Referred to: *Craig v. Craig*, [1896] P. 171.

As to what property may be taken under a writ of sequestration, see 16 HALSBURY'S LAWS (3rd Edn.) 73-74; and for cases see 21 DIGEST (Repl.) 694 et seq.

Case referred to:

(1) *Wilson v. Metcalfe* (1839), 1 Beav. 263; 8 L.J.Ch. 331; 3 Jur. 601; 48 E.R. 941; 21 Digest (Repl.) 694, 1929.

Also referred to in argument:

Crispin v. Cumano (1869), L.R. 1 P. & D. 622; 38 L.J.P. & M. 28; 20 L.T. 150; 17 W.R. 535; 21 Digest (Repl.) 695, 1942.

Motion by a sequestrator of the real and personal estate of W. McMurray, who was the defendant in an action for an account of money received in respect of an annuity, for an order that McMurray's bankers, Messrs. Smith, Payne & Co. pay into court to the credit of the action, the amount of the balance standing to the credit of McMurray in their books, in order to provide for the costs and expenses of the sequestration.

McMurray, having failed to comply with an order to account the writ of sequestration, dated June 24, 1882, was obtained and issued against his real and personal estate. The sequestrator entered into possession of certain property and attached the balance standing to McMurray's credit at his bank. The bank declined to give the sequestrator any information as to the amount of the balance and the present application was made. At the time of this application McMurray was in prison under an attachment issued in the action on Nov. 16, 1882, for contempt for disobedience of the order to account.

Cookson, Q.C., and *A. J. Allen* for the sequestrator.

Kekewich, Q.C., and *W. Latham* for Messrs. Smith, Payne & Co.

FRY, J.—I consider that I have jurisdiction to make the order asked for upon Messrs. Smith, Payne & Co., without any further proceedings. The case comes within the authority of *Wilson v. Metcalfe* (1), which shows that the order can properly be made upon service upon the third persons—the bankers. I may observe that, if I were to hold otherwise, it would involve much greater expense and delay. The order will be that the bankers verify the balance of the defendant McMurray by affidavit, unless they admit the amount at the Bar.

[The amount of the balance having been admitted at the Bar, the following order was made:]—"Messrs. Smith, Payne & Co., admitting £2,689 8s. 6d. to be standing to the credit of Mr. McMurray, in their books, order them to pay that sum into court to the credit of this action, 'sequestration account.' The taxing master to tax the costs of the sequestrators of and incidental to the sequestration, and to fix their remuneration, and to tax the costs of Messrs. Smith, Payne & Co., and the amount so taxed and found due to be paid out of the fund so to be paid into court."

Solicitors: *Allen & Sons; Freshfields & Williams.*

[Reported by J. F. WAGGETT, ESQ., Barrister-at-Law.]

A

Re CARNAC. Ex Parte SIMMONDS

[COURT OF APPEAL (Lord Esher, M.R., Cotton and Lindley, L.JJ.), October 30, 1885]

[Reported 16 Q.B.D. 308; 55 L.J.Q.B. 74; 54 L.T. 439;
34 W.R. 421; 2 T.L.R. 18]

B

Mistake—Mistake of law—Payment to officer of court—Trustee in bankruptcy—Liability to repay.

The rule that money paid under a mistake of law cannot be recovered from the person who has received it does not apply where the money has been paid to and received by an officer of the court in his capacity as such.

C

Therefore, where money is paid under a mistake of law to a trustee in bankruptcy, the court will order him to repay it if it is still in his possession, or, if it is not, will order him to make repayment out of other assets coming into his hands and available for distribution among creditors.

Re Condon, Ex parte James (1) (1874), 9 Ch. App. 609, approved.

D

Notes. Applied: *Re Brown, Dixon v. Brown* (1886), 32 Ch.D. 597; *Re Tyler, Ex parte Official Receiver*, [1904-7] All E.R.Rep. 181. Considered: *Wells v. Wells*, [1914] P. 157. Applied: *Re Thelluson, Ex parte Abdy*, [1919] 2 K.B. 735. Considered: *Scranton's Trustee v. Pearse*, [1922] 2 Ch. 87. Distinguished: *Re Wilson, Ex parte Salaman, The Trustee v. Keith, Prowse & Co.* (1925), 133 L.T. 814. Referred to: *Re Wigzell, Ex parte Hart*, [1921] 2 K.B. 835; *Re London County Commercial Reinsurance Office*, [1922] 2 Ch. 67.

E

As to powers and duties of trustee in bankruptcy, see 2 HALSBURY'S LAWS (3rd Edn.) 382 et seq.; as to recovery of money paid under a mistake of law, see 26 HALSBURY'S LAWS (3rd Edn.) 924-927; and for cases see 4 DIGEST (Repl.) 226-229; 35 DIGEST (Repl.) 172 et seq.

Case referred to:

F

(1) *Re Condon, Ex parte James* (1874), 9 Ch. App. 609; 43 L.J.Bey. 107; 30 L.T. 773; 22 W.R. 937, L.JJ.; 4 Digest (Repl.) 226, 2031.

Also referred to in argument:

Rogers v. Ingham (1876), 3 Ch.D. 351; 35 L.T. 677; 25 W.R. 338, C.A.; 35 Digest (Repl.) 97, 26.

G

Appeal by the trustee in liquidation of Sir John Rivett Carnac, deceased, from a decision of Mr. Registrar MURRAY by which he ordered the trustee in liquidation to pay to G. E. Seymour, the surviving trustee of Sir John Rivett Carnac's marriage settlement, the sum of £569 2s. 2d., being the sum paid to the trustee in liquidation by J. W. Ede, a former trustee of the settlement.

H

By the marriage settlement, dated Nov. 30, 1840, a sum of £5,000 was vested in J. W. Ede and G. E. Seymour, upon trust to invest the money in government or real securities, and to pay the income to Sir John Rivett Carnac during his life, and after his death to his wife during her life, and after the death of the survivor of the two the trust fund was to be held in trust for their children. The said sum of £5,000 was invested in the purchase of consols to the amount of £5,446 2s. 11d. In 1857, at the request of Sir John Rivett Carnac, the trustees sold the consols, and advanced him £3,000 out of the proceeds, and invested the remainder in the purchase of £2,200 Guaranteed Four per Cent. Stock of the North-Eastern Railway Co. This investment was not authorised by the settlement. This transaction was carried out under an agreement, of which a memorandum was contained in an account-book kept by J. W. Ede, who was the acting trustee of the settlement. This memorandum was in the following terms:

I

"Sir John and Lady R. Carnac's Trust Fund.

£5,446 2s. 11d. consols were, at the request of Sir John and Lady Carnac, sold by John W. Ede and George Edward Seymour, the trustees.

Out of the proceeds £3,000 were advanced to Sir John Carnac on the security of his bond at 5 per cent. per annum. His life policy for £3,200 in the London Life Office was also assigned to the trustees as additional security. The balance was invested in the purchase of £2,200 North-Eastern Railway Guaranteed Four per Cent. Stock.

The dividends usually received by Sir J. Carnac on £5,446 2s. 11d. consols being £81 13s. 10d. half-yearly, less income tax, to be paid him as before, and the balance invested and added to the capital for the benefit of his children, on the same trusts as the £5,446 2s. 11d. consols were held. The trustees can sell the guaranteed stock at any time, and invest the proceeds in other railway guaranteed or preference stock, or in government securities.

When £400 of such stock shall have been added, the interest on the bond for £3,000 to be reduced to 4 per cent. per annum.

Dated April 15, 1857.

We agree to the above,

(Signed)

J. R. CARNAC,
ANNE RIVETT CARNAC."

From the date of this agreement to the year 1875 Sir John Rivett Carnac paid the premiums on the policy of insurance, and received half-yearly from J. W. Ede the difference between the dividend to which he would have been entitled if the consols had not been sold, and the interest on the £3,000 which had been advanced. In 1875 Sir John Rivett Carnac filed a petition for liquidation by arrangement, and after this he ceased to pay the premiums on the policy of insurance. These premiums were then paid by J. W. Ede out of income which he received as trustee. In consequence of a notice served by the trustee in the liquidation, J. W. Ede paid to the trustee in the liquidation the whole of the surplus of the income received from 1875 to 1883, amounting to £861 6s. 8d. In 1883 Sir John Rivett Carnac died. The £3,000 advanced to him was realised by the trustees of the settlement out of the proceeds of the policy of insurance. Afterwards, the trustees of the settlement, having been advised that the payment to the trustee in liquidation had been wrongly made, applied for an order for the repayment of the money which had been paid to him. Before the hearing of the application J. W. Ede died.

The trustee in liquidation deposed that the whole of the money, except £56 retained for the expenses of the liquidation, had been distributed in dividends among the creditors. Mr. Registrar MURRAY made an order that the trustee in liquidation should pay to G. E. Seymour, the surviving trustee of the settlement, the sum of £569 2s. 2d., the amount of the payments which had been made by J. W. Ede to the trustee in the liquidation during the last preceding six years. From this order the trustee in the liquidation appealed.

Cooper Willis, Q.C. (Alexander with him), for the trustee in liquidation.

J. G. Wood for G. E. Seymour, the surviving trustee of the settlement.

LORD ESHER, M.R.—It cannot be denied that the demand made by the trustee in liquidation was wrong, and was wrongly acceded to by the trustee of the settlement. The money was paid and received erroneously, both parties being in error in point of law. I am of opinion that the rule of equity laid down by JAMES, L.J., in *Re Condon, Ex parte James* (1), is a good and sound rule, and I desire to adopt it. There is a rule of law which is applicable as between parties, that, where money has been paid under an error in point of law, the party who has paid it cannot recover it back from the party who has received it; that rule was adopted in order to prevent further litigation. But, in the case to which I have referred, JAMES, L.J., said that, although the court cannot prevent a party from doing a shabby thing in taking advantage of this rule, still the court will not allow its own officer to do such a thing. I do not believe that this doctrine is confined to the case of bankruptcy. On the contrary, I think that, if money were

A paid into a common law court erroneously owing to a mistake in law, the court would order the money to be paid out to the person who had so paid it in. In equity, as between the parties, I do not say that a person to whom money was paid under a mistake in law might not be entitled to keep it, but I think that the receiver of the court would be bound to pay it back.

B A trustee in bankruptcy or liquidation is an officer of the court, and in *Re Condon, Ex parte James* (1), both JAMES and MELLISH, L.JJ., say that the court will not allow him to take advantage of the fact that money has come into his hands by reason of an error in point of law. It is true that in that case the money had not been divided among the creditors, and, therefore, the present case goes somewhat further, but the court can see here that other money will come into the hands of the trustee in liquidation, and no injury will be done to anyone by ordering, as I think the court should order, that the money which is to come in shall replace the money which has been wrongfully paid, and that the trustee in the liquidation must repay the surviving trustee of the settlement. The appeal will, therefore, be dismissed.

COTTON, L.J.—There are two questions to be decided: First, whether this money was paid under an error in point of law; and, if so, secondly, whether the court can order the trustee in the liquidation to repay it to the surviving trustee of the settlement. I am of opinion that it was paid under an error in point of law. It is clear that the money cannot be recovered from the trustee personally, but the order is to pay it out of moneys which form part of the debtor's estate, and there is or will be money in the hands of the trustee as part of such estate. The question is, whether such money can be retained by the trustee in liquidation. As between party and party, money paid under a mistake of law cannot be recovered. Here the trustee in liquidation has funds which must be applied for the benefit of the creditors unless there is some previous claim on them. The dividends have erroneously been increased, and the question is, whether the court ought to set this right. JAMES, L.J., lays down in *Re Condon, Ex parte James* (1), that, although money paid under a mistake of law cannot be recovered by one party from another, in the case of an officer of the court that rule will not prevail. It is urged that there the trustee had money in hand, whereas here he has erroneously paid away the money in dividends. This, no doubt, makes our decision a development of the doctrine laid down in that case, but we must look at the fund which has been distributed, and that which has yet to be distributed, as one fund. As there will be sufficient to recoup the trustee in liquidation the order is right, but I think it may, if the trustee wishes, be qualified by saying that the repayment must be made out of money now or hereafter in the hands of the trustee in liquidation, and applicable to the payment of dividends.

LINDLEY, L.J.—I am of opinion that the money was paid under a mistake of law, and, that being so, the question arises whether it is recoverable. By mistake the creditors have got what they should not have received, and the mistake can be put right without injustice. If authority is required, *Re Condon, Ex parte James* (1), supports our decision.

Appeal dismissed.

Solicitors: *Emmanuel & Simmonds; A. F. & R. W. Tweedie.*

[*Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.*]

Re THOMPSON

[COURT OF APPEAL (Cotton and Lindley, L.JJ.), August 6, 11, 1885]

[Reported 30 Ch.D. 441; 55 L.J.Ch. 138; 53 L.T. 479; 34 W.R. 112]

Solicitor—Costs—Bill—Conditions attached to bill—Reservation of right to withdraw bill if not paid within given time—Unlawful condition—Remedy of client—Special application to court.

Solicitors sent bills to clients with a letter stating that they were willing to accept the balance shown if it were paid within eight days, reserving the right, in case of non-payment, to withdraw the bills and deliver others which would "in all probability show a larger balance" against the clients. Payment not being made, the solicitors wrote saying that they withdrew the bills. The clients subsequently obtained the common order for taxation of the bills.

Held: a solicitor might send in a bill to which conditions were attached and the client might refuse to accept it, but, if he did accept it, as happened in this case, he was bound by such of the conditions as were lawful; in the absence of a disclosure by the solicitors that the bill contained charges which they were not prepared to maintain, the condition imposed was not a fair one, and was, therefore, unlawful, and, accordingly, the solicitors could not withdraw the bill; the clients ought not to have obtained the common order to tax, to which no one was entitled when the effect of it was to make him a judge in his own cause of the matter in dispute; they ought to have made a special application; and would be deprived of part of their costs.

Notes. Applied: *Re Kellock* (1887), 56 L.T. 887; *Re Wood*, [1891] W.N. 203; *Re Webster*, [1891] 2 Ch. 102. Considered: *Re Grant, Bulcraig & Co.*, [1904-7] All E.R.Rep. 579; *Lumsden v. Shipcote Land Co.*, [1904-7] All E.R.Rep. 1046; *Re A Solicitor*, [1951] 1 All E.R. 592. Referred to: *Sadd v. Griffin*, [1908] 2 K.B. 510; *Re Louch*, [1930] All E.R.Rep. 711; *Polak v. Marchioness of Winchester*, [1956] 2 All E.R. 660.

As to delivery of a bill of costs, see 36 HALSBURY'S LAWS (3rd Edn.) 130-139; as to taxation of costs, see *ibid.* 139 et seq.; and for cases see 42 DIGEST 157-159.

Cases referred to:

- (1) *Re Heather* (1870), 5 Ch. App. 694; 39 L.J.Ch. 781; 18 W.R. 1079, L.J.; 42 Digest 158, 1588.
- (2) *Re Carven* (1845), 8 Beav. 436; 14 L.J.Ch. 372; 50 E.R. 171; 42 Digest 157, 1576.

Also referred to in argument:

- Re Holroyde and Smith* (1881), 43 L.T. 722; 45 J.P. 437; 29 W.R. 599; 42 Digest 158, 1586.
- Re Chambers* (1865), 34 Beav. 177; 5 New Rep. 298; 34 L.J.Ch. 292; 11 L.T. 726; 11 Jur.N.S. 230; 13 W.R. 375; 55 E.R. 602; 42 Digest 159, 1591.
- Re Carthew, Re Paull* (1884), 27 Ch.D. 485; 54 L.J.Ch. 134; 51 L.T. 435; 32 W.R. 940; 28 Sol. Jo. 709, C.A.; 42 Digest 162, 1646.

Appeal by the clients, the executors of Miss Martha Moordaff, from a decision of BACON, V.-C., discharging a common order of course for taxation of bills of costs delivered to them on May 6, 1885, by Messrs. J. C. and C. Thompson, the respondents, and ordering the respondents to deliver bills within fourteen days.

Messrs. J. C. and C. Thompson, of Workington, acted in the years 1881-3 as solicitors for Miss Martha Moordaff, in an action of *Burgoine v. Moordaff* in the Probate Division of the High Court of Justice. Miss Moordaff having died, her trustees and executors, in February and April, 1885, applied by letter to Messrs. Thompson for delivery of their bills of costs, in order that the trust accounts might be completed. On May 6, 1885, Messrs. Thompson wrote a letter to one

A of the executors, Mr. Fell, enclosing their bills of costs, which letter, so far as material, was as follows:

B "In accordance with the most urgent request of, and to accommodate the executors of the late defendant in passing their legacy duty accounts, and upon the understanding cometo between you and ourselves on the 30th ult., we have, at no small inconvenience, hastened these bills of costs to a conclusion, and now beg to enclose same to you herewith. We beg also to intimate that the costs of and incident to one of the bundles of papers could not, in the short time which has been allowed us, be included in these bills. We are, however, willing to accept payment of the balance of these bills, viz., £768 1s. 6d., in full discharge, if payment of that account is made to us within eight days from this date; if not, we reserve to ourselves the right to withdraw the accompanying bills and deliver others, which will in all probability show a much larger balance against the executors, and the preparation of which must, as you may readily conceive, occupy a considerable time, and thus cause further delay."

D Further correspondence then took place between Messrs. Thompson and the executors and their solicitors, and on May 14, 1885, Messrs. Thompson wrote to Mr. Fell the following letter:

E "*Burgoine v. Moordaff—Martha Moordaff, deceased.*—These bills not having been discharged, we beg to withdraw the same in accordance with our letter to you of the 6th inst., and upon the terms therein referred to. Please return same to us, in order that we may substitute others accordingly."

F On May 19 the executors obtained the common order of course for taxation of the bills delivered on May 6. On June 19, BACON, V.-C., on the motion of Messrs. Thompson, made an order discharging the order of May 19, and ordering Messrs. Thompson within fourteen days to deliver to the executors a bill of fees and disbursement in all causes, matters of business, etc., in which they had been employed as solicitors by Martha Moordaff, or her executors, and that such bills should be referred for taxation, credit being given or taken for moneys received or paid, with the usual directions as to costs. On July 21 the executors gave notice of appeal, asking that the order of June 19 should be reversed, and that it might be declared that the bill to be taxed was that first delivered by Messrs. Thompson. After this, but before the appeal was heard, Messrs. Thompson delivered new bills, in which they admitted having a balance in hand of £51 3s. 1d.

G *Millar, Q.C.*, and *Ashton Cross* for the executors.

Marten, Q.C., and *T. Rolls Warrington* for the solicitors, Messrs. Thompson.

Cur. adv. vult.

H Aug. 11, 1885. **COTTON, L.J.**—This is a case of considerable importance to the parties as regards the question of costs, and to the public as regards the conduct of solicitors and the restrictions which ought to be imposed upon them, so as to prevent them from taking any unfair advantage in making their charges against their clients.

I The clients here were executors, and they employed Messrs. Thompson as their solicitors, and pressed them for some time to furnish their bill of costs, in order that they might prepare and pass their residuary accounts. The result of this pressure was that the solicitors sent in their bills with the letter of May 6, 1885, with which I shall have to deal more particularly by-and-by. I may, however, now observe that that letter mentioned that the bill did not include charges for all matters. Some correspondence then took place, the solicitors acting for the executors saying that they must have all the charges at once. The bills of costs were not returned to the solicitors, and on May 14 they wrote a letter withdrawing the bills delivered. On May 19 the executors obtained the common order to tax

the bills, the order providing that the solicitors were to be at liberty to send in further bills for matters not charged for in the bills which were ordered to be taxed. Subsequently, on a motion by the solicitors, BACON, V.-C., made an order discharging the common order to tax, directing the solicitors to send in a bill, and containing the usual directions as to taxation, and from that order the executors have appealed to us.

It is well established that when a solicitor sends in his bill to his client he gives the client a right to have taxation of the bill sent in. It was necessary to lay down that rule, because, if solicitors could send in a bill, and, when the client did not pay it or was dissatisfied with it, they could send in another bill, it would enable them to avoid the consequences of having sent in a bill which would not stand taxation, viz., of having to pay the costs of taxation if a sixth part of the amount was taxed off, the rule also providing that if a sixth is not taxed off then the client seeking taxation has to pay the costs, unless special circumstances are certified by the master. The rule was laid down to prevent any attempt at imposition on clients, who did not know what the proper charges were, by sending in bills which would not stand taxation, and then, when taxation was insisted on or threatened, sending in another bill which the solicitors knew could stand taxation.

That has been carried so far that, where objections have been made to particular items in a bill delivered, and the solicitors have, with the assent of the client, taken back the bill for the purposes of reconsideration and have struck out certain items, the court has, nevertheless, held that the bill to be taxed is the bill as it was originally sent in, and not the bill as amended. That was decided in *Re Heather* (1).

But here the solicitors say: "We sent in our bill under a condition that if it was not paid within eight days we should be at liberty to withdraw it; it was not paid, and, therefore, we withdrew it and sent in this new bill." Without doubt, the circumstances existing here have never come before the court in the cases on taxation which have been cited to us. All the cases in which the court has refused to allow a solicitor to vary his bill by diminishing it after it has once been sent in, have been cases in which the bill has been sent in unconditionally, and has really been a delivered bill. After availing ourselves of the assistance of the counsel in the case, and looking at the reported cases ourselves, this case appears to be the first which has arisen in which it has been alleged that the bill was originally sent in subject to a condition, and therefore we have to deal with the question, what is the effect of delivering a bill subject to such a condition?

But we must, in the first place, consider whether the solicitors are right in saying that the bill was delivered subject to a condition. The first words of the letter of the solicitors are:

"In accordance with the most urgent request of, and to accommodate the executors of the late defendant in passing their legacy duty accounts, and upon the understanding come to between you and ourselves on the 30th ult."

That refers to a suggested understanding that the bill should be sent in subject to such a condition as is referred to in this letter; but the evidence does not support that suggestion. [HIS LORDSHIP read the rest of the letter of May 6, 1885, and continued:] It is said, on behalf of the executors, that the letter contains no condition at all, and that, even if there is a condition, it is only a condition that the solicitors should be at liberty to add further items to their bill. We must consider carefully whether that condition, if it be one, has been improperly made use of by the solicitors. In my opinion the effect of the letter was, that the bills were delivered upon a condition that the bills should be withdrawn unless payment was made within eight days; and, in my opinion, the course which the solicitors who were then advising the executors should have adopted was to send back that bill at once, saying: "We will have nothing to do with it; we will not take a bill on such conditions; we will require you to send in your bill without any stipulation, and then we will deal with it in the way in which a bill, whatever it

A may be, ought to be dealt with." But that was not the course adopted, and, as the solicitors claimed a right to withdraw the bills and deliver others, and did not simply claim a right to add charges thereto, in my opinion the bills were delivered on the condition I have stated.

B If a bill of exchange, or money, or anything else, is sent to a person on a condition, he must either take it subject to that condition or not take it at all. Of course he may send it back and say that he will not accept it on those conditions; but if he does accept it, his acceptance is subject to the condition imposed by the sender. It was urged on behalf of the executors, that they never agreed to anything of this kind. The evidence does not show that they did; but they took the bills on that condition, and, if the condition is a lawful one, it cannot be said that they took the bills otherwise than subject to the consequences of that condition, whatever it might be. Before the common order to tax was obtained, C the solicitors had written to say that, as the condition had not been performed, they withdrew the bills, and would send others.

We have to consider whether such a condition as that is one which can lawfully be imposed by solicitors on sending a bill. It was urged on behalf of the clients that that condition, if effectual, really reserved a right to the solicitors to deliver D in the first instance bills containing charges which might not be supportable on taxation, and then, if those bills were not paid, or if an intention to tax and question the amount of the bills was shown, to reserve to themselves the right of sending in a different bill which would stand taxation. We have now to consider, for the first time, whether such a condition as this, in a letter sending a bill of costs, is lawful. If a bill is sent in without any condition attached to it, the E solicitor is sometimes allowed to correct mistakes in it on application to the court, though, in *Re Carven* (2) the court refused to allow a solicitor to diminish the charges which he had made so as to avoid the consequences of taxation. A solicitor has, however, been allowed to correct mistakes consisting of omissions and make further charges. The common order here does allow additions to the bill, but the principle upon which the court has always refused to allow a solicitor to alter, F or withdraw from, his bills of costs once sent in by him without condition, is, that to allow him to do so would open a door to fraud, and enable solicitors who are intending to act fraudulently towards their clients to send in excessive bills, which they knew they could not support, with a letter expressing a condition, and then to withdraw the bill and send in a fresh one to which there could be no objection.

In my opinion it would be wrong to say that a solicitor cannot send in his bill subject to a fair and lawful condition, just as anyone else may send either money G or securities on a condition that unless it is acted on and made available the property is to be returned. But, in my opinion, the condition on which this bill was sent in is not one which ought to be allowed, and is not one which a solicitor can impose upon his client. In my opinion, if a solicitor were to send a bill to his client, and to say: "Here is a bill containing charges which I cannot sustain on taxation, or which it is probable I should not be able to sustain on taxation; H they are sums for work done, which are not allowed on taxation," or if in any other way the solicitor fairly stated to his client that there were charges in the bill which the client could not be forced to pay, and was not bound to pay, but which represented work fairly done, and sent the bills to the client with a suggestion that they should be paid, and added: "If you do not like to adopt this bill after I have told you this, then I will send in a bill which will include those charges I which will bear taxation, and which I can enforce against you"—a condition expressed in those terms would, in my opinion, be in no way contrary to the rules which the decisions of this court have imposed on solicitors as regards their dealings with their clients. If, under those circumstances, the client took the bill he would take it subject to the condition; if he did not, then the solicitor would be entitled to send in another bill. But that assumes that the solicitor has made to his client such a statement as prevents the condition being made use of to perpetrate a fraud.

Is the condition expressed in the letter of May 6 one which fairly stated to the clients that which I say must be stated to them in order to make the condition one which a solicitor can impose? There is not a word in the letter suggesting that the bill made out is one which the clients are not bound to pay unless they are minded to deal liberally with the solicitors, but the letter represents it, without any modification, as a bill the balance of which, £768 1s. 6d., is due to the solicitors. The words of the letter, reserving the right to withdraw the bills and deliver others which would probably show a larger balance, in my opinion, bear strongly on what is the true construction of the condition. So far from its representing that the bills could not be enforced so as to enable the solicitors to get this balance, or that there were charges in the bills which would not stand on taxation, these words amount in effect to a statement that, in all probability, if the executors do not pay the bills delivered, the solicitors will make heavier charges against them. In my opinion, that condition is not so fairly expressed as to be one which the solicitors could impose on their clients. In my opinion, therefore, the solicitors must stand or fall by the bills which they sent in. They tried to impose a condition which, in my opinion, did not fairly state to the clients what they desired to do, or what the effect of the bills delivered and of the charges in them was. In my opinion, therefore, although there was a condition, it was ineffectual, and the order of the Vice-Chancellor must be discharged, and the original order for taxation must stand.

But, in my opinion, the common order to tax was not the right form of proceeding for the solicitors to the executors to take in the case. They ought to have fairly stated the facts, and if, when the common order to tax was obtained, Messrs. Thompson had in fact sent a letter withdrawing, or purporting to withdraw, the bills which they sent in, that fact ought to have been stated, and the executors ought not to have gone on to take the common order. The order should have been a special order made by the court with a knowledge of all the circumstances of the case, and that probably would have prevented a great deal of litigation. In my opinion, therefore, the Vice-Chancellor ought not to have granted the application; but, as the order was not in the proper form, there ought, in my opinion, to be no costs of the proceedings before the Vice-Chancellor. As, however, the executors have succeeded in this court, they must have the costs of the appeal. The costs of the taxation will of course abide the result, unless the master thinks fit to state any special circumstances.

LINDLEY, L.J.—I have very carefully read the correspondence and listened to the arguments adduced to us on both sides, and I have come to the conclusion that the condition which Messrs. Thompson sought to impose by their letter of May 6, 1885, was not expressed in such language as to be binding on the clients. I do not mean to say for a moment that bills of costs cannot be sent in subject to a condition, but, underlying that, there is the principle that a solicitor must deal fairly with his client. I am satisfied (and I say it with regret), from the evidence in the case and the tone of the correspondence, that the condition imposed was a catchy and not a fair condition. So far as I can see from the evidence, Messrs. Thompson knew that the bills were not honest bills, or bills by which they were at all prepared to stand. The solicitors could not safely or fairly have said to their clients: "These are our bills, made up to the best of our ability; they contain charges which you may pay if you are liberally disposed, but which we tell you frankly we are not prepared to maintain." Any honest disclosure of that sort would have made all the difference in the world; but when we find that the contrary was the fact, and that the solicitors must have known, or hoped, that these bills would be treated by the clients as fairly made out when they were not so made out, it appears to me that they have not, in expressing the condition in the language which they used, fulfilled their obligation as solicitors to their clients. It is unnecessary for me to refer closely to the correspondence. The pure question of law is: Had the solicitors, or had they not, a right to impose

A such a condition? I say yes, if they acted fairly; no, if they acted otherwise—
and, in my opinion, in this case the solicitors did not act fairly.

The common order to tax appears to me to have been the wrong course of proceeding in this case, and for this reason: I do not think anybody is entitled to get a common order to tax when the effect of it is to make him a judge, in his own cause, of the matter in dispute. Messrs. Thompson maintained they had a right
B to withdraw their bills; the clients afterwards maintained the contrary. That is a matter in dispute which ought not to have been laid aside and prevented from being discussed by the common order to tax. The executors ought to have made a special application raising that point, and to have let the judge say which was right. The justice of the case will, I think, be met by giving no costs of the common order, and allowing the appeal with costs, including the costs of these
C affidavits which were filed after the hearing before the Vice-Chancellor. At the same time we must not allow it to be supposed that a condition of this sort can be imposed in such language as is contained in the letter.

COTTON, L.J.—I think the executors ought to have the costs of their affidavits. They helped us to judge whether the words of the letter were honest.

D *Appeal allowed.*

Solicitors: *Speechley, Mumford & Landon*, for *Paisley & Falcon*, Workington; *Bell, Brodrick & Gray*.

[*Reported by FRANK EVANS, Esq., Barrister-at-Law.*]

E

F

HURST v. HURST AND OTHERS

[COURT OF APPEAL (Sir George Jessel, M.R., Lindley and Holker, L.JJ.), May 3, 5, 6, 1882]

G

[*Reported 21 Ch.D. 278; 51 L.J.Ch. 729; 46 L.T. 899; 31 W.R. 327*]

Will—Forfeiture—Forfeiture on charge of interest bequeathed—Ineffective gift over—Disclaimer by chargee of benefit of charge—Effect on provision for forfeiture.

H The testator devised freeholds to trustees upon trust to permit and suffer his son to collect and receive the net rents during his life, and he directed his trustees after his son's decease to convey the same to the children of his son in equal shares absolutely on their attaining the age of twenty-one years, but in case any of the children should die before attaining that age, then upon trust to convey the share or shares of the children so dying under twenty-one to the other or others of such children. He further declared that, if his son should
I charge or encumber the property, or any part thereof, the bequest to him should become absolutely forfeited, and the trusts in favour of the child or children of his son should at once take effect. The testator died in 1867, and in 1869 the son charged the property. He had no children. The chargee never made a claim under the charge, and subsequently disclaimed the benefit of it in so far as it related to the property subject to the trusts of the will.

Held: (i) the life estate of the son became forfeited on his executing the charge, although the gift over was ineffectual; and (ii) the disclaimer did not revive the son's life interest.

Notes. Considered: *Re Deacon's Trusts*, *Deacon v. Deacon*, *Hagger v. Heath* A (1906), 95 L.T. 701; *Greenwood v. Greenwood*, [1989] 2 All E.R. 150. Applied: *Re Rooke's Will Trusts*, *Taylor v. Rooke*, [1953] 2 All E.R. 110. Referred to: *Re Sheward*, *Sheward v. Brown*, [1893] 3 Ch. 502; *Re Bold*, *Banks v. Hartland* (1926), 95 L.J.Ch. 201.

As to contingent gifts over, see 39 HALSBURY'S LAWS (3rd Edn.) 948-949; as to forfeiture on alienation, see *ibid.* 1158-1161; and for cases see 44 DIGEST 432-433. B

Cases referred to:

- (1) *Doe d. Blomfield v. Eyre* (1848), 5 C.B. 713; 18 L.J.C.P. 284; 10 L.T.O.S. 525; 136 E.R. 1058, Ex. Ch.; 44 Digest 432, 2597.
- (2) *Robinson v. Wood* (1858), 27 L.J.Ch. 726; 31 L.T.O.S. 311; 4 Jur.N.S. 625; 6 W.R. 728; 44 Digest 432, 2598.
- (3) *O'Mahoney v. Burdett* (1874), L.R. 7 H.L. 388; 44 L.J.Ch. 56, n.; 31 L.T. 705; 23 W.R. 361, H.L.; 44 Digest 432, 2599. C

Also referred to in argument:

Jackson v. Noble (1888), 2 Keen, 590; 7 L.J.Ch. 133; 2 Jur. 251; 48 E.R. 755; 44 Digest 433, 2601.

Crozier v. Crozier (1873), L.R. 15 Eq. 282; 21 W.R. 398; 44 Digest 915, 7727.

Hodgson v. Halford (1879), 11 Ch.D. 959; 48 L.J.Ch. 548; sub nom. *Re Lyon*, *Re Jacobs*, *Hodgson v. Halford*, 27 W.R. 545; 44 Digest 452, 2748. D

Appeal by the plaintiff, Augusta Matilda Hurst, the widow, surviving executrix and a residuary legatee of the testator Isaac Blackburn Hurst (the former plaintiff having died), and **Cross-Appeal** by the defendants, Messrs. Mulkern and Runtz, trustees of the Birkbeck Bank and Building Society, from a decision of FRY, J., who held that the defendant Isaac B. Hurst, the son of the testator, had forfeited his protected life interest under the will of the testator. E

Isaac Blackburn Hurst, by his will, dated Sept. 23, 1867, gave, devised, and bequeathed all his freehold and leasehold property whatsoever, thereafter particularly mentioned, unto his executors and trustees, his wife Augusta Matilda Hurst and John Witherden Hurst, upon trust to permit his daughter Margaret Dennant, the wife of Frederick C. Dennant, to collect and receive the net rents and profits of certain freehold and leasehold houses and hereditaments therein particularly mentioned for her separate use during her life, and after her death upon trust to convey and assign the said freehold and leasehold houses to her children in equal shares absolutely, on their respectively attaining the age of twenty-one years; but in case any of the children should not live to attain that age, then upon trust to convey and assign the share of the child so dying under the age of twenty-one years to the others or other of them; and upon further trust to permit his son, the defendant Isaac Blackburn Hurst, to collect and receive the net rents and profits of certain other freehold and leasehold houses and hereditaments for his own use and benefit during his life, and after his decease, upon trust that his executors and trustees should convey and assign the said freehold and leasehold houses unto the children of his said son in equal shares absolutely, on their respectively attaining the age of twenty-one years; but in case any of the children of his said son should die before attaining that age, upon trust to convey and assign the shares or share of the children or child so dying under the age of twenty-one years to the others or other of such children; but in case of his said son not having any issue, or in case none of his children should live to attain the age of twenty-one years, then the testator declared that it was his will that the said freehold and leasehold property the rents of which would be receivable by his said son, the defendant I. B. Hurst, during his life, should be conveyed and assigned by his executors and trustees to and divided equally between such of the children of his said daughter Margaret Dennant as should live to attain the age of twenty-one years as aforesaid. The will contained the following clause: F

"And it is my will that the bequests hereinbefore made to my said son and daughter respectively shall be subject to the following conditions: that is to say, G H I

A that they shall in nowise charge or encumber the said freehold or leasehold
property, the rents of which are receivable by them during their respective lives,
or any part thereof, nor cause any question or dispute to arise with reference
to the said property or my disposal thereof as aforesaid. And in case either
my said son or daughter shall so charge or encumber the said property or any
part thereof, or cause or raise any question or dispute as aforesaid, or in any
B case my said son should become bankrupt or insolvent or compound with his
creditors, then the bequest to my said son or daughter so transgressing such
conditions, or in the case of the bankruptcy or insolvency of my said son as
aforesaid, shall thereupon become absolutely forfeited. And it is my will that
in either of such cases the trusts hereinbefore created in favour of the child
or children of my said son or daughter so transgressing shall at once take
C effect and be acted upon by my said executors and trustees as hereinbefore
directed."

The residuary legatees of the testator's personal estate were the testator's widow
Augusta Matilda Hurst, Mrs. Dennant (since deceased), and the defendant Isaac
Blackburn Hurst. The will contained no residuary devise. The testator died
D in December, 1867, leaving the defendant Isaac Blackburn Hurst his heir-at-law.

On Sept. 30, 1869, Isaac Blackburn Hurst signed a memorandum in the following
terms:

"In consideration of £100 this day advanced to me by Mr. Robert Arthur
Ward, solicitor, Maidenhead, secured by my note of hand for that amount,
dated this day, I hereby charge with the payment thereof all my interest and
estate in all the freehold houses, hereditaments, and premises at Greenwich,
E Kent, given to me for life by the will of my late father, Isaac Blackburn Hurst,
dated Sept. 23, 1867. And I also charge with the payment of the aforesaid sum
a policy of assurance on my life for £500, in the Provident Life Office, 50 Regent
Street, London, bearing the number 25,638. The policy is charged with about
£200 to Mr. Bryant of Greenwich, auctioneer. My life interest in the said
F freehold property is unencumbered, except an annuity of £50 to the widow
of my said father."

On July 13, 1870, Isaac B. Hurst made a beneficial lease for twenty-one years of
all the property, freehold and leasehold, comprised in the devise to himself for
life, to Charles Sidgreaves. On Aug. 26, 1870, Sidgreaves mortgaged this leasehold
interest by underlease to the trustees of the Birkbeck Bank and Building Society,
G who obtained the receipt of the rents and profits of the property given to Isaac B.
Hurst for life. Isaac B. Hurst had never had a child.

The suit was instituted shortly before Nov. 2, 1874 (the date on which the
Supreme Court of Judicature Act, 1873, came into operation), to determine
whether or not the defendant Isaac B. Hurst had forfeited his life estate by
charging or encumbering the same. The original plaintiff, John Witherden Hurst,
H died, and the former defendant, A. M. Hurst, the testator's widow and surviving
executrix, having revived the suit, was now the plaintiff. Other defendants
besides Isaac B. Hurst and R. A. Ward were Messrs. Mulkern and Runtz, trustees
of the Birkbeck Bank and Building Society, who were holders as mortgagees of
Sidgreaves' lease. The defendant Ward, by his answer, disclaimed all interest in
the freehold houses, the subject of the action. His evidence was to the effect that
I he made the advance, having seen only an imperfect copy of the will, which did
not contain the clause of forfeiture; that shortly after (i.e. within three or four
weeks) he saw a copy of the will with the forfeiture clause in it, and from that
time he abandoned all claim to the houses. He still, however, claimed his charge
on the policy, and had given notice of it to the insurance office. The main
question was, what, in the circumstances, was the effect of the proviso in the
will against charge or encumbrance.

FRY, J., held Isaac B. Hurst had forfeited his life interest under the will, but
he held that, as there was no evidence whether he was the heir-at-law of the

testator, it was impossible to determine the rights of the defendants, except as aforesaid. His Lordship declared that, on the execution by the defendant Hurst of the instrument of Sept. 30, 1869, the estate of the defendant Hurst in the freehold and leasehold hereditaments the rents and receipts whereof were under the will receivable by him during his life, subject to certain conditions, ceased; and the court being of the opinion that in the action it was not competent for the court to determine the rights of the persons interested in the said hereditaments except as aforesaid, the action would be dismissed against Ward without costs; and the plaintiff, A. M. Hurst, would be ordered to pay to the defendants Mulkern, Runtz and Sidgreaves, their costs of the action, because she had brought them before the court without being able to determine their rights, and he gave no costs as against the defendant Hurst.

From this judgment, so far as it ordered the bill to be dismissed without costs against the defendants Hurst and Ward and with costs against Mulkern and Runtz, the plaintiff appealed. The defendants Mulkern and Runtz, on the other hand, brought a cross-appeal against the declaration that there had been a forfeiture; and asked for a declaration that the life estate of the defendant Hurst had not ceased.

Cookson, Q.C., and *E. Beaumont* for the plaintiff.

W. W. Cooper for the defendant Isaac B. Hurst.

Glasse, Q.C., and *Owen* for the defendants Mulkern and Runtz, the trustees of the Birkbeck.

The defendant Ward did not appear on the appeal.

SIR GEORGE JESSEL, M.R.—The result of this appeal is curious. It gives a benefit to the principal defendants by establishing their title to the rents of the freeholds, and to the plaintiff by establishing his title to the rents of the leaseholds. Owing to some oversight the attention of Fry, J., was not called to the fact that part of the property was leasehold. As regards the freeholds it was not admitted before him, but has been admitted before us, that Isaac Blackburn Hurst was the testator's heir-at-law, and we have come to the conclusion that as to the freeholds the bill must remain dismissed, on the ground that the plaintiff has no title; but the statement of opinion that proper parties are not before the court to enable the court to determine to whom the rents belong must be struck out of the decree.

The first point argued was whether there was a forfeiture. This turns on a very simple matter. Isaac Blackburn Hurst borrowed money from Ward, and gave him a memorandum in these terms:

"In consideration of £100 this day advanced to me by Robert Ward, secured by my note of hand, I hereby charge with the payment thereof all my interest and estate in the hereditaments at Greenwich given to me for life by the will of my father."

The condition of the will is that the devisees for life shall not "charge or encumber" their interests. The document I have read clearly creates a charge. It is said that Ward never made a claim under this charge, but renounced the benefit of it. It is not necessary that he should make a claim under it; he in the first instance accepted it, and a disclaimer after acceptance is ineffectual. When he discovered the forfeiture clause he complained that he had been cheated, and obtained some other security instead of the original one; but that giving up the charge does not make it any the less a charge.

But it is said that, assuming Isaac B. Hurst to have made a charge, the forfeiture clause never came into operation under the circumstances of this case. If the clause had ended with the first branch which declares the forfeiture there would have been no room for arguing that the forfeiture had not taken effect. but it is contended that as the second branch carries the estate to the children the forfeiture must be taken as only directed for the purpose of the gift to the children, and that as there were no children in esse the forfeiture did not take

- A effect. This does not agree with the words of the will, which are that the bequest to the child transgressing the condition shall be "absolutely forfeited." The intention of these words is clear. There are cases in which it is plain that the original gift was not intended to be defeated unless there were objects to take under the gift over, as, for instance, in cases of substitutionary gifts to children; but here we have an intention separately declared that the gift is to be forfeited.
- B Two intentions are expressed: first, to forfeit the life estate; secondly, to accelerate the gifts to the children of the tenant for life. If the forfeiture is expressly limited to take effect on the event mentioned in the first branch of the clause effect must be given to it, though there be nothing to be accelerated under the second branch, and in that case the residuary devisee, if there is one, and if not the heir-at-law, takes the forfeited interest. It is urged that there is no forfeiture because no child has been born. Suppose that afterwards a child is born, is the estate to go backwards and forwards according as there is or is not issue of the tenant for life? I am of opinion, then, that Isaac Blackburn Hurst's life estate was absolutely forfeited.

- In *Doe d. Blomfield v. Eyre* (1) there was no clause of forfeiture independently of the gift over, and it was held that the fact that the gift over was void ab initio
- D did not prevent the property from going away from the first taker. It was considered that there was sufficient indication of an intention that the property should so go away though the persons designated in the gift over could not take. That decision was followed by KINDERSLEY, V.-C., in *Robinson v. Wood* (2). It is a case which was decided in 1858 by a court of co-ordinate jurisdiction with this, and is treated by the text-writers as settling the law: THEOBALD ON WILLS (2nd Edn.), p. 478; JARMAN ON WILLS (4th Edn.), vol. 1, p. 868; SUGDEN ON POWERS (8th Edn.), p. 514; and if it is to be overruled it can only be by the House of Lords.
- E *O'Mahoney v. Burdett* (3) tends in the same direction. In that case there was a gift over by will of personality to a person who died in the testator's lifetime, so when the instrument came into operation it was impossible that the gift over could ever take effect in favour of the person intended to be benefited by it. It
- F was held that on the happening of the event on which the gift over was to take effect the property went to the residuary legatee. That case was stronger than the present case, for here it was not at the death of the testator impossible for any one to take under the description in the gift over; and there is less reason for saying that the clause of forfeiture was not intended to operate.

- There being then a forfeiture, what is the result? After forfeiture there is no
- G gift during the life of Isaac Hurst which is now operative in favour of any one. We say nothing as to the rights of his children if he should ever have any; but at all events until a child is born the rents of the freeholds are undisposed of and go to the heir-at-law, as there is no residuary devise, and the dispositions made by Isaac Blackburn Hurst, under which the building society is in possession, are effectual.

- H As regards the leaseholds the case is different, for the will contains a residuary bequest, under which the executor holds the residue in trust for three people, and he has a right as legal owner to recover the rents for the benefit of his cestui que trust. The defendants who have received the rents are therefore liable to account to the plaintiff as legal owner, making all just allowances. Isaac Blackburn Hurst, however, was entitled to one-third of them beneficially, and if that
- I third is not wanted for costs the building society would be entitled to receive it back from the plaintiff. I think, therefore, that it will not be right to order them to pay that third at once, but liberty to apply as to it will be given.

LINDLEY, L.J.—As regards the question whether Isaac Blackburn Hurst created a charge in favour of Ward or not by the document he gave him, and whether the event has happened on the happening of which a forfeiture was to take place, it is in a sense true that you cannot charge anything which vanishes if you charge it; but a proviso prohibiting the charging a life estate means in

fact to prohibit anything purporting to charge it. That Ward never actually claimed under the alleged security is nothing to the point, and his disclaimer cannot relate back so as to destroy the charge when he had once accepted it.

As to the argument that the forfeiture was only to take effect if there were children, I should, even apart from *Doe d. Blomfield v. Eyre* (1), be of opinion that FRY, J.'s decision was correct, and that any other conclusion would be merely speculative. There being no children there is no express disposition of the rents during the lifetime of the tenant for life. The rents, therefore, of the freeholds, there being no residuary devise, go to the heir-at-law and pass to his encumbrancers. As to the leaseholds, the undisposed-of rents go under the residuary gift of personal estate. Isaac Blackburn Hurst, therefore, subject to any liability to costs, takes one-third of them, and his encumbrancer will get the benefit of that.

HOLKER, L.J., concurred.

Solicitors: *Mercer & Mercer; Kingsford, Dorman & Co.; John Hales; Poncione; Ewbank & Partington.*

[Reported by E. S. ROCHE, Esq., Barrister-at-Law.]

MARSHALL v. BERRIDGE

[COURT OF APPEAL (Sir George Jessel, M.R., Baggallay and Lush, L.JJ.), November 19, 1881]

[Reported 19 Ch.D. 233; 51 L.J.Ch. 329; 45 L.T. 599; 46 J.P. 279; 30 W.R. 93]

Landlord and Tenant—Lease—Agreement for—Commencement of lease from date of agreement—No date stated for commencement of term.

An agreement to grant a lease which does not state any time for the commencement of the term cannot be construed as an agreement for a lease to commence from the date of the agreement, and was insufficient under s. 3 of the Statute of Frauds, inasmuch as it did not contain all the material terms of the contract.

Blore v. Sutton (1) (1817), 3 Mer. 237, applied.

Jaques v. Millar (2) (1877), 6 Ch.D. 153, overruled.

Notes. Section 3 of the Statute of Frauds, 1677, has been replaced by s. 40 of the Law of Property Act, 1925: 20 HALSBURY'S STATUTES (2nd Edn.) 427.

Considered: *Furness v. Bond* (1888), 4 T.L.R. 457; *Re Lander and Bagley's Contract*, [1892] 3 Ch. 41. Applied: *Humphery v. Conybeare* (1899), 80 L.T. 40; *Edwards v. Jones* (1921), 124 L.T. 740; *Brilliant v. Michaels*, [1945] 1 All E.R. 121. Referred to: *Rock Portland Cement Co. v. Wilson* (1882), 52 L.J.Ch. 214; *Wood v. Aylward* (1887), 57 L.T. 54; *Oxford Corpn. v. Crow* (1893), 69 L.T. 228; *Curtis v. B.U.R.T. Co., Ltd.* (1912), 28 T.L.R. 353; *Berners v. Fleming*, [1925] All E.R.Rep. 557.

As to contracts for leases, see 23 HALSBURY'S LAWS (3rd Edn.) 440 et seq.; and for cases see 30 DIGEST (Repl.) 397 et seq.

Cases referred to:

- (1) *Blore v. Sutton* (1817), 3 Mer. 237; 36 E.R. 91; 30 Digest (Repl.) 395, 388.
- (2) *Jaques v. Millar* (1877), 6 Ch.D. 153; 47 L.J.Ch. 544; 37 L.T. 151; 25 W.R. 846; sub nom. *Jacques v. Millar*, 42 J.P. 20; 30 Digest (Repl.) 448, 893.
- (3) *Doe d. Phillip v. Benjamin* (1839), 9 Ad. & El. 644; 1 Per. & Dav. 440; 2 Will. Woll. & H. 96; 8 L.J.Q.B. 117; 112 E.R. 1356; 30 Digest (Repl.) 461, 1029.

A **Appeal** by the defendant from a decision of FRY, J., granting the plaintiff specific performance of an agreement by the defendant to grant a lease of certain furnaces, ironstone royalties and ironstone mines.

On June 15, 1880, the plaintiff wrote to the defendant proposing a lease of three, five, seven, fourteen, or twenty-one years, optional on the part of the plaintiff only to give up at any one of the dates on giving six months' notice. The letter went on to stipulate

B "that I have six months from date of agreement free from rents and royalties to enable me to do the work I require and start the furnaces. That I take any agreement you have with the Duke of Somerset (if binding on you) on the same terms you have it, but I should prefer to be left free to get other ores, which I find can be obtained at lower prices. This offer is subject to my being able to make satisfactory arrangements for other ironstone adjoining, some of which I have been offered, and other of which I have no doubt of being able to get."

On June 29, 1880, the following memorandum was signed by both parties :

D "... The above rents to be substituted for the rents, etc., specified in Mr. Marshall's letter of June 15 to Mr. Berridge, which in other respects is to be basis of agreement . . . a lease and counterpart containing all usual stipulations to be prepared and executed."

On July 12, 1880, the plaintiff wrote to the defendant stating that there seemed to be every prospect of his getting some ore from adjacent land on satisfactory terms, and asking for a draft agreement so that he might get early possession.

E The defendant replied that it had been agreed between the parties on June 29 that the ores to be used should be taken from him. This the plaintiff denied and on July 22, 1880, he wrote to the defendant again asking for a draft agreement and demanding immediate possession. In the early part of September a draft lease was sent containing a covenant by the plaintiff not to buy, receive, or use upon the premises any ironstone or iron ore other than that which he had received from the defendant. The plaintiff objected to this covenant, and, the parties being unable to agree, the present action was commenced, the plaintiff claiming specific performance and damages.

The defendant, by his statement of defence, did not admit the agreement to let on lease, and alleged that, if there was, there was no memorandum in writing sufficient to satisfy the Statute of Frauds. He also denied having offered the plaintiff possession of the premises on the signature of the memorandum of June 29, 1880, or at any other time.

G The action was tried in March, 1881, before FRY, J. The defendant's counsel raised several objections, and among others urged that, as the date of the commencement of the lease was not mentioned in the agreement, there was no sufficient agreement to satisfy the Statute of Frauds. FRY, J., however, applying his decision, in *Jaques v. Millar* (2) held that, as the agreement was dated, it must be construed as for a lease to commence immediately from its date. His Lordship also overruled the other objections and decreed specific performance of the agreement. The defendant appealed.

H *Davey, Q.C.*, and *Fischer, Q.C.* (*Northmore Lawrence* with them), for the defendant.

I *Cookson, Q.C.*, and *Archibald Brown* for the plaintiff.

SIR GEORGE JESSEL, M.R.—The question which we have to decide is, whether there was any agreement at all between the parties. It appears from the judgment of FRY, J., that he did not consider some of the points which have been urged in argument before us.

As regards the first point, it appears that it was raised by the leading counsel for the defendant in the court below, but that it was not pressed, because it was considered to be covered by a previous decision of the same judge in *Jaques v. Millar*

(2). That would also account for that point not being noticed in the judgment of FRY, J. That point is that, whatever else is to be found in the agreement, the agreement being an agreement for a lease, you cannot discover within the four corners of the agreement from what time the lease is to begin. If that is so, that being a most essential term of the agreement, the agreement cannot be enforced for want of certainty. It was held in the court below that, because the agreement itself had a date, that was the date from which the lease was to begin. I must say that, not only is there no authority for such a proposition as a proposition of law, but that there is a great deal of authority against it, and, among other authorities, *Blore v. Sutton* (1), decided by SIR WILLIAM GRANT, M.R., which is exactly in point, and which FRY, J., in his previous decision in *Jaques v. Millar* (2), attempted to distinguish on the ground that it did not appear, by the report of *Blore v. Sutton* (1) (3 Mer. 237), that the date on which the memorandum of agreement was signed appeared on the memorandum itself. I must say, speaking, I hope, not otherwise than deferentially as to that observation, that I had come to an opposite conclusion from reading the report of *Blore v. Sutton* (1); but, in order to be quite certain, I sent for the record, and from that it appears that the date was in the memorandum. Therefore, the supposed distinction between *Blore v. Sutton* (1) and *Jaques v. Millar* (2) does not exist, and the former case is entirely in point.

Independently of that, I must say that I am quite unable to agree with the decision of FRY, J., in *Jaques v. Millar* (2). No doubt there is plenty of authority for saying that if, on a given day, A. agrees to let and B. agrees to take a house, that operates as a lease or present demise at law, then of course, the words being in the present tense, they relate to the date of the instrument. That is the meaning of *Doe d. Phillip v. Benjamin* (3) and that class of cases. It is equivalent to saying, "On this day I demise." When you have an agreement only, not only is it not to be supposed that that is the date, but I should suppose the very contrary. There is always something more to be done. If there is an agreement to take a lease, there is a lease to be prepared, and I notice that in *Jaques v. Millar* (2) the learned judge says (6 Ch.D. at p. 155):

"There is clearly no indication of the commencement of the term, except the date of the document; but it is equally clear that the agreement is couched in the present tense. There is no express postponement of the time at which the agreement is to come into operation; there is nothing to be done beforehand, no repairs and no stipulation as to the preparation of the lease."

I should think that something more was contemplated in every case where a man agrees to take a lease for thirty years, which, by law, must be an instrument of a solemn character, and carefully prepared.

But, independently of that, in this case, these words occur:

"A lease and counterpart containing all usual stipulations to be prepared and executed."

Therefore, if I desired to distinguish the present case from *Jaques v. Millar* (2), I could distinguish it, using the very argument which was used by the learned judge in the court below. But I must say that I have arrived at the conclusion that *Jaques v. Millar* (2) was not correctly decided, and, therefore, I prefer to rest my decision on the general ground that the mere fact of there being a date to the agreement does not show that it is the date of the lease. The parties, as a rule, do not intend anything of the sort. They intend a lease to be prepared, which, of course, will be dated on a subsequent day, and possession is not given by a prudent landlord until the lease is duly executed. Of course it is not intended by either party that on the one side the lessee shall have possession before the day on which the lease is executed, nor on the other that the lessee is to pay rent without having possession.

Then it was said that, in this particular instance, we can find within the four corners of the agreement itself a date for the beginning of the lease. I have been

A utterly unable to follow the argument. There is nothing in the final agreement to give a date, and in the letter of June 15, 1880, all that is said is, that the plaintiff is to have

“six months from date of agreement free from rents and royalties, to enable me to do the work I require and start the furnaces.”

B It is suggested that the date of the agreement means not the date of the letter, June 15, but the date of the memorandum. But when you look at the letter itself, that offer is “subject to my being able to make satisfactory arrangements.” It is a conditional offer, and the only arrangement which I can find is that the six months from the date of the agreement would most probably have no relation to the lease, and then the lease is to begin, but when I do not know. It appears to me that that objection is fatal and should have disentitled the plaintiff to succeed.

C But there appear to have been other fatal objections, which should also have disentitled the plaintiff to succeed. In the first place, I cannot find that the plaintiff and defendant ever agreed to the same thing, and it is essential to a contract that the parties agree to the same terms. [His LORDSHIP discussed the evidence on this point and in the case generally, and continued:] It does appear to me that, if ever there was a case for refusing the plaintiff specific performance under the discretionary power of the court, we have that case here, and, on that ground, as well as on the other grounds which I have stated, I think that the decision of Fry, J., is unsustainable. Therefore, the appeal will be allowed, and the action dismissed with costs.

E **BAGGALLAY, L.J.**—This is an action for specific performance of an alleged agreement to grant a lease. In my opinion, no sufficient agreement is established in writing to satisfy or comply with the terms of the Statute of Frauds. I agree entirely in what has been said by SIR GEORGE JESSEL, M.R., in the decision that the parties were not ad idem even as regards the subject-matter on which they were desirous of coming to an agreement.

F I need not go through the various passages of the letter of June 15, 1880, or the memorandum of June 29, 1880, for the purpose of pointing that out. It has been done already. But it is sufficient, to my mind, to dismiss the claim that no time is limited in writing for the commencement of the term. *Blore v. Sutton* (1) is clear and distinct on the point as regards the principle applicable to the case then before the court. What SIR WILLIAM GRANT, M.R., held was that there was no sufficient agreement in writing. He says (3 Mer. at pp. 245, 246):

G “Secondly, because the memorandum does not contain some of the material terms of a building lease, which this was. It merely specifies the rent and the number of years. It does not even specify the commencement of the lease.”

H There is very little substantial difference between the terms of the written document in that case and the terms in this case, so far as those terms are clear and distinct. The document in *Blore v. Sutton* (1) says (3 Mer. at p. 238):

“Plans of the ground and buildings agreed to be built by Mr. Robert Blore in Piccadilly, where Mr. Arnold’s house now stands—the term to be ninety-nine years, and the rent for the first two years £60 per annum, and for the remainder of the term £120 per annum :—Covenants as usual in the Bath estate.”

I You have no more indication of particularity in the present case than there was in *Blore v. Sutton* (1). It has been admitted that counsel for the defendant raised this point in the court below. Fry, J., considered it of slight moment, and disposed of it in the course of the argument, and, therefore, we find no reference to it in his judgment. His ground for rejecting the argument was based on his former decision in *Jaques v. Millar* (2), where he had held, under somewhat similar circumstances, that, if the memorandum of agreement bore a date on it, the term agreed to be created was to date from the date of the memorandum of agreement; and he considered that, in that respect the case before him differed

from *Blore v. Sutton* (1), which was pressed on him. He was under the impression that, in *Blore v. Sutton* (1), the memorandum contained no date, and, therefore, that the principle he applied in *Jaques v. Millar* (2) would not apply to that case. But, reading the statement of the memorandum as reported (3 Mer. at p. 238), I should have come to the conclusion that the date did appear in the memorandum. SIR GEORGE JESSEL, M.R., has sent for the bill itself, and from that it appears that the date was on the memorandum. *Jaques v. Millar* (2) appears, therefore, to be inconsistent with *Blore v. Sutton* (1), the distinction drawn by FRY, J., did not exist, and, therefore, so far as the judgment proceeded on that supposed distinction, I feel bound to say that I must dissent from the conclusion at which FRY, J., arrived.

It has been suggested here that, if you look through the terms of the letter of June 15, 1880, and the memorandum of June 29, 1880, you will find sufficient indication that it was the intention of the parties that the lease should be dated from the date of the agreement, whenever that agreement might be executed or come to. I am unable to find any indication in that direction. If anything, I should infer from the documents themselves that there was an intention that, as soon as the plaintiff should be able to ascertain that he could obtain mining rights in adjoining property, then probably an agreement should be entered into, but I can find nothing in the direction that the parties intended the terms to commence from the day when the final agreement should be signed between them. There being no agreement capable of being enforced in a court of equity, I am of opinion that the decision of FRY, J., was wrong and must be reversed.

LUSH, L.J.—I am also of opinion that the agreement sought to be enforced is essentially defective on the ground taken by counsel for the defendant, that it does not define, nor can it be collected from it with reasonable certainty, at what period the term is to commence. The agreement is for a lease for three, five, seven, fourteen, or twenty-one years. It is essential to the validity of the lease that something should appear, either in express terms or by reference to some writing or some instrument, which would make it certain on what day the term is to commence. There must be a certain beginning and a certain ending, and the contract must, in order to satisfy the Statute of Frauds, contain this reference. From the documents in this case, it is impossible that anyone can tell when the lease stipulated for was to commence. [HIS LORDSHIP considered the letter of June 15, 1880, stated that the agreement was essentially defective and could not be sued on either at law or in equity, that the parties were never ad idem on what was to be the subject-matter of the contract and that there was never any agreement at all, and continued:] I think that the contract must be held to be no valid contract.

Appeal allowed.

Solicitors: *Hunters, Gwatkin & Haynes; Hacon & Turner*, for *Tyndall, Tyndall & Deakin*, Birmingham.

[Reported by FRANK EVANS, ESQ., Barrister-at-Law.]

A

LANGRISH v. ARCHER

[QUEEN'S BENCH DIVISION (Lord Coleridge, C.J., and Stephen, J.), November 28, 1882]

B

[Reported 10 Q.B.D. 44; 52 L.J.M.C. 47; 47 L.T. 548; 47 J.P. 295; 31 W.R. 183; 15 Cox, C.C. 194]

Gaming—Public place—Open place to which public have, or are permitted to have, access—Railway carriage—Vagrant Act Amendment Act, 1873 (36 & 37 Vict., c. 38), s. 3.

C

By s. 3 of the Vagrant Act Amendment Act, 1873: "Every person playing or betting by way of gaming, in any street, road, highway, or other open and public place, or in any open place to which the public have, or are permitted to have, access . . . shall be deemed a rogue and a vagabond. . . ."

A railway carriage, when being used for the conveyance of passengers on the line, **held** to be "an open place to which the public have, or are permitted to have, access" within the meaning of s. 3 of the Vagrant Act Amendment Act, 1873.

D

Per STEPHEN, J.: the word "access" in s. 3 of the Vagrant Act Amendment Act, 1873, not confined to unconditional access.

Notes. The Vagrant Act Amendment Act, 1873, has been repealed by the Betting and Gaming Act, 1960. For s. 3 of the Act of 1873, see s. 18 of the Act of 1960.

E

Referred to: *Airton v. Scott* (1909), 100 L.T. 393.

As to betting in public places, see 18 HALSBURY'S LAWS (3rd Edn.) 385 et seq.; and for cases see 25 DIGEST (Repl.) 464. For the Betting and Gaming Act, 1960, s. 18, see 40 HALSBURY'S STATUTES (2nd Edn.) 349.

Cases referred to:

F

(1) *R. v. Holmes* (1853), 3 Car. & Kir. 360; Dears C.C. 207; 22 L.J.M.C. 122; 21 L.T.O.S. 160; 17 J.P. 390; 17 Jur. 562; 1 W.R. 416; 1 C.L.R. 487; 6 Cox, C.C. 216, C.C.R.; 15 Digest (Repl.) 892, 8602.

(2) *Re Freestone* (1856), 1 H. & N. 93; 27 L.T.O.S. 109; 20 J.P. 376; 2 Jur.N.S. 525; 4 W.R. 567; 156 E.R. 1131; sub nom. *Ex parte Freestone*, 25 L.J.M.C. 121; 25 Digest (Repl.) 464, 356.

G

Case Stated by a metropolitan police magistrate.

On the hearing of a complaint preferred by the appellant against the respondent under the Vagrancy Act, 1824, s. 4, and the Vagrant Act Amendment Act, 1873, s. 3, the following facts were found: The respondent, in company with two other men, entered a first-class carriage at the Waterloo Terminus of the London and South Western Rail. Co. The respondent and the two other men, while the train in which they were travelling was on its journey from Waterloo to Sunbury Station, commenced playing a game commonly known as the "three-card trick." Two other passengers were travelling in the same compartment, and both were induced to join in the game. One of them lost his money at this game.

H

The respondent was then charged before one of the metropolitan police magistrates with gaming in an open and public place. The magistrate dismissed the charge, and the appellant appealed. The question for the opinion of the court was whether such railway carriage, being on its journey and then being used for the conveyance of passengers, was or was not an open and public place, or an open place to which the public have, or are permitted to have, access within the meaning of the Vagrant Act Amendment Act, 1873, s. 3.

I

Danckwerts for the appellant.

Woodgate for the respondent.

LORD COLERIDGE, C.J.—I am of opinion that the decision of the magistrate was wrong in law, and that he ought to have convicted the respondent. We have

to construe a section of an Act of Parliament that most probably was drawn without this question of a railway carriage being present to the mind of the draughtsman. Section 3 of the Vagrant Act Amendment Act, 1873, provides :

"Every person playing or betting by way of wagering or gaming in any street, road, highway, or other open and public place, or in any open place to which the public have, or are permitted to have, access, at or with any . . . card, shall be deemed a rogue and vagabond. . . ."

Is a railway carriage, under the circumstances of this case, an "open place" within the meaning of the section? I am of opinion that it is, and that the words of the section admit of such an interpretation. An omnibus while conveying passengers was expressly held by the Court for Consideration of Crown Cases Reserved, in *R. v. Holmes* (1), to be a public place within the meaning of the Criminal Procedure Act, 1851. In *Re Freestone* (2), the court seemed to think that, if the railway carriage had been in use on the railway, the conviction would have been good. That case strongly supports, if indeed it does not directly determine, our decision. The word "open," in the statute means open to the public, and not, of course, open to the sky.

It was argued on behalf of the respondent that it must be a place to which the public have an absolute and unconditional right of access without payment, or other special permission; and hence that a railway carriage cannot be an "open place," as no one can enter it without paying his fare. I confess that I cannot assent to that argument. A railway company cannot exclude anyone for whom there is room, and who is willing to pay his fare, though they cannot, of course, take more in one carriage than it is capable of holding. It seems to me, therefore, that a railway carriage while travelling on the line must come within the words "open place to which the public . . . are permitted to have access."

STEPHEN, J.—I am entirely of the same opinion. I do not think that counsel for the respondent dealt with *Re Freestone* (2) at all. Though it may not decide this point, it clearly contains a very strong expression of opinion on it. I fail to find anything in the Vagrant Act Amendment Act, 1873, s. 3, to the effect that the access must be an unconditional access. The magistrate certainly ought to have convicted the respondent.

Appeal dismissed.

Solicitors: *Solicitor to the Treasury; R. Biale.*

[*Reported by* DUNLOP HILL, Esq., *Barrister-at-Law.*]

A

ROLLS v. MILLER

[COURT OF APPEAL (Cotton and Lindley, L.JJ.), May 20, 28, 1884]

[Reported 27 Ch.D. 71; 53 L.J.Ch. 682; 50 L.T. 597; 32 W.R. 806]

B

Landlord and Tenant—Covenant—Covenant prohibiting use of premises for "trade or business"—"Business"—Charitable institution for homeless girls—No payment received for board or lodging—No charge made for services.

The lease of a dwelling-house contained a covenant that the lessee should not "use, exercise, or carry on, or permit or suffer to be used, exercised or carried on in . . . the said demised premises . . . any trade or business of any description." The lessees, trustees of a charitable institution, proposed to use the house as a home for girls working in London. No charge was to be made for the use of the house or for any of the meals, but there was a paid superintendent.

C

Held: the proposed user amounted to the carrying on of the business of a lodging house; the fact that no payments were to be made by the occupants of the house was immaterial; and, therefore, what the lessees proposed would be a breach of covenant.

D

Per COTTON, L.J.: The words "trade" and "business" cannot be read as synonymous. It is not essential that there should be payment in order to constitute a business, and the mere fact that there is payment under certain circumstances does not necessarily make a thing a business which, if there were no payment, would not be a business.

E

Notes. Applied in *Barnard Castle U.C. v. Wilson*, [1901] 2 Ch. 813. Considered: *South-West Suburban Water Co. v. St. Marylebone Guardians*, [1904] 2 K.B. 174; *Re a Debtor* (No. 3 of 1926), [1926] All E.R.Rep. 337. Referred to: *Tod-Heatley v. Benham* (1888), 59 L.T. 25; *Wiltshire v. Cosslett* (1889), 5 T.L.R. 410; *Withington District Local Board of Health v. Manchester Corpn.* (1893), 68 L.T. 330; *Tomkins v. Rogers*, [1921] 2 K.B. 94; *Frost v. Caslon*, *Frost v. Wilkins*, [1929] All E.R.Rep. 734; *Re Arbitration between Willesden Borough Council and Municipal Mutual Insurance, Ltd.*, [1944] 2 All E.R. 600; *Re Williams' Will Trusts*, *Chartered Bank of India, Australia and China v. Williams*, [1953] 1 All E.R. 563.

F

As to covenants as to user of premises, see 23 HALSBURY'S LAWS (3rd Edn.) 622 et seq.; and for cases see 31 DIGEST (Repl.) 169 et seq.

G

Cases referred to in argument:

Bramwell v. Lacy (1879), 10 Ch.D. 691; 48 L.J.Ch. 339; 40 L.T. 361; 43 J.P. 446; 27 W.R. 463; 31 Digest (Repl.) 170, 3043.

German v. Chapman (1877), 7 Ch.D. 271; 47 L.J.Ch. 250; 37 L.T. 685; 42 J.P. 358; 26 W.R. 149, C.A.; 28 Digest (Repl.) 807, 553.

H

Re St. James' Club (1852), 2 De G.M. & G. 383; 19 L.T.O.S. 307; 16 Jur. 1075; 42 E.R. 920, L.C.; 8 Digest (Repl.) 650, 1.

Smith v. Anderson (1880), 15 Ch.D. 247; 50 L.J.Ch. 39; 43 L.T. 329; 29 W.R. 21, C.A.; 9 Digest (Repl.) 70, 270.

Doe d. Bish v. Keeling (1813), 1 M. & S. 95; 105 E.R. 36; 31 Digest (Repl.) 169, 3038.

I

Portman v. Home Hospitals Association (1879), 27 Ch.D. 81, n.; 50 L.T. 599, n.; 31 Digest (Repl.) 170, 3044.

Appeal from orders of PEARSON, J., that the proposed user of a house as a home for working girls would be a breach of a restrictive covenant that no trade or business should be carried on in the premises, and that trustees of the proposed home should pay the costs of the application.

By an indenture, dated July 30, 1825, a piece of land in St. George's parish, Southwark, forming part of the Paragon in the New Kent Road, together with a house lately erected thereon, called No. 13, the Paragon, was demised by the

plaintiff, at the request and by the direction and appointment of W. Chadwick, to J. Russell the younger, for a term of eighty years from Michaelmas, 1824, at and subject to the rent and provisions therein mentioned, including the following covenant by the lessee for himself, his executors, administrators, and assigns, viz. :

"And further that the said J. Russell, his executors and administrators, shall not nor will at any time during the term hereby granted use, exercise, or carry on, or permit or suffer to be used, exercised, or carried on in or upon the premises hereby demised any trade or business of any description whatsoever without the consent of the said J. Rolls, or his assigns, or of the person or persons so entitled, as aforesaid, in writing."

The lease afterwards became vested in the defendant, S. Miller, and by an indenture, dated Aug. 2, 1883, the premises were demised by him to the defendants the Earl of Aberdeen, the Hon. Thomas H. W. Pelham, the Hon. Arthur F. Kin- naird, Charles E. Baring Young, and John Shrimpton (who were the trustees of a charity known as the "Homes for Working Girls"), for twenty-one years from Mid- summer, 1883, at and subject to the rent and provisions therein mentioned, includ- ing the following covenant by the lessees, viz. :

"And further that they, the lessees, shall not nor will during the said term hereby granted, use, exercise, or carry on, or permit or suffer to be used, exer- cised, or carried on in or upon the said demised premises, or any part thereof, any trade or business of any description whatsoever, without the consent in writing of the lessor first had and obtained, but it is expressly provided that nothing herein contained shall be deemed to prohibit the use of the said premises as a home for working girls, or to render it requisite for the lessees to obtain any consent from the lessor, or any other person or persons, before using the same for that purpose."

In course of time the trustees having begun to make preparation for the opening of one of their "homes" on the premises, objections were raised by some of the other inhabitants of the Paragon, and a petition against such user was signed by eleven out of sixteen of such inhabitants. No willingness to abandon the intended user being shown, the present action was commenced on Oct. 31, 1883, against the defendant S. Miller, the trustees of the "homes" being added as defendants on Nov. 5.

The object of the charity was to take in as temporary inmates, or for a more extended period, such working girls as had no homes, or could not conveniently use their homes. There was no rule as to admission, though the girls were not admitted indiscriminately. The terms of admission, according to the rules as originally settled, included fixed charges for board and lodging. The object was not to make a profit, and on the other homes of the society the balance-sheet showed a loss.

The plaintiff having moved for an injunction to restrain the defendants from using the premises or permitting the same to be used

"as one of the Homes for Working Girls of London, and from otherwise using the said premises or permitting the same to be used in breach of the covenant in that behalf contained in"

the first above-mentioned lease, PEARSON, J., on Nov. 23, 1883, granted an interim injunction, being of opinion that the proposed use of the house as a home would be carrying on a business, and came within the restriction of the covenant.

After the order was made, the trustees of the homes sent by their solicitors to the plaintiff's solicitors a letter which was as follows :

"We take the earliest opportunity of informing you that our clients, having been advised that the course contemplated by them will not be a breach of the injunction, have decided to open the house No. 13, The Paragon, New Kent Road, as a home for the free use of working girls and young women between

A the ages of fifteen and twenty-five, who are without situations, and temporarily unable to support themselves. The opening will take place as soon as the necessary arrangements can be completed. We shall be happy to give you any further information you may require as to the manner in which it is proposed to use the home."

B And in answer to a letter from the plaintiff's solicitors, asking that the intentions of the trustees might be clearly defined, the following was written :

"You are quite correct in assuming that our previous letter was intended to give you definite notice of the intentions of the defendant trustees.

C The following regulations have been decided upon, though possibly they may hereafter be added to so far as the domestic arrangements are concerned, and they will, we think, give you sufficient information as to the manner in which it is proposed to use the house.

D 1. This house is intended by the committee for the free use of working girls and young women between the ages of fifteen and twenty-five, who are without situations and temporarily unable to support themselves. . . . 3. No charge of any kind will be made for the use of this house, or for any meals that may be supplied therein. 4. The residents will therefore consider themselves as guests of the superintendent and committee, and will, it is hoped, feel it incumbent on them to regard the wishes of the superintendent, who so far as possible will desire them to conduct themselves as if they were in their own homes. 5. The superintendent, however, wishes it to be understood that the residents will be expected to attend the morning and evening family prayers in the house, and also to attend Divine service every Sunday at some place of religious worship to be approved of by her, and to render her, if and when she wishes it, cheerful assistance in the performance of the domestic duties of the house."

F In order to obtain the opinion of the court as to whether the proposed user of the house would offend against the covenant in the lease, it was agreed between the solicitors to the parties that the expressed intention should be taken as equivalent to actual user in the manner intended, and the plaintiff by motion asked leave to issue writs of attachment against the trustees individually for their contempt in using the premises No. 13, The Paragon, or permitting the same to be used as one of the Homes for Working Girls in London, or otherwise using the said premises or permitting the same to be used in breach of the order dated Nov. 23, 1883, and that the trustees might be ordered to pay to the plaintiff his costs of the application.

G On Mar. 8, 1884, PEARSON, J., held that the proposed user would be a breach of the restrictive covenant. The trustees undertaking, however, not to open the house in the way proposed, the only order made was that the trustees should pay the costs of the application. From the two orders of PEARSON, J., the trustees appealed.

H Sir Farrer Herschell, Q.C., and W. W. Karslake, Q.C. (Birrell with them), for the trustees.

Cozens-Hardy, Q.C., and Butcher for the plaintiff.

Cur. adv. vult.

I May 28, 1884. The following judgments were read.

COTTON, L.J.—This is an appeal from two orders of PEARSON, J. One was an order granting an injunction restraining the defendants from using a house, of which the plaintiff is landlord, as a girls' home, and the other was an order declaring that what was afterwards proposed to be done would be a breach of that injunction, and therefore would be a contempt. The parties have acted in a most reasonable way. The plaintiff, the landlord, is protecting not only his property, but the other residents on it, and he and the defendants have taken the shortest

possible means of ascertaining either whether the original scheme, or the modified scheme proposed to be adopted, is, or is not, to be restrained. A

The plaintiff is landlord, as I have stated, of a house of which these defendants are under-lessees, and the object of this action is to enforce a covenant contained in the original lease. The defendants, who are now appealing, are the trustees of a charity, the nature of which I shall have presently to consider. The covenant is this: [HIS LORDSHIP read the covenant between the landlord and the original lessee and continued:] This covenant evidently had for its object to keep this house as a residence or dwelling-house, but the covenant does not, as is very usual in these clauses, contain any restriction against using the house "otherwise than as a dwelling-house," or say that it shall "only be used as a private dwelling-house." P
What we have to consider is, whether what is proposed to be done, and has been done by the defendants, is, or is not, a breach of the covenant upon the fair construction of the words used, and of course we must construe these words with reference to what is the apparent object of this covenant, although it does not contain the usual words which I have mentioned. C

The defendants, who are now appealing, are trustees of what appears to me to be a most admirable institution, though of course that cannot affect our decision in any way. They are a nobleman and certain gentlemen who combine together for the purpose of raising subscriptions for providing homes for working girls. In this house, and in other houses which they have obtained, they have a resident and paid superintendent, and they provide rooms, and board also, for girls who have not any home of their own, and who are working in London. They invite all the members of the public to assist in getting the girls to find a home in these houses, and they have no connection with the girls except this, that those girls who want a home are, if they come, provided, subject to certain regulations, with a home in these houses, in which there are bedrooms and a common sitting-room, and in which they are provided with board. D E

The case came before PEARSON, J., on two occasions, when he made the orders now appealed from under somewhat different circumstances. In the first instance, the defendants were receiving payment from those girls who occupied rooms and availed themselves of the benefit of this home, and the injunction was granted to restrain the defendants from using the house in that way, on the ground that such user was a violation of the covenant. Then, by arrangement and correspondence between the parties, what the defendants determined to do was, not to receive any payment, but to make the benefits conferred on the girls entirely gratuitous. F
The question is, whether what they are doing is a business. The words are "trade or business," and there can be no question that the defendants are not carrying on any trade. The question then is, Is what they are doing a business? G

I cannot read the two words "trade" and "business" as synonymous. There may be a great many businesses which are not trades, and although, in my opinion, receiving payment for what is done, using what you are doing as a means of getting payment with a view to profit—whether profit is actually obtained or not, must, of course, be immaterial—is certainly material in considering whether what was being done is, or is not, a business, yet, in my opinion, it is not essential that there should be payment in order to constitute a business. And the mere fact that there is payment under certain circumstances, does not necessarily make a thing a business, which if there was no payment would not be a business. In my opinion, in the present state of things, what is now intended to be done does not put the matter in a different position from that in which it stood when the defendants received payment, because that payment was not a payment in the ordinary way for the purpose of getting profit if they could—it was not to constitute this a business for the purpose of profit—but it was simply a payment to go towards the charity in order to aid the funds of the charity. In my opinion it really does not make any difference that the defendants are not now receiving any payment. If without payment this scheme would not be a business, in my opinion, having regard to the mode of payment and the object for which the payment was required. H I

A it would not make any difference. But one is to consider whether this is carrying on a business, and I come to the conclusion that PEARSON, J., is right in the view which he has taken, that it is.

It has been urged upon us very strongly that this is no business at all, but a charity; that the defendants, in making a home for these girls, are treating them simply as guests, and that receiving any number of guests or any number of friends
B into a house cannot be said to be carrying on a business in that house. I quite agree that bringing guests into, or having any number of guests or friends in, your house is not in any way carrying on a business. But what is done here? None of the defendants are residing in the house, nor are they receiving into their house as their guests or friends these girls who make their home there. The defendants have a paid superintendent who manages the house for them, and it is the duty of
C that paid superintendent so to manage the house, and to see that the girls who are there conduct themselves properly and in accordance with the rules and regulations of the charity, and provision is made as to the way in which they are to be accommodated. It is not that any particular individuals known to the defendants, or whom they treat as their friends (except so far as they wish to be the friends of all those who are in distress), are admitted, but that all the public who are objects of this charity, on submitting to these regulations, are admitted into the house which they occupy. It might well be that the defendants if they liked to do this in a house which they occupied might do so, but when they do so in a house in which they pay a superintendent in order to receive the girls, these girls are really lodgers. They lodge there, and, although the trustees are, with a most praiseworthy object, using this lodging-house for the purpose of charity, nevertheless, in my opinion,
E although the lodging is given gratuitously, what is being done must be considered as carrying on the business of a lodging-house. Therefore, unhappily, these trustees, in my opinion, cannot, having regard to this covenant, use the house which belongs to the plaintiff, even according to this modified scheme. In my opinion, therefore, this appeal fails.

F **LINDLEY, L.J.**—I am of the same opinion. The question we have to determine is whether this covenant, which is a very simple one, is being infringed or not. The covenant is that the lessee will not use, exercise, or carry on, or permit or suffer to be used, exercised, or carried on, on the premises, any trade or business of any description, without the consent of the plaintiff.

The first question to be considered is, What is the object of this covenant? The
G covenant must be construed consistently with that object, and, on the other hand, something may fall within the scope of the covenant which does not fall within the words. One must look, therefore, at both the words and the object. The necessity of doing both may be made apparent by putting an illustration. If you take the words of the covenant simply, without looking at the object, it would prevent a private family from having their victuals cooked in the ordinary way on the premises;
H that is to say, as everybody in this country who lives in the ordinary way does, by a cook, whose business it is to cook the victuals. The words in this covenant are that no business shall be allowed to be carried on, and it would be ridiculous to construe the covenant as extending to any such business as that. To see the ridiculousness of that you must look beyond the words to the object of the covenant, and, looking to the object of the covenant, one sees plainly what it is. The house was a dwelling-house; it is so described in the lease. It was let as a dwelling-house,
I and this covenant was inserted in the lease.

What is the object of that covenant? There can, I think, be but one answer to that question. It was to prevent the house being used otherwise than as a dwelling-house. I think that is conceded on all hands. It is very true that this covenant does not go on, as such covenants usually do, "and not to use the house or allow it to be used otherwise than as a private dwelling-house." But that is the object of the whole thing, and, if those words were not implied, the covenant would be useless.

Another question is, What sort of a dwelling-house is it to be? because dwelling-houses are of various kinds. For example, hotels are dwelling-houses after a fashion; persons eat and drink and sleep there, and do nothing else, that I know of, except cook their meals, and so on. Is that the kind of dwelling-house which is meant? I apprehend not. I think that, although a dwelling-house was contemplated, keeping the house as an hotel would fall within the words and object of this covenant, because the hotel-keeper would be carrying on a business, and the business which he carried on would be one which it was the object of this covenant to prevent. A B

What are the defendants doing? Counsel for the trustees made a great point of the fact that it was impossible to say what kind of business this was. I do not think myself that is conclusive. It is quite possible to have new businesses which have not yet got a name, but I do not think that difficulty as great as he thought it. When we understand what is being done, it strikes me that it is not difficult to give a name to this business. I should call it the business of a lodging-house keeper. It is very true it is a charitable lodging-house; but what is being done? The defendants are associated together for the purpose of finding a home for these working girls, and they invite them to come and board and lodge there. They do not take any payment now—I do not think that is material—but they have a staff. They have a superintendent in this house whose business it is to look after the lodging-house, and that appears to me to fall both within the words of the covenant and within the mischief. That it is within the mischief I am afraid is too plain, because persons complain of it, and, of course, one sees plainly enough that it was not the kind of thing that was contemplated when the covenant was entered into. But the great difficulty is, Is it within the words? Can it be said to be carrying on, or allowing to be carried on, a business on these premises? When we look into the dictionaries as to the meaning of the word "business," I do not think they throw much light upon it. The word means almost anything which is an occupation and not a pleasure; anything which is an occupation or duty which requires attention is a business. I do not think we can get much aid from the dictionary. We must look at the words in the ordinary sense, and we must look at the object of the covenant; and, looking at both, I have no hesitation in saying that this is clearly within the words and within the object of the covenant. I think the view of PEARSON, J., was correct, and that the appeal ought to be dismissed with costs. C D E F

Appeal dismissed.

Solicitors: *Nisbet and Daw; Markby, Wilde & Burra.*

[*Reported by F. EVANS, Esq., Barrister-at-Law.*]

A

CARTER v. WHITE

[COURT OF APPEAL (Cotton, Lindley and Fry, L.JJ.), December 8, 10, 11, 1883]

[Reported 25 Ch.D. 666; 54 L.J.Ch. 138; 50 L.T. 670;
32 W.R. 692]

B

Bill of Exchange—Completion of inchoate bill—Omission of drawer's name—Insertion after death of acceptor—Non-payment—Notice—Need for notice to persons not parties to bill.

Guarantee—Discharge—Laches of creditor—No notice of non-payment of bill of exchange—Omission to fill in drawer's name on bill.

C

In November, 1874, N. deposited stock with W. as collateral security for a debt due to W. from R. who had accepted and delivered to W. two bills of exchange for the amount of the debt which were complete in all respects except that the drawer's name was left in blank. The bills fell due on Dec. 18, 1874, and Feb. 18, 1875. R. died on Jan. 6, 1875, insolvent, the drawer's name not having been inserted in the bills. No presentation for payment was made and no notice of non-payment of the bills was given to N. On July 23, 1879, N. was declared bankrupt, and on Mar. 15, 1880, his trustee in bankruptcy brought an action against W. to have the stock delivered up discharged from the debt on the ground that N. had been discharged from his suretyship by the negligence of W. in leaving the drawer's name in blank during the life of the acceptor so that it had become impossible to fill it in, whereby the bills had ceased to be valid.

D

E

Held: the name of the drawer might be filled in after the death of the acceptor; notice of non-payment was only required to be given to the parties to a bill, and not to persons who were interested without being parties; and, therefore, N. was not discharged from his suretyship.

F

Notes. Inchoate instruments are dealt with in s. 20 of the Bills of Exchange Act, 1882, see 2 HALSBURY'S STATUTES (2nd Edn.) 515.

Followed: *Re Wolmershausen, Wolmershausen v. Wolmershausen* (1889), 62 L.T. 541. Referred to: *Barber v. Mackrell* (1892), 68 L.T. 29; *Smith v. Wood* (1928), 139 L.T. 250; *Mahant Singh v. U. Ba Yi*, [1939] A.C. 601.

G

As to blank signatures on a bill of exchange and as to notice of dishonour, see 3 HALSBURY'S LAWS (3rd Edn.) 165–167, 207–212; and for cases see 6 DIGEST (Repl.) 65, 239. As to laches of creditor discharging guarantor, see 18 HALSBURY'S LAWS (3rd Edn.) 513; and for cases see 26 DIGEST (Repl.) 67 et seq.

Cases referred to:

H

(1) *Polak v. Everett* (1876), 1 Q.B.D. 669; 46 L.J.Q.B. 218; 35 L.T. 350; 24 W.R. 689, C.A.; 26 Digest (Repl.) 164, 1228.

(2) *Hitchcock v. Humfrey* (1843), 5 Man. & G. 559; 6 Scott, N.R. 540; 12 L.J.C.P. 235; 1 L.T.O.S. 109; 7 Jur. 423; 134 E.R. 683; 26 Digest (Repl.) 70, 498.

(3) *Black v. Ottoman Bank* (1862), 15 Moo.P.C.C. 472; 6 L.T. 763; 8 Jur.N.S. 801; 10 W.R. 871; 15 E.R. 573, P.C.; 26 Digest (Repl.) 194, 1478.

I

(4) *In the Goods of Duffy* (1871), 5 I.R.Eq. 506; 44 Digest 311, m.

Also referred to in argument:

Watson v. King (1815), 4 Camp. 272; 1 Stark. 121; 1 Digest (Repl.) 798, 3251.

Montague (Mountague) v. Perkins (1853), 22 L.J.C.P. 187; 21 L.T.O.S. 185; 17 Jur. 557; 1 W.R. 437; 1 C.L.R. 579; 1 Digest (Repl.) 366, 388.

Stoessiger v. South Eastern Rail. Co. (1854), 3 E. & B. 549; 23 L.J.Q.B. 293; 23 L.T.O.S. 65; 18 Jur. 605; 2 W.R. 375; 2 C.L.R. 1595; 118 E.R. 1248; 6 Digest (Repl.) 19, 102.

- M'Call v. Taylor* (1865), 19 C.B.N.S. 301; 6 New Rep. 207; 34 L.J.C.P. 365; 12 L.T. 461; 11 Jur.N.S. 529; 13 W.R. 840; 114 E.R. 803; 6 Digest (Repl.) 19, 103.
- Goldsmid v. Hampton* (1858), 5 C.B.N.S. 94; 27 L.J.C.P. 286; 31 L.T.O.S. 248; 4 Jur.N.S. 1108; 6 W.R. 768; 141 E.R. 37; 6 Digest (Repl.) 71, 615.
- Harvey v. Cane* (1876), 34 L.T. 64; 24 W.R. 400; 6 Digest (Repl.) 64, 572.
- Scard v. Jackson* (1875), 34 L.T. 65, n.; 24 W.R. 159; 6 Digest (Repl.) 64, 571.
- Strange v. Fooks* (1863), 4 Giff. 408; 2 New Rep. 507; 8 L.T. 789; 9 Jur.N.S. 943; 11 W.R. 983; 66 E.R. 765; 26 Digest (Repl.) 197, 1499.
- Bonser v. Cox* (1841), 4 Beav. 379; 10 L.J.Ch. 395; 5 Jur. 164; 49 E.R. 385. L.C.; subsequent proceedings (1844), 6 Beav. 110; 13 L.J.Ch. 260; 2 L.T.O.S. 493; 8 Jur. 387, L.C.; 26 Digest (Repl.) 73, 519.
- Wulff v. Jay* (1872), L.R. 7 Q.B. 756; 41 L.J.Q.B. 322; 27 L.T. 118; sub nom. *Woulff v. Jay*, 20 W.R. 1030; 26 Digest (Repl.) 193, 1461.
- Hatch v. Searles, Stanway's Case, Conway's Case* (1854), 2 Sm. & G. 147; 22 L.T.O.S. 280; 2 W.R. 242; 65 E.R. 342; affirmed, 24 L.J.Ch. 22; 3 W.R. 49, L.J.J.; 6 Digest (Repl.) 133, 983.
- Usher v. Dauncey* (1814), 4 Camp. 97, N.P.; 6 Digest (Repl.) 64, 576.
- Straton v. Rastall* (1788), 2 Term Rep. 366; 100 E.R. 197; 26 Digest (Repl.) 197, 1501.

Appeal from a decision of KAY, J., in an action by the plaintiff claiming that the surety had been discharged from his suretyship by the negligence of the defendant creditor and for a declaration that stock deposited as security with the defendant should be treated as discharged from all claims of the defendant in respect of money intended to have been secured by two bills of exchange, or for an account. KAY, J., dismissed the claim except for an account due to the defendant and held that, notwithstanding the death of the acceptor, the name of the drawer might be filled in.

The plaintiff was the trustee in bankruptcy of G. Noble, the surety, and the defendant was Sir T. White, the creditor.

In November, 1874, G. Noble deposited with the defendant, Sir T. White, the certificates for £505 stock in the Chigwell, Loughton, and Woodford Gas Co. as collateral security for a debt of £500 then due from J. E. Randle to the defendant. This debt had been primarily secured by two bills of exchange for £250 payable one on Nov. 18, 1874, and the other on Dec. 18, 1874. The first of these was renewed by another bill of exchange accepted by Randle, dated Nov. 18, 1874, for £250 payable at three months date, and it was in consideration of such renewal that the gas stock was deposited.

The two bills of exchange contained no drawer's name when delivered to the defendant, and they had not been completed by inserting the drawer's name at the commencement of this action; the amounts and dates were duly filled in.

J. E. Randle died on Jan. 6, 1875, his estate being insufficient to pay the debt of £500. In April, 1875, when both the bills of exchange were due, G. Noble executed transfers of £405 of the stock to the defendant, retaining £100 in his own name to provide for his qualification as director of the company.

G. Noble was made bankrupt on July 23, 1879. In the same year the defendant sold the £405 stock so transferred to him, and applied the proceeds in discharge of the debt of £500.

The bills were never presented for payment, nor was the sum due on them ever paid. The defendant had never given Noble notice of their non-payment.

On Mar. 15, 1880, the plaintiff as trustee in bankruptcy of G. Noble commenced this action, to which the executrix of J. E. Randle was made a party by amendment, and contended that the defendant by his negligence discharged Noble from his suretyship, especially by leaving the name of the drawer of the bills in blank until the death of the acceptor, which rendered it impossible to fill them up, and they therefore ceased to be valid securities.

A In his answer to interrogatories the defendant, referring to the original acceptances, stated as follows :

B “One of such acceptances would have been payable on Nov. 18, 1874, but was not presented, it being the arrangement between . . . J. E. Randle, E. Noble, and myself, that it should not be presented, but be renewed by another acceptance, and that . . . G. Noble should deposit with me the gas shares referred to in the pleadings as security for the due payment of the £250 the amount of the renewed acceptance, and the £250 the amount of the other acceptance which was to be paid on Dec. 18, 1874.”

He then set out a copy of the renewed acceptance, dated Nov. 18, 1874, and payable three months after date, and continued :

C “The £500, the subject of such renewed acceptance and of the acceptance which was paid on Dec. 18, 1874, was not paid; the non-payment of the . . . sum of £500 and the fact of the . . . acceptance not having been taken up, were the subject of constant conversation between myself and . . . G. Noble, and as to the first of the . . . acceptances between myself and . . . J. E. Randle, and as to the second of such acceptances between myself and Kate Maria Randle, his widow, and I constantly informed . . . G. Noble that it was my wish that the £500 should be repaid.”

D The case came before KAY, J., in March, 1882, when he held that, notwithstanding the death of the acceptor, the name of the drawer might be filled in, and dismissed the action, except so far as it asked for an account of the debt and of the proceeds of the stock which had been sold by the defendant. The plaintiff appealed.

E *Higgins, Q.C.*, and *Bradford* for the plaintiff.

Rigby, Q.C., and *Shebbeare* for the defendant.

COTTON, L.J.—This case has been brought by way of appeal from a decision of KAY, J. The plaintiff represents Noble, who became a surety to the defendant F White for a debt due from Randle. Randle is dead. KAY, J., refused the relief prayed, but directed an inquiry what was due to White and as to the proceeds of the stock. The objection of the plaintiff to this judgment is that it is not declared, as the claim asks, that the plaintiff's suretyship was discharged, he wishing to get back the stock which was transferred as security, or the proceeds thereof. The facts are shortly these. In 1874, the defendant White lent a sum G of money to Randle, and certain stock was deposited by Noble as security. Acceptances were given by Randle to the defendant in blank, and remained in blank at Randle's death. The stock deposited as collateral security has now been transferred. The Statute of Limitations has run against the bills.

H Several grounds were urged by the plaintiff. First, it was said that Noble agreed to become surety only for bills of exchange, and that meant perfect bills; whereas these are imperfect, and therefore his suretyship is discharged. But that argument is displaced when we look at the facts and the pleadings. In the statement of defence they are spoken of as “the acceptances in the statement of claim called bills of exchange.” And when we come to the interrogatories it is clear that Noble knew at the time what the documents really were. The plaintiff comes here without any evidence beyond that to show what really took I place; and from it we must come to the conclusion that Noble knew what the documents were; that they were not perfect bills of exchange, but acceptances only. That disposes of the first point.

It was said that the documents were not bills of exchange and not promissory notes, and, assuming that they could be filled up and made perfect before the death of the acceptor, yet after his death no one had power to fill them up. That was the only point decided by KAY, J., who held that they could be now filled up, and in my opinion it was correctly decided. The power which the defendant had to fill up the acceptances was not in consequence of the defendant

being appointed by Randle, his agent, to fill them up on his behalf, but in consequence of a contract that the person to whom they were given, or anyone authorised by him, should be at liberty to fill them up. That contract was not put an end to by the death of the acceptor; therefore KAY, J., was quite right. Notwithstanding the death of the acceptor, the power remains, and they may be still made good bills of exchange. A

It is said that if filled up in proper time they might have been presented and payment enforced. That question does not arise here. Noble never required that they should be filled up. The principle is this: That if there is a contract, express or implied, that the creditor shall acquire or preserve any right against the debtor, and the creditor deprives himself of the right which he has stipulated to acquire, or does anything to release any right which he has, that discharges the surety; but when there is no such contract, and he only has a right to perfect what he has in his hand, which he does not do, that does not release the surety unless he can show that he has received some injury in consequence of the creditor's conduct. That is laid down by BLACKBURN, J., in *Polak v. Everett* (1). Here, although these acceptances were not perfected, there is no evidence that anything could have been recovered from the debtor if they had been; therefore the surety is not entitled to anything in the nature of damages for being deprived of an advantage which he otherwise would have had. The surety is not now prevented from getting the acceptances filled up, though, of course, they would not be of any use if the statute were pleaded. A surety is not discharged merely by the negligence of the creditor. If he had required them to be enforced and the creditor had refused, the surety might have been discharged; but he is not discharged merely by the laches of the creditor, for this reason—that the surety may at any time pay off the debt and sue the debtor in the name of the creditor, or call on him to sue. B C D E

Then it was contended that the bills were not presented, and that no notice of dishonour was given to Noble, which it was said he was entitled to have. But the rule as to notice of dishonour applies only to parties to bills of exchange, not to persons who are interested in them without being parties. If any authority is required, we have *Hitchcock v. Humfrey* (2) where it was expressly decided that the surety for payment of a bill is not discharged although he has received no notice of the dishonour of the bill. F

The same thing was laid down in *Black v. Ottoman Bank* (3). It was there said (15 Moo.P.C.C. at p. 484):

“The cases referred to upon bills of exchange turn upon a different principle, viz., that by mercantile usage a contract is implied by the holder to give notice of dishonour, within a certain time, to the drawer or indorser, who stands in the situation of surety for the acceptor.” G

I am therefore of opinion that the appeal must be dismissed, but there must be an account of what was due to the defendant, and of the proceeds of the sale of the stock. H

LINDLEY, L.J.—I am also of opinion that this appeal substantially fails. On the evidence before us it is clear to me that Noble knew from the beginning of the transaction what the documents were, that the drawer's name was not filled in, and that they were not perfect bills. It is a strong thing to contend that the defendant is to be deprived of his security because, as is contended, these acceptances are useless bits of paper. I

The points relied on were, first, that the defendant did not fill up and perfect the security. But he is in a position to hand over the acceptances in the same state in which he received them, for better, for worse; he is able to comply strictly with the rule that the creditor must hand over what he gets to the surety. It is said that it was his duty to present the bills for payment and to give notice to the surety of their non-payment. That depends on the custom of merchants. It

A was decided years ago that there is a difference in this respect between those who are sureties for the payment of a bill and those who are parties to the bill. In *BYLES ON BILLS* (12th Edn.), p. 295, the author says :

“A man merely guaranteeing the payment of a bill, but not a party to it, is not discharged by the neglect of the holder to give him notice of dishonour, unless he has been actually prejudiced by such neglect.”

B It was said that the defendant had discharged his surety by holding the bills till the Statute of Limitations had run. Is it the law that a creditor who neglects to sue his debtor till the statute has run will thereby discharge his surety? There is no decision to that effect. On the contrary, the true principle is that mere omission to sue does not discharge the surety, because the surety can himself set the law in operation against the debtor.

C That disposes of most of the grounds of appeal. As regards the judgment of KAY, J., the point on which he decided it is new. There appears to be no authority on the subject, except the Irish case *In the Goods of Duffy* (4). I am not disposed to differ from the judge on that point. He has dismissed the action with costs, except ordering the account against the defendant, and I think he was right.

D The plaintiff's counsel contends that he ought to have had judgment against the personal representative of Randle. This was not asked for in the court below, but it is now contended that it would be right to give liberty to the plaintiff to go in and prove against Randle's estate in an administration suit. He can go in and prove if he likes. I do not understand that the judgment precludes him from doing so, but I see no objection to insert a proviso in the judgment reserving him that power.

E **FRY, L.J.**—I am of the same opinion. The question before KAY, J., was whether such a document as we have in this case can be filled up after the death of the acceptor; and it was argued that the delivery of the acceptance conferred an authority to fill it up which came to an end with the death of the person who gave it, and therefore that it was too late now to make the acceptance a complete bill. In my judgment that reasoning proceeds upon a false proposition. It is not by an authority, but by a contract between the acceptor and the intended drawer, that the drawer had a right to fill up the instrument and make it a complete bill. That is the nature of the transaction between them. You may call such a right an authority, but it is a right founded on a contract, and being a contract it does not come to an end by the death of the acceptor. The instrument may be made perfect after the death of the acceptor as well as before. Therefore in my opinion the judgment was right.

H The other grounds on which the plaintiff rested his case were these: First, it was said that the surety was discharged because he did not get something which he bargained for. But the conclusion that I draw from the evidence is that he knew the facts from the beginning, and that he did get everything that he bargained for. Secondly, it was said that the non-presentment of the bills discharged the surety. In my opinion there is no ground for such a contention. On the other points I agree with the other lords justices, and I also agree that it will be better to insert the proviso that the judgment is not to preclude the plaintiff from carrying in a claim against Randle's estate for what was paid out of his property in discharge of the obligation.

I *Appeal dismissed.*

Solicitors: *Wild, Browne & Wild; A. T. Hewitt.*

[*Reported by W. C. Biss, Esq., Barrister-at-Law.*]

Re COTTON'S TRUSTEES AND LONDON SCHOOL BOARD

[CHANCERY DIVISION (Fry, J.), February 10, 11, 1882]

[Reported 19 Ch.D. 624; 51 L.J.Ch. 514; 46 L.T. 813;
30 W.R. 610]

Settlement—Will—Power of sale—Duration of power—Exercise by trustees after property absolutely vested in beneficiaries—No election to take property and extinguish trusts—Intention of settlor—Perpetuities.

Where trustees of a will or settlement have been given a power of sale over land comprised in the instrument they can exercise that power after the property has, under the trusts, become absolutely vested in persons who are sui juris, provided that, on construction of the instrument, such an exercise appears to have been intended by the testator or settlor, and provided that the duration of the power does not offend the rule against perpetuities and the cestuis que trust have not elected to take the property and thereby extinguish the trusts.

Notes. The Vendor and Purchaser Act, 1874, has been repealed by the Law of Property Act, 1925, s. 207, Sched. 7. Section 49 of the Act of 1925 now deals with applications to the court by vendor and purchaser: (see 20 HALSBURY'S STATUTES (2nd Edn.) 541).

Considered: *Re Sudeley and Baines*, [1894] 1 Ch. 334. Distinguished: *Re Dyson and Fowke*, [1896] 2 Ch. 720. Considered: *Re Jump, Galloway v. Hope*, [1903] 1 Ch. 129. Followed: *Re W. & R. Holmes and Cosmopolitan Press, Ltd.'s Contract*, [1943] 2 All E.R. 716. Referred to: *Re Horsnail, Womersley v. Horsnail*, [1909] 1 Ch. 631.

As to election to conversion by several owners, see 14 HALSBURY'S LAWS (3rd Edn.) 586; and for cases see 43 DIGEST 900 et seq. As to duration of powers, see 29 HALSBURY'S LAWS (3rd Edn.) 333. As to satisfaction and exercise of powers, see 30 HALSBURY'S LAWS (3rd Edn.) 286; and for cases see 37 DIGEST 115.

Cases referred to:

- (1) *Mortlock v. Buller* (1804), 10 Ves. 292; 32 E.R. 857; 43 Digest 910, 3507.
- (2) *Peters v. Lewes and East Grinstead Rail. Co.* (1881), 18 Ch.D. 429; 50 L.J.Ch. 839; 45 L.T. 234; 29 W.R. 874, C.A.; 43 Digest 901, 3442.

Also referred to in argument:

Lantsbery v. Collier (1856), 2 K. & J. 709; 25 L.J.Ch. 672; 28 L.T.O.S. 35; 4 W.R. 826; 69 E.R. 967; 43 Digest 901, 3435.

Wolley v. Jenkins (1856), 23 Beav. 53; 26 L.J.Ch. 379; 53 E.R. 21; affirmed (1857), 28 L.T.O.S. 362; 3 Jur.N.S. 321; 5 W.R. 281, L.C.; 37 Digest 116, 476.

Taite v. Swinstead (1859), 26 Beav. 525; 33 L.T.O.S. 312; 5 Jur.N.S. 1019; 7 W.R. 373; 53 E.R. 1001; 37 Digest 116, 477.

Re Brown's Settlement (1870), L.R. 10 Eq. 349; 39 L.J.Ch. 845; 18 W.R. 945; 43 Digest 901, 3439.

Adjourned Summons under the Vendor and Purchaser Act, 1874, to determine whether the trustees of a will could, under their powers of sale, make a good title to certain land without the concurrence of the persons beneficially entitled under the will.

By his will, dated July 6, 1865, the testator, William Cotton, gave his Bow Common Estate unto and to the use of his trustees, their heirs, executors, administrators, and assigns, upon the several trusts and for the following purposes: viz., on trust that the trustees should raise £30,000 by way of mortgage on the estate, or some part thereof, and should stand possessed of the same and the interest thereof on the trusts thereafter declared, and (subject as aforesaid) that the trustees should, for so long as they should think fit, during a period com-

A mencing at his decease and ending at the expiration of a term of twenty-one years, to be computed from the decease of the last survivor of the several persons named in his will, manage the estate in whatever manner they should deem expedient, they exercising, as regarded such management, all and every or any of the powers and discretions thereafter given to them, in conformity, nevertheless, with the express restrictions and qualifications thereafter contained.

B The testator also declared that, subject thereto, his trustees should stand seised and possessed of the estate in trust for his wife during her life, with remainder upon trust for the benefit of his eight children in equal shares.

The testator then stated that his Bow Common Estate consisted in part of building sites and land adapted for building, and of incomplete buildings and works, and that it was his wish that such sites and land should be built upon, C laid out for building, or otherwise improved, and that the incomplete buildings and works should be completed as expeditiously as circumstances would reasonably admit of, and then proceeded to give the trustees various specific powers of management, authorising them to grant leases, etc., to enter into contracts for building, to build, to lay out roads, and generally to manage the estate, for which purpose he gave them very wide powers. He created a special fund, which he called his D Bow Common Estate Capital, which consisted of a fund which might be in the hands of certain bankers to a particular banking account and moneys which he had invested by way of mortgage upon this particular estate, and directed that this Bow Common Estate Capital should be applied in furtherance of his thereinbefore recited wish respecting his Bow Common Estate, and be disposed of in such manner as his trustees in execution of the trust for and powers of management E thereinbefore contained should order or direct; and the capital was ultimately to belong to the persons to whom the beneficial interest in the estate belonged. He further provided that it should be lawful for his trustees, at any time or times during the said period, commencing on the day of his decease and ending on the day of the expiration of a term of twenty-one years from the decease of the last survivor of the several persons named in his will, absolutely to sell his Bow F Common Estate, or any part or parts thereof, either wholly or partially freed from all or any of the mortgages affecting the same.

The testator died on Dec. 1, 1866, and in 1881, after the death of the widow, the trustees contracted to sell a portion of the estate to the London School Board. The Board objected that, if all the persons beneficially entitled under the will were sui juris, they were in a position to require the property to be handed over to G them, and that the power of sale was gone. The trustees replied that the persons entitled were all sui juris, but that, inasmuch as the property was primarily given to the trustees for twenty-one years, as yet unexpired, to manage, and with a power of sale incident thereto, they insisted that the power of sale still existed. The Board then required that all the persons beneficially entitled under the will should join in the conveyance. The trustees declined to comply with this requisition, and there- H upon took out the present summons, asking the opinion of the court whether they had, under the will, power to sell and to make a valid assurance of the property comprised in the agreement with the Board, without the concurrence of any other person or persons, so as to vest such property in the Board as the purchasers thereof in fee simple.

W. W. Karlake, Q.C., and C. J. Ruscombe Poole for the trustees.

I A. R. Kirby for the Board.

FRY, J.—The question is whether the trustees of the will of the testator, William Cotton, have power to sell certain property to the London School Board without the concurrence of any other person or persons. It appears that the beneficial interest in the property in question is vested in undivided eighths in certain persons, and it has been argued on the part of the purchasers that, whenever the interests under a will or settlement have absolutely vested in a person or persons who are sui juris, any existing powers with regard to that property have come to an end.

Before proceeding to consider that argument, I must observe that there is the greatest possible distinction between the determination of a power under the instrument which created it and its extinction by the concurrence of the persons who are entitled to take the property which is the subject of the power. The former appears to me, subject to the question of the power going beyond the period allowed by law for the duration of such powers, to be a mere question of the intention of the donor of the power, as evidenced by the instrument by which the power was created. It seems needless to dwell upon that, because if the power be valid the sole question is whether it has been created, and that again is really a question of intention and of construction.

LORD ST. LEONARDS (SUGDEN) in his book upon "POWERS" has pointed out that that is the true criterion as to the existence of powers. Referring to the cases arising out of settlements he says ((8th Edn.), at p. 859):

"It frequently happens that a tenant for life of an estate in strict settlement, with the ultimate remainder to himself in fee, with powers of leasing, jointuring, charging, portions, sale and exchange, etc., acquires the fee by the failure of the limitations intermediate between his life estate and remainder; and it may be questioned whether all these powers continue after the accession of the fee. Perhaps the better opinion is, that the powers cannot be exercised after the union of the estates, on the ground, not that the powers are merged, but that according to the true construction of the settlement they were not to be exercised after the determination of the limitations which they were intended to overreach. To this there could be no objection; it would not affect any prior exercise of the power, although by will."

Then he refers to one of the earliest cases upon this question, *Mortlock v. Buller* (1), in which a settlement had been made, and during the life of the tenant for life, the life estate had united with the ultimate remainder, and he then observes:

"The substantial ground upon which such a power in trustees should be held not to be subsisting is, that the intention of the settlement was to confine it to the time during which the uses of the settlement existed."

Accordingly it is well ascertained that, where there is a settlement of real estate, either by will or by deed, and the settlement ultimately carries the land to a person entitled in fee simple, and there are powers couched in general words and without limitation as to time, which are, nevertheless, obviously intended to be exercised only during the subsistence of the intermediate limitations, there, the moment the estate in fee is vested the powers are at an end, because it was the intention of the settlement that they should subsist only during the intermediate limitations. In that case, therefore, the vesting of the estate absolutely in the persons ultimately entitled is an indication that, according to the true construction of the settlement, the intention of the settlor with regard to the powers has come to an end. That is an illustration of the principle that you must look at the intention of the settlor or testator.

Another case recently decided may be referred to to show the way in which the courts look at the intention. In *Peters v. Lewes and East Grinstead Rail. Co.* (2) a power was created for the purpose of dividing the property among the persons who were ultimately to take it absolutely. If the court had there held that the absolute vesting of the ultimate interests had put an end to the power, they would have defeated the object and intention of the creator of the power, and accordingly the court held that the power subsisted, notwithstanding that the ultimate estates had vested absolutely.

So here the question is, What was the intention of the settlor or deviser? To my mind that is reasonably apparent. The testator was possessed of a large building estate called "The Bow Common Estate," which he gave to certain trustees, who are the present applicants, upon trust to raise the sum of £30,000 by mortgage, and then he indicated a period which was to run from his death to the expiration

A of twenty-one years from the death of the survivor of all the persons named in his will. The object of so limiting that period was to keep the estate together for the purpose of management as long as the law would permit. He then gave the benefit of the estate to his wife for her life, with remainder in undivided eighths, which are stated to have become vested in persons who are now sui juris. During the term to which I have already referred he directed the trustees to manage the estate. The object of the testator is made plain by the recital which is contained in the will. He clothes his trustees during the period to which I have referred with very ample and very specific powers of management. They may enter into contracts for building, they may build, they may lay out roads, they may make advances to builders, they may lease, and lastly they may sell; and it is under that power of sale that the present contract has been made. Moreover, the testator C by his will created a special fund, which he called his "Bow Common Estate Capital," which was to be used by the trustees during this period as the capital for carrying on building operations upon his estate, and it was ultimately to vest in a manner corresponding with the limitations of the estate.

Nothing can be more plain, to my mind, than the intention of the testator that, during the period to which I have referred, the estate and the fund should be D managed together by the trustees as a common concern, in order to utilise and improve the estate. That was his intention, and it would be a violation of his intention if I were to hold that it had come to an end by the absolute vesting of the beneficial shares. Nothing could be more inconvenient than for persons entitled to undivided eighths to have the management and carrying on of a concern of this kind. The case is very similar to that which would have occurred if the E testator, being the owner of a business and land connected with it, had vested the business in trustees for the purpose of their carrying it on during the same period. It would be very difficult in such a case to say that the intention of the testator was that the power should come to an end when the beneficial interests in the business had become absolutely vested.

F The question, therefore, in my judgment, being merely one of intention, I conclude that the intention of this testator was that this enterprise should be carried on during that period which he has indicated. It has not been suggested that that period transgresses the law against perpetuities, and therefore it is valid. I am not deciding that the persons beneficially interested might not at any moment put an end to the power and the trusts connected with the term; but there is no suggestion that they have yet done so. The power must therefore be assumed to be still subsisting, and the trustees can make a good title under it without the concurrence of anyone else.

Order accordingly.

Solicitors: *Prideaux & Sons; Gedge, Kirby, Millett & Morse.*

[*Reported by W. C. BISS, Esq., Barrister-at-Law.*]

DAVIS v. HARFORD

[CHANCERY DIVISION (Chitty, J.), November 15, 16, 1882]

[Reported 22 Ch.D. 128; 52 L.J.Ch. 61; 47 L.T. 540; 31 W.R. 61]

Settled Land—Tenant for life—Powers—Leasing—Agreement to grant lease—Death of tenant for life before execution—Equitable exercise of power of leasing—Legal title vested in trustees—Trustees bound to execute lease.

The tenant in possession of real estate devised in strict settlement entered into an agreement with the plaintiff to grant him a building lease under a power in the will given to any tenant for life and also to the trustees during the minority of any tenant in tail. The tenant for life died without having executed the lease and left an infant tenant in tail. Thereupon the power of leasing became vested in the trustees who declined to execute the lease to the plaintiff who had entered under the agreement and erected buildings.

Held: the agreement being within the power was an equitable exercise of the power of leasing which gave the plaintiff a perfect equitable title binding on all claiming under the settlement, and the trustees who were enabled to vest the legal estate were bound to execute the lease.

Notes. This case was decided before the Settled Land Act, 1882, had come into force. This Act is now repealed and the relevant ss. 2 (5), 12; and 60, are now replaced by ss. 19, 43, and 26 of the Settled Land Act, 1925, respectively: (see 23 HALSBURY'S STATUTES (2nd Edn.) 55, 114, 72).

As to validation of defective leases in equity, see 23 HALSBURY'S LAWS (3rd Edn.) 421; and for cases see 40 DIGEST (Repl.) 772 et seq. As to persons who may claim relief in case of defective execution of powers, see 30 HALSBURY'S LAWS (3rd Edn.) 273; and for cases see 28 DIGEST (Repl.) 549 et seq.

Case referred to in argument:

Shannon v. Bradstreet (1803), 1 Sch. & Lef. 52; 40 Digest (Repl.) 772, *494.

Special Case in an action for specific performance.

P. J. Miles, by his will made in 1842, devised his estates in the county of Gloucester to the use of his second son P. W. S. Miles, for life, with remainder to the use of trustees, during the life of such son, to preserve contingent remainders, with remainder to the use of the first and other sons of P. W. S. Miles successively in tail male, with remainders over. The will contained powers of leasing, including a power for a tenant for life in possession, and also for the trustees during the minority of any tenant for life or in tail, by deed to grant building leases for ninety-nine years.

The testator died in 1845, and in July, 1881, P. W. S. Miles, being tenant for life in possession, entered into an agreement with G. Davis, the plaintiff, to grant under the powers in the will a building lease of part of the estates for ninety-nine years, and the plaintiff entered upon the land and erected buildings thereon pursuant to the agreement. In October, 1881, P. W. S. Miles died without having completed the agreement to grant a lease and leaving an only son, P. N. Miles, an infant, who thereupon became tenant in tail.

The question arose whether the trustees, as the persons in whom the powers of leasing were vested during the minority of the tenant in tail, had power to grant a lease for the purpose of effectuating the agreement entered into by the tenant for life. It was admitted that the agreement was both within the terms of the power, and had been carried out by the plaintiff.

Dunning for the plaintiff.

H. M. Mills for the defendants, the trustees.

CHITTY, J.—The actual point I have to decide is not covered by direct authority, but the case is a simple one. The tenant for life having under the

A settlement a power of granting building leases, entered into an agreement with the plaintiff to grant him a building lease. It is admitted that the agreement was within the power, consequently it was an equitable exercise of the power of leasing. The plaintiff entered under the agreement and erected buildings on the land. Inasmuch, therefore, as there is a power of leasing in the settlement, and that power has been equitably exercised, all persons entitled under the settlement are bound. The only question is how the legal estate is to be vested in the lessee. There being a perfect equitable title, and all persons entitled under the settlement being bound, the question is whether the parties who have the control of the legal estate, and who can give legal effect to the contract, are authorised by the power to grant a lease. I am of opinion that they are authorised to grant the lease. If the agreement had been for a lease not in accordance with the power, my opinion might have been otherwise; but since all parties under the settlement are bound by the equitable contract, and the equitable interest is effectually passed to the lessee, I am of opinion that the persons who are enabled by the power to vest the legal estate are bound to give effect to the exercise of the power and to execute the necessary deed.

D *Judgment for the plaintiff for specific performance with costs.*

Solicitors: *Meredith, Roberts & Mills, for Osborne, Ward, Vassall & Co., Bristol.*

[*Reported by* REGINALD B. SCHOMBERG, ESQ., *Barrister-at-Law.*]

E

Re HODGSON. BECKETT v. RAMSDALE

F [COURT OF APPEAL (Sir James Hannen, P., Bowen and Fry, L.JJ.), November 9, 10, 12, 1885]

[*Reported* 31 Ch.D. 177; 55 L.J.Ch. 241; 54 L.T. 222; 34 W.R. 127;
2 T.L.R. 73]

G *Administration of Estates—Claim on estate—Evidence—Evidence of claimant—Need of corroboration.*

H There is no rule of law laying down that there must be corroboration of the evidence of the claimant given in support of a claim against the estate of a deceased person before that claim can be established. In the necessary absence through death of one of the parties to the alleged transaction it is natural that, in considering the statement of the survivor, the court will look for corroboration in support of it, but, if the evidence of the living party brings conviction to the tribunal who has to try the question, there is no rule of law which prevents that being acted on.

I Observations of Fry, L.J., on the procedure to be followed where an administration decree is obtained by a separate creditor against the estate of a deceased partner and proof is afterwards tendered by a creditor of the partnership.

Partnership—Dissolution—Notice—Publication in London Gazette—Need to prove creditors' actual knowledge of dissolution.

Where persons have had dealings with a partnership firm the mere publication in the LONDON GAZETTE of the dissolution of the partnership is not sufficient to affect such persons with notice if they continue to give credit on the footing of the continuance of the partnership. It is necessary, to affect them with notice, that actual knowledge should be brought home to them.

Estoppel—Res judicata—Partnership debt—Claim against estate of deceased partner—Death of surviving partner—Claim against surviving partner's estate.

A father and his son, being in partnership, became indebted to the plaintiffs. The son having died, the father commenced an action for the administration of his estate, and creditors of the firm, not being aware that the father had been a partner in the firm, carried in a claim for their debt against the estate of the son, and were declared to be entitled to a dividend. Two years later the father died, and the creditors, having discovered that he had been a partner, commenced an action for the administration of his estate which they claimed to make liable for the debt.

Held: the proceedings taken by the creditors in the previous action did not constitute the matter *res judicata* so as to prevent them proving in the later action for their debt, but they must undertake to postpone their dividend out of the son's separate estate to the claims of his separate creditors.

Contract—Debt—Joint contractors—Joint debtors—Action maintainable against all or one—One cause of action.

PER BOWEN, L.J.: In the case of a joint contract and joint debt, as distinguished from a case of joint and several contract and joint and several debt, there is only one cause of action. The party injured may sue at law all the joint contractors, or he may sue one, subject in the latter case to the right of the single defendant to plead in abatement, but whether an action in the case of a joint debt is brought against one debtor or against all the debtors, or continued against one debtor or all the debtors, it is for the same cause of action. There is only one cause of action.

Notes. Considered: *Wildish v. Fowler* (1888), 5 T.L.R. 113; *McLeod v. Power*, [1898] 2 Ch. 295. Followed: *Rawlinson v. Scholes* (1898), 79 L.T. 350. Referred to: *Re Farman*, *Farman v. Smith* (1887), 57 L.J.Ch. 637; *Blyth v. Fladgate*, *Morgan v. Blyth*, *Smith v. Blyth*, [1891] 1 Ch. 337; *Moore v. Knight*, [1891] 1 Ch. 547; *Wegg Prosser v. Evans* (1894), 64 L.J.Q.B. 1; *Isaacs v. Salbstein*, [1916] 2 K.B. 139.

As to *res judicata*, see 15 HALSBURY'S LAWS (3rd Edn.) 184-187, and as to actions against partners, see *ibid.*, vol. 28, pp. 519-525. For cases see 21 DIGEST (Repl.) 225 et seq., and 36 DIGEST (Repl.) 513 et seq.

Cases referred to:

- (1) *Kendall v. Hamilton* (1878), 3 C.P.D. 403; 47 L.J.C.P. 665; 39 L.T. 250, C.A.; affirmed (1879), 4 App. Cas. 504; 48 L.J.Q.B. 705; 41 L.T. 418; 28 W.R. 97, H.L.; 21 Digest (Repl.) 294, 593.
- (2) *King v. Hoare* (1844), 13 M. & W. 494; 2 Dow. & L. 382; 1 New Pract. Cas. 72; 14 L.J.Ex. 29; 4 L.T.O.S. 174; 8 Jur. 1127; 153 E.R. 206; 21 Digest (Repl.) 293, 591.
- (3) *Liverpool Borough Bank v. Walker* (1849), 4 De G. & J. 24; 45 E.R. 10, L.J.J.; 6 Digest (Repl.) 105, 805.
- (4) *Jacomb v. Harwood* (1751), 2 Ves. Sen. 265; 28 E.R. 172; 3 Digest (Repl.) 214, 471.
- (5) *Hills v. M'Rae* (1851), 9 Hare, 297; 20 L.J.Ch. 533; 17 L.T.O.S. 242; 15 Jur. 766; 68 E.R. 516; 24 Digest (Repl.) 873, 8699.

Also referred to in argument:

- Pennell v. Roy* (1853), 3 De G.M. & G. 126.
Goate v. Fryer (1789), 2 Cox, Eq. Cas. 201.
Parton v. Douglas (1803), 8 Ves. 520; 32 E.R. 456, L.C.; 20 Digest (Repl.) 253, 20.
Parker v. Ringham (1864), 33 Beav. 535; 55 E.R. 476; 23 Digest (Repl.) 353, 4213.
Scarfe v. Jardine (1882), 7 App. Cas. 345; 51 L.J.Q.B. 612; 47 L.T. 258; 30 W.R. 893, H.L.; 21 Digest (Repl.) 299, 633.

- A *Munster v. Cox* (1885), 10 App. Cas. 680; 55 L.J.Q.B. 108; 53 L.T. 474; 34 W.R. 461; 1 T.L.R. 542, H.L.; 21 Digest (Repl.) 296, 614.
Re McRae, Forster v. Davis, Norden v. McRae (1883), 25 Ch.D. 16; 49 L.T. 544; 32 W.R. 304, C.A.; Digest (Practice) 772, 3369.
Neve v. Weston (1747), 3 Atk. 557.
Hill v. Wilson (1873), 8 Ch. App. 888; 42 L.J.Ch. 817; 29 L.T. 238; 21 W.R. 757, L.J.J.; 24 Digest (Repl.) 786, 7751.
- B *Re Finch, Finch v. Finch* (1883), 23 Ch.D. 267; sub nom. *Re Wynne-Finch, Wynne-Finch v. Wynne-Finch*, 48 L.T. 129; 31 W.R. 526, C.A.; 24 Digest (Repl.) 857, 8519.
Re Whittaker, Whittaker v. Whittaker (1882), 21 Ch.D. 657; 51 L.J.Ch. 737; 43 L.T. 802; 30 W.R. 787; 23 Digest (Repl.) 414, 4851.

C **Appeal** by the defendants from a decision of BACON, V.-C., in an action brought by Beckett & Co., bankers, at Beverley, trading under the name of the "York and East Riding Bank," against the executors of James Hodgson, deceased, claiming the sum of £3,189 11s. 6d., the balance of the banking account of Hodgson & Co. with the plaintiffs.

D J. B. Hodgson, the son of James Hodgson, for some years previous to 1873 carried on the business of a brewer near Beverley, in partnership with Thomas Gibson, and this firm kept their account at the plaintiffs' bank. In 1873 James Hodgson bought this business and entered into a partnership with his son, the deed of partnership being dated Jan. 19, 1874. From the evidence of J. R. Pease, the managing partner of the plaintiff firm, it appeared that James Hodgson and his son J. B. Hodgson called at the bank on Oct. 1, 1873, and informed him that

E Gibson had retired from the firm of brewers and that they were going to carry on the business in partnership, and expressed a wish to continue the account of the firm with the bank. Mr. Pease showed them that there was a balance due from the old partnership of Hodgson and Gibson, and at their request it was transferred to the account of the new firm, Hodgson & Co., but there was no entry in the books to show who were the members of the new firm. On Sept. 5, 1877, the

F partnership between the father and son was dissolved, and the son continued to carry on the brewery alone. The dissolution was advertised in the "London Gazette" and in the "Hull News," but Mr. Pease stated that the firm did not take either of those newspapers, and partners in the plaintiff firm swore that they had no knowledge of the dissolution. The account was carried on without any alteration. In November, 1880, J. B. Hodgson became too ill to attend to the business. There being a balance due to the plaintiffs on the account of Hodgson

G & Co., Silvester & Son, the plaintiffs' solicitors, wrote to Levett and Champney, the solicitors of James Hodgson, and, after saying that Walker and Spink, who were J. B. Hodgson's solicitors, had written to say they believed that James Hodgson was prepared to accept the responsibility of the account, but had suggested that Levett and Champney should be written to thereon, continued:

H "Our clients have always considered Mr. James Hodgson as one of their debtors for the balance; but this should be placed beyond a doubt, and arrangements must be made for reducing the debt within reasonable limits."

On Nov. 8 Levett and Champney replied saying:

I "We have seen Mr. James Hodgson this morning on the subject of your letter. He denies any liability for payment of the balance due to the York and East Riding Bank from his son, J. B. Hodgson."

In July, 1881, J. B. Hodgson died, and, immediately after his death, James Hodgson took out a summons for the administration of his estate, claiming to be a creditor for a large sum. In this action the plaintiffs carried in a claim against the estate for £3,124 13s. 4d., the balance due to them from the firm of Hodgson & Co. at the death of J. B. Hodgson. The claim was allowed, and a dividend of 5s. in the pound had been declared, but the plaintiffs had not yet received any of

it. In 1883 James Hodgson died, and on May 29 in that year the plaintiffs' solicitors wrote to Levett and Champney, giving them notice not to distribute the estate of James Hodgson until the balance due to them from Hodgson & Co. had been paid, and saying :

"We now find that the late Mr. Hodgson, the father, was a partner in this firm in and after the year 1875, and no notice, actual or constructive, was given to the bankers on his retirement."

On July 25, 1883, the plaintiffs commenced this action against the executors of James Hodgson for the administration of his estate, claiming the sum of £3,189 11s. 6d., as the balance due at the time of his death from Hodgson & Co. The defendants contended that the estate was not liable, on the ground that James Hodgson was only a dormant partner in the firm of Hodgson & Co.; that the plaintiffs were not aware that he was a partner, and did not give credit to him; and further, that, if the plaintiffs had notice of the partnership, they also had notice of the dissolution in 1877. They also contended that the plaintiffs, having proved against the estate of J. B. Hodgson, had elected to treat the debt as the separate debt of J. B. Hodgson, and had released James Hodgson's estate from liability. The case was heard on Feb. 16, 1885, by Bacon, V.-C., who held on the evidence that the bankers had notice of the partnership between James Hodgson and J. B. Hodgson, and gave credit to the firm, but had no notice, actual or constructive, of the dissolution of the partnership; and that the plaintiffs were not prevented from claiming against James Hodgson as the surviving partner, in consequence of their having proved against the estate of the deceased partner, J. B. Hodgson. He, therefore, gave judgment for the plaintiffs, and directed an account of what was due on the banking account at the death of James Hodgson. From this decision the defendants appealed.

Sir Richard Webster, Q.C., Marten, Q.C., and Nalder for the defendants.
Crossley, Q.C., Barber, Q.C., Solomon and Silvester for the plaintiffs.

Cur. adv. vult.

Nov. 12, 1885. The following judgments were read.

SIR JAMES HANNEN, P.—The plaintiffs, who are bankers, seek to recover from the representatives of James Hodgson, deceased, a sum of money in which they say the firm of Hodgson & Co. was indebted to them, and they allege that they had notice that the deceased James Hodgson was a member of that firm before they gave credit to the firm of Hodgson & Co., and that they never had any notice or knowledge that James Hodgson had retired from that firm and so withdrawn the authority to his original partner, John B. Hodgson, to pledge his credit, and therefore the credit was given to James Hodgson and his son, and that James Hodgson is liable. The defendants deny that there ever had been any holding out of James Hodgson to the plaintiffs as a member of the firm of Hodgson & Co., and they further deny that the plaintiffs had no notice of the withdrawal of James Hodgson from the firm.

On the first point, the fact whether or not the plaintiffs had notice of the connection of James Hodgson with the firm, the evidence of Mr. Pease, one of the plaintiffs, was distinct and circumstantial. It is said on behalf of the defendants that that evidence is not to be accepted by the court because there is no corroboration of it, and that in the case of a conflict of evidence between living and dead persons there must be corroboration to establish a claim advanced by a living person against the estate of a dead person. We are of opinion that there is no rule of English law laying down such a proposition. The statement of a living man is not to be disbelieved because there is no corroboration, although in the necessary absence through death of one of the parties to the transaction it is natural that, in considering the statement of the survivor, we should look for corroboration in support of it; but if the evidence given by the living man brings conviction to the tribunal which has to try the question, then there is no rule of

A law which prevents that being acted upon. As a matter of fact, it does appear to us that there is not an absence of corroboration in this sense, but that there are corroborative circumstances about which there can be no dispute, since they are written documents. It appears upon those documents in the highest degree probable that James Hodgson and John B. Hodgson should have made the representation which Mr. Pease represents that they did make, because it appears that the firm of John B. Hodgson and Gibson was about to be broken up by the retirement of Gibson, and, therefore, it would be a desirable thing that the credit extended to the previous firm should be extended to the new firm. But if Gibson were to retire, leaving John B. Hodgson alone, that would have weakened the security which the bankers had for their advances, and it, therefore, appears in the highest degree probable that the father, James Hodgson, who was the person of credit, should have made the representation that he and the son contemplated entering into partnership. That they did, in fact, enter into partnership shortly afterwards is common ground. [Hrs LORDSHIP referred to other portions of the evidence, and expressed his opinion that they did not throw discredit on, but confirmed, the evidence of Mr. Pease.]

Upon the second question of fact, namely, whether or not the plaintiffs had notice or knowledge of the withdrawal of James Hodgson from the partnership, which took place in 1877, it is elementary knowledge that, where persons have had dealings with a partnership firm, the mere publication of the dissolution in the "Gazette" is not sufficient to affect such persons with notice if they continue to give credit on the footing of the continuance of the partnership. It is necessary in such a case that actual knowledge should be brought home to the persons who had previously given credit to the firm. In the present case we have the positive statement of every living member of the plaintiffs' firm that they had no such knowledge, and that they had not in fact become aware of any notice of the dissolution in the "Gazette," or in any of the papers that copied from the "Gazette." On these grounds we have come to the conclusion that upon those two questions of fact the judgment of the Vice-Chancellor must be supported.

But then it is said as a matter of law that the course which has been pursued by the plaintiffs precludes them from now having recourse to the estate of the father, and that argument is based upon the decision of *Kendall v. Hamilton* (1). In that case, it was undoubtedly decided, confirming the decision in *King v. Hoare* (2)—a case which has always attracted a great deal of attention—that where some members of a firm or some joint contractors are sued and judgment is obtained against them, the matter then passes into *res judicata*, and that it is to be treated thenceforth as a debt against those persons only against whom that judgment has been recovered, and recourse cannot be had to a person who was not joined in that action. That, of course, must be taken as now clearly established; but in that case it was from the beginning pointed out that there is an exception to that rule, one which had long prevailed in equity, to the effect that where one member of a firm has died, though at law the debt would from that time forth be only the debt of the survivors, yet in equity recourse might always be had against the estate of the deceased partner. That is very clearly laid down by COTTON, L.J., in the judgment which he delivered on behalf of himself, the present Master of the Rolls [LORD ESHER], and THESIGER, L.J., in *Kendall v. Hamilton* (1), where he says (3 C.P.D. at p. 407):

"It is now well established that a court of equity does treat the estate of a deceased partner as still liable to the partnership creditors, though at law the survivor has become solely liable. And it must now be considered as established that the partnership creditor may obtain relief against the estate of the deceased without having exhausted his remedy against the survivor. . . . It is difficult to understand how the Court of Chancery came to interfere with the legal liability of partners, and although it has done so, it has, in giving the partnership creditor relief, dealt with him in an anomalous way, that is to

say, except in cases where there has been no joint estate, the court has only admitted the partnership creditor to rank against the estate of the deceased after all his private or separate debts have been paid." A

That passage has a very important bearing on a matter to which I shall subsequently refer. He says in conclusion (*ibid.* at p. 409):

"It is unnecessary to go through the numerous cases which were cited during the argument, but it would be right to refer to the cases of the *Liverpool Borough Bank v. Walker* (3) and *Jacomb v. Harwood* (4), as in those cases judgments recovered against some of several partners were held not to be a bar to proceedings in equity against the estate of a deceased partner. But in each of those cases the judgment was not recovered until after the death of the partner against whose estate the creditor was seeking relief; and the cases in which relief has been given in equity against the estate of a deceased partner certainly establish that from and after his death his estate is subject to a separate or several liability." B C

That view of the law is adopted by almost every member of the House of Lords who took part in the affirmation of the decision. It is stated by LORD CAIRNS, by LORD HATHERLEY, by LORD SELBORNE, and by LORD O'HAGAN, and finally by LORD BLACKBURN, who states that he had been convinced, in the course of the argument, that that was the law, and it would be impossible for us to resist such a consensus of opinion of such high authorities as those. We come, therefore, without any hesitation, to the conclusion that that is the correct view of the law. It was argued here that there was a difference between this case and the cases cited, as the judgment recovered, or that which is said to make the transaction *res judicata*, namely, the proof against the estate of the son, J. B. Hodgson, took place before the action was brought against the executors of the surviving partner, the father, James Hodgson; but we are of opinion that that difference in the order of events can make no difference in the principle. What is clearly established by the decision which I have referred to is this, that in the case of a deceased partner there is a concurrent remedy against his estate as well as against the surviving partner, and we can see no reason why the order of events where several remedies are pursued can make any difference as to the liability of the assets of the surviving partner. D E F

It is, however, pointed out by COTTON, L.J., in *Kendall v. Hamilton* (1), that though this concurrent remedy has been established by the courts of equity, yet that it does not put the creditor in the position of a several creditor against the estate of a deceased partner, because, if he were treated to all intents and purposes as a joint and several creditor, he would be entitled to prove with the separate creditors of the deceased partner, which he says is not the case. As my learned colleague, FRY, L.J. (who is more conversant with the practice in those matters than I am), has pointed out from reports and precedents given in *SETON ON DECREES*, it has not been the practice to allow the joint creditor to compete with the separate creditors of the deceased partner. But it appears to me that that does not go to the root of the matter. A claim has been brought in this instance against the separate estate of the son, and at the time it was brought in the claim was stated in this manner. The plaintiffs said: "We have always considered that the father was liable, but he now disputes his liability, and we seek to prove against the estate of the son." The father was in fact the creditor of the son, who had instituted proceedings in the administration suit. He was, therefore, present and had cognisance of all that took place. In his position of a creditor suing on behalf of himself and all other creditors it was his duty to the estate to see that no person improperly advanced claims for proof, and, therefore, it was his duty when the claim was advanced by the bank, if there was any doubt as to the nature or extent of their claim, to see that it was so framed that the estate of the son which he was to administer should not be prejudiced. That he did not do. As a matter of fact no dividend has been received by the plaintiffs from the estate of the son, and it is in our power now to prevent any injustice being done by the plaintiffs G H I

A competing with the several creditors of the son. That may be effected in the manner that has been suggested, by a declaration that the plaintiffs have consented to postpone any claim they may have upon the estate of the son until his separate creditors are satisfied. This appears to us to meet the justice of the case, and it affords a firm basis for our decision that the judgment of the Vice-Chancellor must be supported. The appeal, therefore, must be dismissed with costs.

B

BOWEN, L.J.—With respect to a large portion of the ground which the President has traversed I desire not to add a single word. It is only on account of the somewhat delicate and interesting nature of the questions which have been discussed, and which the President last dealt with, that I add any remarks of my own to what has fallen from him. It has become necessary, in order to meet the case of the defendants to consider, at all events to a certain extent, the character of a creditor's right to pursue a remedy in equity against the estate of a deceased partner. The allegation of the defendants is to the effect that the father and son being joint debtors only, and not jointly and severally liable, the bankers, their creditors, by the course which they have taken in proving against the estate of the son, have put an end to their right any further to pursue a remedy against the father, and in support of this proposition the defendants invoke, though I think they invoke unsuccessfully for the reason I will mention, the judgment in *Kendall v. Hamilton* (1).

D

It appears to me to be of considerable importance to bear in mind exactly what *Kendall v. Hamilton* (1) did, and what it did not decide. In order to do that, in a few words I should like to consider the rights in equity as distinguished from the rights in law of creditors of a joint debtor. The common law principle that a judgment recovered against a joint debtor is a bar to a further action to be prosecuted against another joint debtor is explained at length in *King v. Hoare* (2). There is in the case of a joint contract and joint debt, as distinguished from a case of joint and several contract and joint and several debt, only one cause of action. The party injured may sue at law all the joint contractors, or he may sue one, subject in the latter case to the right of the single defendant to plead in abatement; but whether an action in the case of a joint debt is brought against one debtor or against all the debtors, or continued against one debtor or all the debtors, it is for the same cause of action—there is only one cause of action.

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This rule, though the advantage or disadvantage of it may have been questioned in times long past, has now passed into the law of this country. I should only wish to observe that, whether or no the rule by the light of pure reason and unassisted by authority might or might not have recommended itself to modern minds, the rule is by no means a technical rule. It is based, rightly or wrongly, on the idea that a joint debtor has a right to demand, if he pleases, that he shall be sued at one and the same time with all his co-debtors. To enforce this right he is entitled to plead in abatement, but the right is one of considerable business value, and is so recognised by the law. In order to protect each of the joint debtors the law treats the cause of action as being a joint one, and as capable of being merged whenever it is pursued to a judgment. It is absorbed and merged in the judgment which is recovered against one of the debtors, not only as against him, but as against all the rest, and the object is to prevent the prejudice which the law conceives might arise to a joint debtor who is not being sued, if he were left with future litigation still hanging over his head. All his liability is merged, therefore, in the judgment, the old debt disappears and the judgment is left in its place. That is the legal view which has been laid down in *King v. Hoare* (2), and that was the real ground of the decision in *Kendall v. Hamilton* (1).

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In *Kendall v. Hamilton* (1), however, it was sought to avoid or to escape from the consequence of the legal doctrine by invoking a supposed principle in equity which is stated somewhat loosely in the textbooks in equity, that partnership debts are joint and several. Be it observed that *Kendall v. Hamilton* (1) has nothing to do with the pursuit of a remedy against the estate of a deceased partner. An

attempt had been made inter vivos to extend beyond what was legitimate the doctrine that partnership debts are joint and several. In repudiating that attempt the House of Lords explained in a most valuable way what in their view are the useful limits within which alone language can be properly used to the effect that partnership debts are joint and several. With regard to the reason of the thing, I do not know that anything better can be cited than the language of LORD SELBORNE in *Kendall v. Hamilton* (1). It appears to me that equity, although it allows the pursuit of a remedy against the estate of a deceased partner, does not consider the debt of the deceased partner as a joint and several debt, but only gives the right to pursue the remedy of a joint debt as if it were a several debt so far as the rights and liabilities of the other joint debtors are not disturbed or prejudiced. It seems to me that LORD SELBORNE's language shows that that is the true view. In discussing the question of the origin of this principle he says (4 App. Cas. at p. 538):

"There is (as it seems to me) only one really consistent explanation of this course of practice when taken in connection with the rule in bankruptcy, and with the general principles of law and equity, viz., that derived from the doctrine *jus accrescendi inter mercatores locum non habet*. As in several other well-known classes of cases (of which mortgages and security bonds with penalties may be taken as examples) equity controls the operation of a legal contract so as to give effect to the purposes and objects to which it was meant to be subsidiary, so in these partnership cases it controls inter mercatores the legal effect of survivorship. If that is the principle of the rule, it is one which arises upon death only. The partnership is dissolved by death; but in equity it is taken as still subsisting for every purpose of liquidation, just as if it had been dissolved inter vivos, and the creditors are taken as still creditors of that partnership. What was before joint thus became several by the dissolution, and by the exclusion in equity of the survivorship which takes effect in law; and although when this rule was first established it might well have been doubted whether it did not give creditors rights for which they never contracted, there could be no doubt, after it had once become a settled rule, that the rights resulting from it were necessarily implied in all subsequent onerous contracts by copartners. For this purpose (and as it seems to me for this purpose only—and only by the operation of death) all such contracts may be described, as in equity, joint and several."

That is, as I translate it, to exclude the doctrine of survivorship.

As I said a few minutes ago, the rule at law is that a several remedy cannot be pursued against joint debtors if the joint debtors object, and each has a right to protect himself against that. That is not a technical rule, but a rule based upon supposed convenience of commerce, and it seems to me it ought to follow that equity, although it displaces the effect of survivorship when there is a death, would never give such effect to the death of one man as to prejudice the rights of another, and ought only to regard the effect of death as converting a joint into a several debt so far as the interests of joint debtors are not prejudicially affected. I think the cases that have been cited before us show that there is still a shield maintained by equity to protect the other joint debtors. On the one side there is *Liverpool Borough Bank v. Walker* (3), which was cited by COTTON, L.J., in *Kendall v. Hamilton* (1), and certainly not disapproved of by the House of Lords, which lays down a firm principle that a judgment at law against surviving partners does not operate as an extinguishment of a partnership debt in equity—that is to say, the doctrine of *res judicata* does not prevent the remedy of pursuit against the estate of a deceased partner. On the other hand, we have got an illustration of the opposite extreme in *Hills v. M'Rae* (5), which seems to show that the courts of equity have recognised the principle that, in pursuing the remedy against the separate estate of the deceased partner, it is the proper course to bring the surviving partners before the court, so that their rights and liabilities in respect of a joint

- A debt may be ascertained and justified at the same time. Taking those two cases together the result appears to me to show that the debt is still to a certain extent a joint debt, and, as COTTON, L.J., has expressed it, that equity recognises it as a joint debt, though it will allow the separate remedy. Equity, therefore, ought to mould that separate remedy so as to protect those who have contractual rights, and so as not to prejudice others in the way in which the co-debtors should be sued.
- B How far does the doctrine of *res judicata* apply in dealing in equity with the estate of a deceased partner? *Kendall v. Hamilton* (1) does not decide the point. *Liverpool Borough Bank v. Walker* (3) would seem to show that equity does not apply with the same rigidity the extreme rule of *res judicata* to those classes of cases as the common law, and there may be some reason for that distinction. The doctrine of *res judicata* is a doctrine which the common law finds convenient to apply to protect joint debtors in the absence of any other adequate machinery for protecting them. But, in this equitable machinery employed by the courts of equity against the estate of the deceased partner, it seems to me that there is sufficient flexibility to prevent injustice being done to other third parties, and I can see no reason for applying in all its fierce severity the doctrine of *res judicata* if you can do complete justice without applying that doctrine. In the present case strict justice can be done in the way in which our judgment will be drawn up, and it must not be forgotten that the procedure in the administration action which has led to the difficulty is a procedure of which the defendants are the last persons to complain. The proper course to follow in such administration suits will be expressed by my learned brother FRY, L.J., who is more familiar with the practice of equity than myself. But I agree with what he is about to add, and I will now leave him to deal with that part of the case, as well as the rest.
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FRY, L.J.—Upon the first head of inquiry in this appeal, namely, the question of fact, I have nothing whatever to add to what has been said by the learned President. For my own part I feel very strongly convinced that the conclusion arrived at by the learned Vice-Chancellor was the correct conclusion.

- F Upon the second question, the question of law as to how far the plaintiffs were precluded by what took place in the administration action, I will add a few words. I will, in the first place, refer to a passage in the judgment of the Court of Appeal in *Kendall v. Hamilton* (1), in which COTTON, L.J., in pronouncing the judgment of the court, says (3 C.P.D. at p. 407):

- G “It is now well established that a court of equity does treat the estate of a deceased partner as still liable to the partnership creditors, though at law the survivor has become solely liable, and it must now be considered as established that the partnership creditor may obtain relief against the estate of the deceased partner without having exhausted his remedy against the survivor.”

- It appears to me that the Court of Chancery and the Chancery Division of the High Court have enforced the remedies against the estate of a deceased partner subject to two conditions. In the first place, they have required that partnership debts shall be postponed to the separate debts, and that upon a very apparent ground, for it is obvious that, inasmuch as the partnership debts are paid first from the partnership estate, before anything can flow from the partnership estate to the separate estate of the deceased partner it is not unreasonable by contrast that the partnership debts should be postponed to the separate debts. The second condition is this. The courts have required the presence of the surviving partner in some method, shape, or manner, at the taking of the accounts of the partnership. The obvious justice and reasonableness of that course I need not occupy the time of the court in explaining.
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There are two cases which obviously arise: the first, where the plaintiff in the administration action against the estate of the deceased partner sues as a creditor of the firm; and the second, where a decree has been obtained by a separate creditor for the administration of the estate of the deceased, as in the present case. I

will consider what appears to me to be the course of practice in these two cases separately. A

In the first place, in the case where the plaintiff in the administration action sues as a creditor of the firm, the course of practice seems to me to be well ascertained and determined by *Hills v. M'Rae* (5). That was a case which came before TURNER, V.-C., than whom there were few greater masters of equity procedure, and the declaration made by the learned judge in that case was this : B

"Declare that all persons who are creditors of Donald M'Rae, the testator, are entitled to the benefit of this order; and that the surplus of the estate real and personal of the said testator, after satisfying his funeral and testamentary expenses, and his separate debts, was liable in equity at the time of his death to the joint debts then due from the said testator and George Potter [the surviving partner] in respect of the partnership heretofore carried on by them under the firm of George Potter & Co., but without prejudice to the liability of the said George Potter thereto as between himself and the said testator's estate." C

The decree worked out that declaration in this way. It directed that George Potter, the surviving partner, should be summoned to attend before the master in prosecuting the said inquiry, and then it directed that the personal estate should be applied in the first instance in the payment of the separate debts and funeral expenses of the deceased in due course of administration, and then in payment of the joint debts of the partnership. In that form of decree the two conditions I have referred to were worked out and satisfied. It is not necessary for me to consider whether the service on the surviving partner is sufficient, or whether the making of the surviving partner a party to the original action is necessary. When that question arises it can be decided, but that by some means or other the surviving partner should be brought before the court in taking the account of the partnership debts appears to me to be plain. D E

In the second case, namely, where the administration decree is obtained by a separate creditor against the estate of a deceased partner, and proof is afterwards tendered by a creditor of the partnership, there appears to me to be no distinct authority showing what the course of procedure is, but it appears to me that it is not difficult to mould the procedure so as to make it in substance the same as the decree which was pronounced by TURNER, V.-C., in *Hills v. M'Rae* (5). I think it would be the duty of the chief clerk to ascertain and certify separately the separate debts of the deceased, and the partnership debts of the firm in which the deceased was a partner; and it might be possible afterwards, by some order or upon further consideration, to bring the surviving partner before the court in order that he might dispute the chief clerk's finding, if he chose, with regard to the partnership debts. On further consideration it seems to me it would be the duty of the court to deal with the two separate classes of creditors in a different manner, and to direct the immediate application of the estate of the deceased to the payment of the separate debts, and after those separate debts and the funeral and testamentary expenses had been paid, it would then go on to direct the distribution of the surplus among the partnership creditors. In that way, or in some similar way, the two conditions which were satisfied in *Hills v. M'Rae* (5) would be satisfied by the decree made on further consideration in an action to which the creditor was not really a party. F G H

In the present case, it seems to me that the surviving partner, having been himself the plaintiff in the action for the administration of the son's estate, was bound to have proceeded in such a manner as to satisfy the two conditions which I have mentioned. I think that the proof indicated a claim against the partnership on the part of the bankers, although I admit not with the utmost distinctness, and I say it was the duty of the father, who had the conduct of the action, to raise the point whether the bankers claimed as creditors of the partnership or as creditors of the separate estate of the son, and if they had claimed as creditors of the I

A partnership, then to require the chief clerk to find what was the debt, and to have conducted the subsequent proceedings so as to draw a distinction between the two classes of creditors. Unfortunately the plaintiffs' interest was antagonistic to that course, and such a course was not taken.

It only remains for us to consider whether, notwithstanding that course was not taken, the two conditions can be satisfied in the present case. I think they can, because, in the first place, the surviving partner was there, as he was himself the plaintiff. He owed a duty to all the creditors for whom he appeared, as well as for himself, to cut down the amount of the banker's claim to the right amount. He, therefore, was present for all the creditors to all intents and purposes. The next condition is, that the surviving member of the partnership shall not enforce his claim until after the separate creditors shall have been satisfied, and that condition can be satisfied by the undertaking which the respondents have given at the Bar, that they will not enforce their right to dividends which have been ordered to be paid to them on further consideration until after all the separate creditors have been paid. In that way substantial justice will be done, and the slip with regard to the estate of the surviving partner will be remedied. For these reasons, without going into the other portion of the case, I express my concurrence in the views which have fallen from my learned brethren, and I concur with them in thinking that this appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: *Collyer-Bristowe, Withers, Russell & Hill*, for *Levett & Champney*, *Hull*; *C. A. Wright*, for *Silvester & Son*, *Beverley*.

[*Reported by W. C. Biss, Esq., Barrister-at-Law.*]

NORTHERN COUNTIES OF ENGLAND FIRE INSURANCE CO. v. WHIPP

G [COURT OF APPEAL (Cotton, Bowen and Fry, L.JJ.), March 6, 7, 8, 10, April 3, 1884]

[*Reported 26 Ch.D. 482; 53 L.J.Ch. 629; 51 L.T. 806; 32 W.R. 626*]

H *Mortgage—Priority—Loss by legal mortgagee—Assistance or connivance in fraud leading to subsequent equitable estate—Omission to use ordinary care as respects title deeds—Mortgagor constituted by mortgagee agent to raise money—Security represented as being first estate—Carelessness by mortgagee.*

I The court will postpone a prior legal estate to a subsequent equitable security (a) where the owner of the legal estate (the legal mortgagee) has assisted in or connived at the fraud which has led to the creation of a subsequent equitable estate without notice of the prior legal estate, of which assistance or connivance the omission to use ordinary care in inquiring after or keeping title deeds may be sufficient evidence, where such conduct cannot otherwise be explained; or (b) where the owner of the legal estate has constituted the mortgagor his agent with authority to raise money, and the security thus created has, by the fraud or misconduct of the agent, been represented as being the first estate. But the court will not postpone a prior legal estate to a subsequent equitable estate on the ground of any mere carelessness or want of prudence on the part of the legal owner.

Notes. Considered: *Garnham v. Skipper* (1885), 53 L.T. 940. Applied: *Manners v. Mew* (1885), 29 Ch.D. 725. Distinguished: *Farrand v. Yorkshire Banking Co.* (1888), 40 Ch.D. 182. Considered: *Taylor v. Russell*, [1891] 1 Ch. 8. Followed: *Garside v. Liverpool Railway Permanent Benefit Building Society* (1897), 13 T.L.R. 189; *Coithey v. National Provincial Bank of England* (1904), 20 T.L.R. 607. Applied: *Walker v. Linom*, [1907] 2 Ch. 104. Referred to: *National Provincial Bank of England v. Jackson* (1886), 33 Ch.D. 1; *Isaac v. Worstencroft* (1892), 67 L.T. 351; *Brocklesby v. Temperance Permanent Building Society*, [1893] 3 Ch. 130; *Re Ingham, Jones v. Ingham*, [1893] 1 Ch. 352; *Re Castell and Brown, Roper v. Castell and Brown*, [1898] 1 Ch. 315; *Oliver v. Hinton*, [1899] 2 Ch. 264; *Taylor v. London and County Banking Co., London and County Banking Co. v. Nixon*, [1901] 2 Ch. 231; *Berwick v. Price* (1904), 74 L.J.Ch. 249; *Ruben v. Great Fingall Consolidated*, [1904] 2 K.B. 712; *Longman v. Bath Electric Tramways*, [1905] 1 Ch. 646.

As to loss of priority by a mortgagee, see 27 HALSBURY'S LAWS (3rd Edn.) 224-229; and for cases see 35 DIGEST (Repl.) 523 et seq.

Cases referred to:

- (1) *Le Neve v. Le Neve* (1747), Amb. 436; 1 Ves. Sen. 64; 3 Atk. 646; 27 E.R. 291, L.C.; 38 Digest (Repl.) 877, 898. D
- (2) *Peter v. Russell* (1716), Gilb. Ch. 122; 2 Vern. 726; 1 Eq. Cas. Abr. 321; 25 E.R. 85, L.C.; 35 Digest (Repl.) 543, 2224.
- (3) *Evans v. Bicknell* (1801), 6 Ves. 174; 31 E.R. 998, L.C.; 35 Digest (Repl.) 542, 2217.
- (4) *Martinez v. Cooper* (1826), 2 Russ. 198; 38 E.R. 309, L.C.; 35 Digest (Repl.) 543, 2225. E
- (5) *Beckett v. Cordley* (1784), 1 Bro.C.C. 353; 28 E.R. 1174; 35 Digest (Repl.) 512, 2004.
- (6) *Barnett v. Weston* (1806), 12 Ves. 130; 33 E.R. 50; 35 Digest (Repl.) 493, 1787.
- (7) *Ratcliffe v. Barnard* (1871), 6 Ch. App. 652; 40 L.J.Ch. 777; 19 W.R. 764, C.A.; 35 Digest (Repl.) 540, 2202. F
- (8) *Colyer v. Finch* (1856), 5 H.L.Cas. 905; 26 L.J.Ch. 65; 28 L.T.O.S. 27; 3 Jur.N.S. 25, H.L.; 35 Digest (Repl.) 543, 2220.
- (9) *Roberts v. Croft* (1857), 2 De G. & J. 1; 27 L.J.Ch. 220; 30 L.T.O.S. 111; 3 Jur.N.S. 1069; 6 W.R. 144; 44 E.R. 887, L.C.; 35 Digest (Repl.) 546, 2251. G
- (10) *Worthington v. Morgan* (1849), 16 Sim. 547; 18 L.J.Ch. 233; 31 Jur. 316; 60 E.R. 987; 35 Digest (Repl.) 541, 2205.
- (11) *Clarke v. Palmer* (1882), 21 Ch.D. 124; 48 L.T. 857; 35 Digest (Repl.) 540, 2201.
- (12) *Hewitt v. Loosemore* (1851), 9 Hare, 449; 21 L.J.Ch. 69; 18 L.T.O.S. 133; 15 Jur. 1097; 68 E.R. 586; 35 Digest (Repl.) 541, 2208. H
- (13) *Agra Bank, Ltd. v. Barry* (1874), L.R. 7 H.L. 135, H.L.; 35 Digest (Repl.) 519, 2060.
- (14) *Hunt v. Elmes* (1860), 2 De G.F. & J. 578; 30 L.J.Ch. 255; 3 L.T. 796; 7 Jur.N.S. 200; 9 W.R. 362; 45 E.R. 745, L.J.J.; 35 Digest (Repl.) 539, 2193.
- (15) *Perry Herrick v. Attwood* (1857), 2 De G. & J. 21; 27 L.J.Ch. 121; 30 L.T.O.S. 267; 11 Jur.N.S. 101; 6 W.R. 204; 44 E.R. 895, L.C.; 35 Digest (Repl.) 544, 2229. I
- (16) *Briggs v. Jones* (1870), L.R. 10 Eq. 92; 23 L.T. 212; 35 Digest (Repl.) 544, 2230.

Also referred to in argument:

Baxendale v. Bennett (1878), 3 Q.B.D. 525; 47 L.J.Q.B. 624; 40 L.T. 23; 43 J.P. 204; 26 W.R. 899, C.A.; 36 Digest (Repl.) 36, 175.

- A** *Bank of Ireland v. Evans' Charities Trustees* (1855), 5 H.L.Cas. 389; 25 L.T.O.S. 272; 3 W.R. 573; 3 C.L.R. 1066; 10 E.R. 950, H.L.; 13 Digest (Repl.) 198, 181.
- Arnold v. Cheque Bank* (1876), 1 C.P.D. 578; 45 L.J.Q.B. 562; 34 L.T. 729; 40 J.P. 711; 24 W.R. 759; 21 Digest (Repl.) 483, 1706.
- Rice v. Rice* (1854), 2 Drew. 73; 2 Eq. Rep. 341; 23 L.J.Ch. 289; 22 L.T.O.S. 208; 2 W.R. 189; 61 E.R. 646; 35 Digest (Repl.) 548, 2259.
- B** *Waldron v. Sloper* (1852), 1 Drew. 193; 61 E.R. 425; 35 Digest (Repl.) 547, 2254.
- Dowle v. Saunders* (1864), 2 Hem. & M. 242; 4 New Rep. 478; 34 L.J.Ch. 87; 10 L.T. 840; 10 Jur.N.S. 901; 12 W.R. 1074; 71 E.R. 456; 35 Digest (Repl.) 547, 2255.
- Halifax Union v. Wheelwright* (1875), L.R. 10 Exch. 183; 44 L.J.Ex. 121; 32 L.T. 802; 39 J.P. 823; 23 W.R. 704; 3 Digest (Repl.) 181, 321.
- C**

Appeal by the plaintiff from a decision of the Vice-Chancellor of the County Palatine of Lancaster.

On Jan. 11, 1878, Crabtree, who was the manager of the plaintiff company, executed a legal mortgage of a freehold property known as Milbank to the company to secure £4,500, and, according to the conclusion drawn by the Court of Appeal from the evidence, Crabtree, at or about the same time, delivered the title deeds to the company, receiving the £4,500 from the company in cash. On May 24, 1878, Crabtree made a legal mortgage to the company of other freehold property to secure £2,500, and the title deeds were in like manner delivered to the company. In respect to this mortgage it was not proved that the £2,500 passed in cash from the company to Crabtree, but it was in the opinion of the Court of Appeal the true conclusion from the evidence that, at the date of the mortgage, Crabtree was indebted to the plaintiff company in a sum greatly exceeding £2,500 beyond the previous £4,500. The deeds of the mortgaged properties were placed in a safe of the company, and were seen there on the occasion of an audit in May, 1878.

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Crabtree, who, as already stated, was the manager of the plaintiff company, was entrusted with one of the two keys which opened the lock which secured the safe in which the deeds of the company were kept; and it appeared that, in November, 1878, he produced the deeds in question to the defendant's solicitor, Mr. Milne Whitehead, to whom Crabtree had applied for a loan on mortgage of the two properties. As the result of this application, the defendant, Mrs. Whipp, advanced £3,500 to Crabtree on a mortgage, dated Dec. 19, 1878, of the two properties included in the plaintiffs' securities, and she, at the same time, received from Crabtree the title deeds of the properties, but not the mortgages to the plaintiff company. The defendant's mortgage was taken, and the mortgage money paid by her to Crabtree in entire ignorance of the securities to the plaintiff company. In November, 1879, Crabtree became bankrupt, and in the following month an order was made for winding-up the plaintiff company. In 1880 the liquidator, in the name of the company, commenced this action against Mrs. Whipp and Crabtree's trustee in bankruptcy, for foreclosure. The trustee disclaimed, and the action was dismissed as against him. Mrs. Whipp filed a defence and counterclaim by which she asked that the securities of the plaintiff company might be declared fraudulent and void against her, or, in the alternative, that they might be postponed to her security, and that the company might be ordered to convey the property to her subject only to such equity of redemption as it was subject to under her mortgage. The Vice-Chancellor held that the company ought to be postponed to Mrs. Whipp, and the company appealed.

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Ambrose, Q.C., and Maberley for the company.

Karslake, Q.C., and Pankhurst for the defendant.

Cur. adv. vult.

April 3, 1885. **FRY, L.J.**, read the following judgment of the court.—The plaintiffs, being possessed of mortgages earlier in date than the mortgage of the defendant,

and, under these instruments, being the owners of the legal estate, are prima facie entitled to priority over the defendant, but the defendant seeks to postpone the plaintiffs' legal estate on various grounds. The main contention on the part of the defendant, which succeeded in the court below was that by reason of the negligent conduct of the plaintiffs after they had taken their mortgages, these securities ought to be postponed to the security of the defendant, and this point has been argued at such length and with so extensive a reference to the authorities that it appears to us necessary to consider the matter fully.

The question which has thus to be investigated is: What conduct in relation to the title deeds on the part of a mortgagee who has the legal estate is sufficient to postpone such mortgage in favour of a subsequent equitable mortgagee who has obtained the title deeds without knowledge of the legal mortgage? The question is not what circumstances may as between two equities give priority to the one over the other, but what circumstances justify the court in depriving a legal mortgagee of the benefit of the legal estate. It has been contended on the part of the plaintiffs that nothing short of fraud will justify the court in postponing the legal estate. It has been contended by the defendant that gross negligence is enough.

The cases which assist in answering the question thus raised will be found to fall into two categories: (i) those which relate to the conduct of the legal mortgagee in not obtaining possession of the title deeds; (ii) those which relate to the conduct of the legal mortgagee in giving up or not retaining the possession of the title deeds after he has obtained them. The two classes of cases will not be found to differ in the principles by which they are to be governed, but they do differ much in the kind of fraud which is to be most naturally looked for. In the case of a person taking the legal estate, and not seeking for or obtaining the title deeds from the mortgagor, the question may arise between the legal mortgagee and either a prior or a subsequent encumbrancer or purchaser. But in such a transaction the fraud about which the courts are most solicitous is that which is practised when a man takes the legal estate with knowledge of a prior equitable sale or encumbrance, and yet strives to put himself in a position to show that he took without notice—that kind of fraud which LORD HARDWICKE explained in *Le Neve v. Le Neve* (1), when he said (Amb. at p. 446):

"The taking of a legal estate after notice of a prior right makes a person a mala fide purchaser. . . . This is a species of fraud, and dolus malus itself; for he knew the first purchaser had the clear right of the estate, and, after knowing that, he takes away the right of another person by getting the legal estate."

On the other hand, when the legal mortgagee has obtained the possession of the title deeds and subsequently gives them up, no question can arise between him and a prior equitable owner, and no suspicion of the particular fraud which we have referred to can arise. The estate of the legal mortgagee can never be improved by any subsequent dealings with the deeds, and, therefore, before the court can find a fraudulent intent in the legal mortgagee, it must be shown that he concurred in some project to enable the mortgagor to defraud a subsequent mortgagee, or that he was a party or privy to some other fraud in fact. The kind of fraud most to be looked for in this class of cases is such as was described by LORD COWPER, L.C., in *Peter v. Russell (Thatched House)* (2), when he said (1 Eq. Cas. Abr. at p. 322):

"If a man makes a mortgage and afterwards mortgages the same estate to another, and the first mortgagee is in combination to induce the second mortgagee to lend his money, this fraud without doubt will in equity postpone his own mortgage. So if such mortgagee stands by and sees another lending money on the same estate without giving him notice of his first mortgage, this is such a misprision as shall forfeit his priority."

- A On the head of law now under consideration the observations of LORD ELDON in giving judgment in *Evans v. Bicknell* (3) are without doubt the leading authority. That case is remarkable for several reasons, and not the least so because it is the leading authority on a point which did not naturally arise in it. In that case a settlement had been made on the marriage of Stansell and his wife, the defendant Bicknell being the trustee of the settlement, and as such having possession of the title deeds. Bicknell had delivered the deeds to Stansell, and Stansell, having obtained the deeds, mortgaged the property to the plaintiffs and delivered to them the deeds. The plaintiffs alleged that Bicknell so delivered the deeds to assist Stansell in his fraud. Bicknell, on the contrary, alleged and swore that he did it to enable Stansell to obtain credit in his trade by showing that his wife was tenant for life of the property; and the real question for decision was whether Bicknell could, on the ground of his alleged participation in Stansell's fraud, be made liable for the difference between the value of Stansell's life interest under the settlement, and the amount of the plaintiff's mortgage. In considering this point, the Lord Chancellor was led to discuss the question of postponing the legal estate on the ground of conduct. It is, we think, impossible to read the judgment and not come to the conclusion that LORD ELDON considered that the same fraud and the same kind of negligence which would support a suit for personal relief would justify the postponement of the legal estate. Having referred to the evidence of the principal witness, LORD ELDON said (6 Ves. at pp. 189, 190):

- E "I still entertain great doubt whether, upon such a transaction, a party should be charged personally: for even upon that it amounts to no more than that a trustee delivers the deeds into the hands of a party who has the settlement. I do not say it is not negligence; but it is too dangerous, upon such loose evidence, to hold that it is that gross negligence that amounts to evidence of fraud."

- F The Lord Chancellor then turned to consider a judgment in which BULLER, J., had erroneously affirmed that it was an established rule in equity that a second mortgagee who has the title deeds without notice should be preferred, and, after adverting to his mistake, observed (*ibid.* at p. 190):

- G "The doctrine at last is, that the mere circumstance of parting with the title deeds, unless there is fraud, concealment, or some such purpose, or some concurrence in such purpose, or that gross negligence that amounts to evidence of a fraudulent intention, is not of itself sufficient ground to postpone the first mortgagee."

- H The expression "gross negligence that amounts to evidence of a fraudulent intention" is certainly embarrassing, for negligence is the not doing of something from carelessness and want of thought or attention, whereas a fraudulent intention is a design to commit some fraud, and leads men to do or omit doing a thing, not carelessly, but for a purpose. But LORD ELDON seems to have meant by his words to describe the not doing of something so ordinarily done by honest men under the given circumstances as to be really attributable, not to negligence or carelessness, but to a fraudulent intention. In short, it appears to us that, in the mouth of LORD ELDON, the word "negligence" was used simply to express nonfeasance. In a subsequent passage of his judgment the Lord Chancellor varies the form of his language, but without throwing any fresh light on his meaning. In one place (*ibid.* at p. 191) he speaks of "negligence so gross as to amount to fraud," which seems like speaking of carelessness so great as to amount to design; in another place (*ibid.* at p. 192) of "negligence so gross as to amount to constructive fraud"; and again (*ibid.* at p. 193) of a "circumstance of so gross negligence . . . that it is conclusive evidence of fraud." In the subsequent case of *Martinez v. Cooper* (4) LORD ELDON referred to *Evans v. Bicknell* (3) as having settled the principle which he again expresses in nearly similar language. He said (2 Russ. at p. 217):

"There must be either direct fraud or negligence amounting to evidence of fraud to induce this court to interfere for the purpose of postponing a party who insists on the legal benefit of his deed."

All this language of LORD ELDON, though loose and difficult to construe, appears to us to point to fraud as the necessary conclusion before the court can deprive the owner of the legal estate of his legal rights derived from that estate. This fraud, no doubt, may be arrived at either by direct evidence or by evidence circumstantial and indirect, and it does not cease to be a fraud because the particular object in contemplation of the parties may have been a fraud in some respects different from the fraud actually accomplished; or because the person intended to have been defrauded may be different from the person actually defrauded; or because the original fraudulent intention had no particular person in view: *Beckett v. Cordley* (5), and per LORD ELDON in *Evans v. Bicknell* (3). That fraud, and fraud alone, was the ground of postponing the legal estate was, we think, the opinion of LORD HARDWICKE in *Le Neve v. Le Neve* (1). He said (Amb. at p. 447):

"Fraud, or mala fides, therefore, is the true ground on which the court is governed in the cases of notice."

That SIR WILLIAM GRANT entertained the same view, and considered it as the result of *Evans v. Bicknell* (3) is apparent from his observations in *Barnett v. Weston* (6), where he said that the old cases for postponing the first mortgagee had been shaken unless a case of fraud could be made out. That JAMES, L.J., adopted the same rule is plain from what he said in *Ratcliffe v. Barnard* (7), namely (6 Ch. App. at p. 654):

"[The legal mortgagee] must have been guilty of fraud, or of that wilful negligence which leads the court to conclude that he is an accomplice in the fraud."

From this consensus of expression as to the true rule, some departure is said by the learned counsel for the defendant to have occurred in the language used by LORD CRANWORTH, L.C., in *Colyer v. Finch* (8) and *Roberts v. Croft* (9). It is enough to say that, in our opinion, the Lord Chancellor plainly intended in both of these cases to lay down no new principle, and his use of the expression "negligence so gross as to be tantamount to a fraud," and his emphatic reliance in his judgment in *Colyer v. Finch* (8) on *Evans v. Bicknell* (3) and *Martinez v. Cooper* (4) are sufficient evidence of this intention.

Turning now to the decisions, mostly subsequent to that of *Evans v. Bicknell* (3) which have been cited in argument, it will be found that the cases which have arisen on the conduct of the mortgagee in not obtaining possession of the title deeds may be ranged in the following classes: (i) Where the legal mortgagee or purchaser has made no inquiry for the title deeds, and has been postponed, either to a prior equitable estate, as in *Worthington v. Morgan* (10) or to a subsequent equitable owner who used diligence in inquiry for the title deeds, as in *Clarke v. Palmer* (11). In these cases the courts have considered the conduct of the mortgagee in making no inquiry to be evidence of the fraudulent intent to escape notice of a prior equity; and in the latter case that a subsequent mortgagee, who was, in fact, misled by the mortgagor taking advantage of the conduct of the legal mortgagee, could as against him take advantage of the fraudulent intent. (ii) When the legal mortgagee has made inquiry for the deeds and has received a reasonable excuse for their non-delivery, and has accordingly lost his priority, as in *Barnett v. Weston* (6); *Hewitt v. Loosemore* (12); and *Agra Bank, Ltd. v. Barry* (13). (iii) Where the legal mortgagee has received part of the deeds under a reasonable belief that he was receiving all, and has accordingly not lost his priority, as in *Hunt v. Elmes* (14); *Ratcliffe v. Barnard* (7); and *Colyer v. Finch* (8). (iv) Where

A the legal mortgagee has left the deeds in the hands of the mortgagor with authority to deal with them for the purposes of his raising money on security of the estate, and he has exceeded the collateral instructions given to him. In these cases the legal mortgagee has been postponed, as in *Perry Herrick v. Attwood* (15). This case was decided not on the ground that the legal mortgagees had been guilty of fraud, but on the ground that, as they had left the deeds in the hands of
B the mortgagor for the purpose of raising money, they could not insist, as against those who, in reliance on the deeds, lent their money, that the mortgagor had exceeded his authority.

The cases where the mortgagee, having received the deeds, has subsequently parted with them or suffered them to fall into the hands of the mortgagor, will be found to fall into the following classes: (i) Where the title deeds have been lent
C by the legal mortgagee to the mortgagor upon a reasonable representation made by him as to the object in borrowing them, and the legal mortgagee has retained his priority on the subsequent equities, as in *Peter v. Russell* (2), and *Martinez v. Cooper* (4). (ii) Where the legal mortgagee has returned the deeds to the mortgagor for the express purpose of raising money on them, though with the expectation that he would disclose the existence of the prior security to any second mortgagee:
D *Briggs v. Jones* (16). In such cases the court has, on the ground of authority, postponed the legal to the equitable estate. This is the same in principle as the decision in *Perry Herrick v. Attwood* (15). No case has been cited in which the legal mortgage has (as by the Vice-Chancellor in this case) been postponed by reason of negligence in the custody of the deeds.

The decisions on negligence at common law have been pressed on us in the
E present case; but it appears to us enough to observe that the action at law for negligence imports the existence of a duty on the part of the defendant to the plaintiff, and a loss suffered as a direct consequence of the breach of such duty; and that in the present case it is impossible to find any duty undertaken by the plaintiff company to the defendant, Mrs. Whipp. The case was argued as if the
F legal owner of land owed a duty to all other of Her Majesty's subjects to keep his title deeds secure, as if title deeds were, in the eye of the law, analogous to fierce dogs or destructive elements, where, from the nature of the thing, the courts have implied a general duty of safe custody on the part of the person having their possession or control. This view is, in our opinion, impliedly negatived by the whole course of decisions, and it is expressly repelled by the observations of the present Lord Chancellor [the EARL OF SELBORNE] in *Agra Bank, Ltd. v. Barry* (13), where he said (L.R. 7 H.L. at p. 157):
G

“It has been said in argument that investigation of title and inquiry after deeds is ‘the duty’ of a purchaser or a mortgagee; and no doubt there are authorities (not involving any question of registry) which do use that language. But this, if it can properly be called a duty, is not a duty owing to the possible
H holder of a latent title or security. It is merely the course which a man dealing bona fide in the proper and usual manner for his own interest ought by himself or his solicitor to follow, with a view to his own title and his own security. If he does not follow that course, the omission of it may be a thing requiring to be accounted for or explained. It may be evidence, if it is not explained, of a design inconsistent with bona fide dealing to avoid knowledge of the true state of the title. What is a sufficient explanation must always
I be a question to be decided with reference to the nature and circumstances of each particular case.”

These observations appear to us conclusive on the point, and they, at the same time, suggest the conclusion that if in any case it shall appear that a prior legal mortgagee has undertaken any duty as to the custody of the deeds towards any given person, and has neglected to perform that duty with due care, and has thereby injured the person to whom the duty was owed, there the legal estate

might be postponed by reason of the negligence. But no such case appears as yet to have arisen, nor does it seem one likely often to occur. The point certainly does not arise in the present case, and we, therefore, give no opinion upon it.

The authorities which we have reviewed appear to us to justify the following conclusions: (i) The court will postpone the prior legal estate to a subsequent equitable estate (a) where the owner of the legal estate has assisted in or connived at the fraud which has led to the creation of a subsequent equitable estate without notice of the prior legal estate, of which assistance or connivance the omission to use ordinary care in inquiring after or keeping title deeds may be, and in some cases has been, held to be sufficient evidence where such conduct cannot otherwise be explained; (b) where the owner of the legal estate has constituted the mortgagor his agent with authority to raise money, and the estate thus created has, by the fraud or misconduct of the agent, been represented as being the first estate. But (ii) the court will not postpone the prior legal estate to the subsequent equitable estate on the ground of any mere carelessness or want of prudence on the part of the legal owner.

To apply the conclusions thus arrived at as to the facts of the present case. That there was great carelessness in the manner in which the plaintiff company, through its directors, dealt with their securities, seems to us to admit of no doubt. But is that carelessness evidence of any fraud? We think that it is not. Of what fraud is it evidence? The plaintiffs never combined with Crabtree to induce the defendant to lend her money. They never then knew that she was lending it, and stood by. They can have no motive to desire that their deeds should be abstracted and their own title clouded. Their carelessness may be called gross, but, in our judgment, it was carelessness likely to injure and not to benefit the plaintiff company, and, accordingly, has no tendency to convict them of fraud. Then comes the inquiry whether the plaintiff company constituted Crabtree their agent to raise money, in which case the defendant might be entitled to priority. The circumstance most favourable to this contention was, in our opinion, the possession by Crabtree of the key to the safe, but the defendant has not proved the circumstances attending this fact, or the duties for the performance of which the key may have been essential, with sufficient distinctness to enable us to conclude from the possession of the key that it implied an authority to deal with the securities of the plaintiff company. The cases in which Crabtree did so deal with the securities, when carefully considered, appear to us insufficient to support the authority claimed, and the fact that Crabtree in dealing with the defendant suppressed his mortgage to the company, and dealt with her, not as agent of the company having an authority to pledge its securities, but as the unencumbered owner of the property, goes, we think, far to negative the suggested authority. On this point, therefore, we agree with the Vice-Chancellor.

One other point was argued, and demands decision. Of the £3,500 paid by Mrs. Whipp to Crabtree it appears that £1,900 found its way from Crabtree into the banking account of the plaintiff company, but on the evidence we conclude that it was paid to the company on account of and as the money of Crabtree and not of Mrs. Whipp; and, further, that it was paid in part satisfaction of a much larger debt and without notice to the company of the source from whence it was derived. It has been argued that, to the extent of this £1,900, the company should be postponed to Mrs. Whipp, on the ground that the defendant is entitled to follow this money obtained from her by fraud. The proposition that money obtained by fraud can be followed into the hands of persons who take it in satisfaction of a bona fide debt without notice is, in our judgment, devoid of support from principle or authority. Differing as we do from the learned Vice-Chancellor on the one point on which he decided against the plaintiffs, we conclude that his judgment must be discharged, and that instead of it the court must declare the plaintiffs entitled to priority, and give the usual consequent relief. The plaintiffs must add to their security so much of the costs of the action in the court below

A as would have been incurred if the action had been a simple action for foreclosure and no question of priority had been raised; and the defendant must pay to the plaintiffs the residue of the plaintiffs' costs in the court below, and the whole of the costs of the appeal.

Solicitors: *Parker & Stocks*, Manchester; *J. G. Oppenshaw*, Bury.

B [Reported by W. C. Biss, Esq., Barrister-at-Law.]

C

METROPOLITAN BANK, LTD., AND ANOTHER v. POOLEY

[House of Lords (The Earl of Selborne, L.C., Lord Blackburn, Lord Watson and Lord FitzGerald), March 24, 26, 1885]

D

[Reported 10 App. Cas. 210; 54 L.J.Q.B. 449; 53 L.T. 163;
49 J.P. 756; 33 W.R. 709]

Pleading—Striking out—Frivolous and vexatious—Statement of claim—Inherent power of court—Action manifestly incompetent.

E

There is an inherent power in every court of justice to stay a manifestly vexatious suit and so protect itself from an abuse of its procedure. An action is frivolous and vexatious where upon the face of the pleading it is manifest that it cannot be maintained.

Bankruptcy—Bankrupt—Right of action—Wrongful procurement of bankruptcy—Maintenance.

F

An undischarged bankrupt began an action for fraudulently and without reasonable cause procuring him to be adjudicated bankrupt, maintenance in respect of those bankruptcy proceedings, and malicious prosecution.

Held: any right of action which the bankrupt had passed to the trustee in the bankruptcy on the adjudication; thereafter, until the annulment of the bankruptcy the bankrupt had no interest in the action and could not prosecute it; accordingly, the action was frivolous and vexatious, and the court would order it to be stayed.

G

Company—Action against company in liquidation—Maintenance—Competency—Misfeasance of liquidator—Liability of company.

A company in liquidation may be answerable in certain circumstances for the improper acts of its liquidator, and, if it profited by those acts, it would not be permitted to retain the profit. But it cannot be guilty of the misdemeanour or tort of maintenance.

H

Notes. R.S.C., 1883, Ord. 25, r. 4, now R.S.C. (Revision), 1962, Ord. 18, r. 19, conferred on the High Court power to stay or dismiss an action on the grounds that it was frivolous or vexatious.

I

Considered: *Neville v. London Express Newspaper*, [1917] 1 K.B. 402. Referred to: *British Cash and Parcel Conveyors v. Lamson Store Service Co.*, [1908-10] All E.R.Rep. 146; *Boaler v. Power*, [1910] 2 K.B. 229; *Oram v. Hutt*, [1911-13] All E.R.Rep. 376; *Neville v. London Express Newspaper*, [1918-19] All E.R.Rep. 61.

As to dismissal of action as being frivolous and vexatious, see 30 HALSBURY'S LAWS (3rd Edn.) 407-410; and as to an action for malice in presenting a bankruptcy petition, see *ibid.*, vol. 2, p. 300. For cases see DIGEST (Practice) 975 et seq., and 5 DIGEST (Repl.) 1072, 1073.

Cases referred to :

- (1) *Whitworth v. Hall* (1831), 2 B. & Ad. 695; 9 L.J.O.S.K.B. 297; 109 E.R. 1802; 5 Digest (Repl.) 1072, 8644.
- (2) *Bradlaugh v. Newdegate* (1883), 11 Q.B.D. 1; 52 L.J.Q.B. 454; 31 W.R. 792; 1 Digest (Repl.) 82, 618.
- (3) *Crean v. Hodgkins*, Hayes, 184.
- (4) *Atkinson v. Raleigh* (1842), 3 Q.B. 79.
- (5) *Munce v. Black* (1858), 7 I.C.L.R. 475; 33 Digest (Repl.) 402, *85.

Also referred to in argument :

- Cobbett v. Warner* (1866), L.R. 2 Q.B. 108; 8 B. & S. 21; 36 L.J.Q.B. 94; 16 L.T. 150; 31 J.P. 548; 15 W.R. 403; 38 Digest (Repl.) 937, 1273.
- Hoare v. Dickson* (1849), 7 C.B. 164; 6 Dow. & L. 577; 18 L.J.C.P. 158; 12 L.T.O.S. 402; 137 E.R. 67; 32 Digest (Repl.) 212, 2315.
- Dawkins v. Prince Edward of Saxe Weimar*, *Dawkins v. Wynyard*, *Dawkins v. Stephenson* (1876), 1 Q.B.D. 499; 45 L.J.Q.B. 567; 35 L.T. 323; 24 W.R. 670; 38 Digest (Repl.) 84, 584.
- Castro v. Murray* (1875), L.R. 10 Exch. 213; 44 L.J.M.C. 70; 32 L.T. 675; 39 J.P. 440; 23 W.R. 596; 38 Digest (Repl.) 64, 387.
- Johnson v. Emerson & Sparrow* (1871), L.R. 6 Exch. 329; 40 L.J.Ex. 201; 25 L.T. 337; 4 Digest (Repl.) 108, 966.

Appeal by the defendants in the action from a decision of the Court of Appeal (SIR BALIOL BRETT, M.R., BOWEN and FRY, L.JJ.), reversing an order of the Divisional Court (STEPHEN and WILLIAMS, JJ.) on appeal from MATHEW, J., at chambers.

In March, 1879, proceedings were taken to wind-up the Metropolitan Bank, Ltd., under the Companies Act, 1862, the appellant Cooper was appointed official liquidator, and the business was transferred to, and carried on by the Royal Exchange Bank as their successors. In October, 1879, the respondent Pooley was adjudicated bankrupt on a debtor's summons issued by one Toppin, to whom, it was alleged, the Metropolitan Bank had given an indemnity against all costs and expenses which he might incur. Pooley appealed against the adjudication, but the appeal was dismissed and a subsequent application to annul the bankruptcy was refused. In July, 1880, he brought an action against the Royal Exchange Bank and Cooper for maliciously causing the filing of a bankruptcy petition against him, for maintaining the same by fraud, and for malicious prosecution. The action came on for trial in May, 1881, when the plaintiff was non-suited with costs. These costs had never been paid. In August, 1881, Pooley attempted to take criminal proceedings against Cooper and others at the Bow Street Police Court for maintenance and conspiracy, but the summons was dismissed with costs. The writ in the present action, in which Pooley claimed damages against the appellants for maintenance of the bankruptcy proceedings and wrongfully procuring his bankruptcy, was issued in December, 1883, and in March, 1884, the appellants took out a summons to dismiss it as frivolous, vexatious, and harassing, or to stay proceedings until the costs in the previous action of *Pooley v. Royal Exchange Bank* were paid. The summons was referred by the master to MATHEW, J., at chambers, who refused to make an order. On appeal the Divisional Court made an order staying proceedings till the costs in the previous action were paid, on the ground that the parties and the causes of action were substantially the same. The Court of Appeal rescinded the order, and dismissed the summons. The defendants appealed to the House.

Webster, Q.C., and *A. T. Lawrance* for the appellants.

Gazdar and *Shallcross Goddard* for the respondent.

THE EARL OF SELBORNE, L.C.—In the view which I take of this case, it is not necessary to determine whether the view of the facts taken by the Court of Appeal—viz., that the two actions brought by the respondent were not substantially

A between the same parties—was right or not. The Court of Appeal do not seem to have addressed themselves (and I think that your Lordships would presume that the course of the argument did not really direct them) to the other question—whether the action should be dismissed as frivolous and vexatious. According to the present rules of practice applicable to appeals to the Court of Appeal, it is the duty of that court, upon an appeal, to make the order which ought to have been
B made by the court below, and if it would have been right for the Court of Appeal, differing from the Divisional Court so far as related to the order which that court had made, to go further and to stay the action altogether as frivolous and vexatious, your Lordships upon this appeal ought now to make the order which the Court of Appeal ought to have made.

In my opinion, the order which the Court of Appeal ought to have made was to
C dismiss the action altogether as frivolous and vexatious. Upon that point I entertain a very clear opinion. Before the rules were made under the Supreme Court of Judicature Act, 1873, the practice had been established to stay a manifestly vexatious suit which was plainly an abuse of the authority of the court, although, so far as I know, there was not at that time any statute or rule enabling the court to do it. The power seemed to be inherent in the jurisdiction of every court of
D justice to protect itself from the abuse of its procedure. Another reason why that should have been very rarely done before the recent rules is that, if the objection was one which could be raised upon the face of the pleadings, that always might be done by demurrer. But when the Rules of 1883 were settled and came in force, which they did before the present action was brought, it was thought that the formal and technical practice of demurrer might with advantage be abolished, and that more easy and equally summary modes of applying to the court to get rid
E of an action on the face of it manifestly groundless might be substituted.

By R.S.C., 1883, Ord. 25, r. 4 :

“The court or a judge may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer, and in any such case or in case of the action or defence being shown by the pleadings to be frivolous
F or vexatious, the court or a judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just.”

Under that rule it is manifest that the court might have ordered this action to be stayed or dismissed on the same grounds as those on which a demurrer might formerly have been allowed, or if it appeared that the action was frivolous or vexatious. In this case the form of the application to the court was that the action
G should be dismissed as frivolous and vexatious, and not on the ground that the pleading did not disclose any reasonable cause of action. Nevertheless, it is an element of primary importance, in determining the question whether an action is frivolous and vexatious, to consider what sort of cause of action, if any, appears upon the face of the pleading.

H The plaintiff, Mr. Pooley, who instituted this action on Dec. 7, 1883, is a bankrupt, and had been a bankrupt for a considerable time before that date. In the view which I take of the case it is not material, but it is, I believe, the fact that he is an undischarged bankrupt. Even if he had been discharged without having got the bankruptcy annulled as wrong ab initio, my impression is that it would have made no difference in this case. The facts with regard to his bankruptcy appear
I to be these, and there is no dispute whatever upon them. He was adjudicated bankrupt on the petition of a Mr. Toppin, who was one of the defendants to this action, but is not an appellant to your Lordships, on Oct. 22, 1879, rather more than four years before the commencement of the present action. The plaintiff appealed against the adjudication, and that appeal was dismissed with costs on Nov. 13, 1879, the plaintiff not appearing. But the matter did not stop there. It appears from an exhibit to an affidavit put in by Mr. Pooley himself, that on Feb. 18, 1880, he examined or cross-examined in bankruptcy Mr. Cooper, the official liquidator of the Metropolitan Bank, Ltd., and that the conspiracy to procure his

ruin (that is what he alleges in this present action) was fully disclosed by that examination. Whether he had before that time actually made his application to annul the bankruptcy is not clear. I think it very probable that he may have done so; but whether it was before or after, he did make such an application, and he did not then make a default in appearance. Upon July 16, 1880, that application was heard and dismissed with costs. He never appealed from that dismissal. So, three and a half years before the present action was brought he was plainly in possession of all the materials on which his present complaint is founded. He used those materials, as it was right and proper that he should do if there was anything in them, to get rid of the bankruptcy. He went to the proper court for that purpose, and the adjudication in bankruptcy was finally and conclusively affirmed.

Under those circumstances it is perfectly clear and certain that Mr. Pooley as a bankrupt, and as a bankrupt irreversibly found to be so, has no locus standi in curia to come into court and to say what he does say by his statement of claim—that he

“has suffered damage by the wrongful acts of the defendants in fraudulently and without reasonable cause procuring him to be adjudicated bankrupt,”

or to say, as he does in his writ, which is explained by that statement of claim, that he seeks “damages for fraud and conspiracy.” I reserve for separate observation the other point which is insisted upon, namely, “maintenance.”

It was settled as long ago as *Whitworth v. Hall* (1) that in an action for maliciously and without reasonable cause suing out a commission of bankruptcy it must be averred and proved that the commission was superseded before the action was brought, and that for a reason which applies to other analogous cases. An action for malicious prosecution cannot be maintained until the result of the prosecution has shown that there was no ground for it. If a man has been tried and convicted on that prosecution and there is no writ of error brought and no reversal of the decision, such an action will not lie. It is manifestly a matter of the highest public policy that it should be so, otherwise the most solemn proceedings of all our courts of justice, civil and criminal, when they have come to a final determination settling the rights and liabilities of the parties, might be made the subject of an independent controversy, and their propriety might be challenged by actions of this kind. It is, therefore, clear (and the learned counsel for the respondent found a difficulty in denying it in the course of his argument) that on that ground, namely, causing the plaintiff to be fraudulently and without reasonable cause adjudicated a bankrupt, there can be no possible pretence for the action. It is manifestly groundless, and even without the correlative facts I should have been disposed to say manifestly frivolous. The adjudication stands, and even if the respondent had never litigated or disputed it, the fact of it standing would be a sufficient answer to this alleged cause of action. But when you find from the affidavits filed in the cause that he had litigated it with all that knowledge of these facts, which facts, if true and if his view of them were correct, would be a sufficient reason for setting it aside, and that it was solemnly confirmed, and that that occurred two or three years before the action was brought, I am bound to say that I can conceive nothing more frivolous, I can conceive nothing more vexatious, than an action brought on that ground.

That is really the sole substantial ground for the action, because, although he adds the word “maintenance” in the endorsement upon the writ and states in the second paragraph of his statement of claim that the appellants, the Metropolitan Bank, Ltd., gave to Toppin, the petitioning creditor, an indemnity against his costs in the bankruptcy proceedings, and alleges that at that time the bank had no common interest in the bankruptcy proceedings or in the debt due to Toppin, and although in the fifth paragraph, founding himself on these allegations, he says that,

“by reason of those acts of the defendant he claims damages for the maintenance of such bankruptcy proceedings and otherwise as aforesaid,”

A yet I think it is quite plain that, if the first ground fails, the second ground must fail also.

It was said by the respondent's counsel that in a recent case, *Bradlaugh v. Newdegate* (2), it had been determined that an action would lie for maintenance by one man of an action in the name of another who would not otherwise have brought the action, but was induced to bring it by the solicitation and offer of indemnity of the person charged with maintenance. That may be very true, but, as applied to the present case, there seem to me to be two considerations which completely dispose of this allegation of maintenance, showing that it can be no real or substantial ground for maintaining this present action. The first is this. Maintenance, in the sense which the argument assumes, is not merely under some circumstances a civil wrong entitling the person injured to damages, but that wrong is founded upon a prohibition by statute which makes it a criminal act and a misdemeanour, and I apprehend it to be perfectly clear that the civil action for maintenance would not lie, except against a person who was guilty of the criminal act. As with respect to the adjudication in bankruptcy, so with respect to this alleged maintenance, the present plaintiff has previously tried the matter, and in a more proper form, because on Aug. 24, 1881, as appears by the affidavits, he made a criminal charge for maintenance against Mr. Cooper, the official liquidator, who could alone be the agent in such a thing if it were done, and that charge was dismissed with costs. He charged Arthur Cooper and Francis Cooper, his partner in business, Arthur being the liquidator, with this offence of maintenance, the magistrate considered the case to be completely answered, and dismissed the charge with costs. I will not cite what was said by the counsel, because it has nothing to do with the matter, though it very much expresses the sentiments which I think this proceeding is calculated to excite in your Lordships' minds, so that in proper form the application was made, and the criminal charge for maintenance could not be pressed further.

In my opinion the appellant, the Metropolitan Bank, Ltd., was incapable of maintenance. Maintenance in that sense could not take place by a corporation in liquidation. A corporation in liquidation might be answerable under certain circumstances for the improper acts of its liquidator as its agent. If it had profited by those acts it would not be permitted to retain the profit. It would be chargeable no doubt in that respect, I suppose, even if in liquidation. But this particular act of maintenance, which is criminal and also in some circumstances the ground of a civil action, is an act which, in my opinion, the Metropolitan Bank, Ltd., in liquidation, the corporation as distinct from the individual liquidator, was incapable of committing. That is one reason. Another reason is that, if this act, which, upon the showing of the plaintiff, preceded the proceedings in bankruptcy, was an act amounting to a civil wrong against him, in respect of which he had a right of action and was entitled to recover damages, and if that right of action was against the Metropolitan Bank, in that case, that right of action, as well as all other rights of action which he was entitled to at the time of the adjudication, passed to the trustee in bankruptcy, and he could no longer sue for or in respect of it. So, if any real damage had been sustained, and if there was this right of action, it being necessarily founded upon something antecedent to the proceedings in bankruptcy, it is clear to me that he, as a bankrupt, would have no interest whatever, after the adjudication, in that right of action. Therefore, there is no right of action at all in him, and the whole thing is a bankrupt's action for matters in respect of which the bankrupt, not having got rid of or annulled his bankruptcy, could not sue.

I think that what I have already said would have brought me, if there was nothing to be added to it, without doubt or hesitation to the conclusion that this was not only a groundless statement of claim, but was also frivolous and vexatious. But to that is to be added the fact that the plaintiff brought another and a similar action in respect of the same matters (I do not know that maintenance was thought of at that time; but putting maintenance aside, the whole substance of the

complaint was the same) against other parties, including the liquidator, I think in his personal capacity, on July 28, 1880. Beyond all doubt the liquidator, if a wrong had been committed, would have been personally liable for it; and the corporation in liquidation, who could not do any such act at all otherwise than through its liquidator, if liable at all upon the principle which I have mentioned, namely, the principle that it was *lucratus*, or whatever else may be stated as the ground, could only be so upon the supposition that its liquidator had done the wrong which was alleged against him in that former action. That former action was permitted to proceed. Whether it might have been stopped or not it is not for us now to inquire. It proceeded, it was tried upon the merits, and in 1881, not quite three years before the present action was brought, it ended in a non-suit upon the merits, the whole case entirely failing and being adjudged against the bankrupt. I am sorry to say that it appears that that proceeding of the undischarged bankrupt cost to the various parties £3,000, of which £1,800 was incurred by Mr. Arthur Cooper, the liquidator of this corporation.

It would be a scandal and disgrace to the administration of justice in this country if such proceedings were permitted to be repeated, whether with some variation of the *dramatis personæ* or not. Anything more vexatious than to allow, after that, a groundless action, upon such a statement of claim as this, by a bankrupt, to go on at the risk of incurring £3,000 more costs, I cannot conceive. I, therefore, advise your Lordships that the appeal should be allowed, and that the order should be made, which I think ought to have been by the Court of Appeal, that the action be absolutely stayed as frivolous and vexatious.

LORD BLACKBURN.—I quite agree in the result to which the Lord Chancellor has come, that the order of this House ought to be to stay this action altogether, and, however little good may come of it, to order the respondent to pay the costs of the appeal. At common law originally the judgment of the court was always obtained either by a demurrer or any other proceeding which upon the record gave a judgment, or an issue was taken of fact and a verdict was found, and then a judgment was given upon the record. But from early times (I rather think, though I have not looked at it enough to say, from the earliest times) the court had an inherent power to see that its process was not abused by a proceeding without reasonable grounds, so as to be vexatious and harassing. The court had the right to protect itself against such an abuse, but that was not done upon demurrer, or upon the record, or upon the verdict of a jury or evidence taken in that way; it was done by the court informing its conscience upon affidavits, and by a summary order to stay the action which was brought under such circumstances as to be an abuse of the process of the court. In a proper case they did stay the action.

In the present case we are not any longer at common law. The Judicature Act has been passed and rules have been made under it. I agree in what the Lord Chancellor has said, that R.S.C., 1883, Ord. 25, r. 4, considerably extends the power of the court to act in such a manner as I have stated, and enables it to stay an action on further grounds than those on which it could have been stayed at common law. The power which is thus given, however, does require the court to be satisfied that the action is frivolous and vexatious, and then the action may be dismissed or it may be stayed by the court in a summary manner, without raising the question upon a demurrer or by an issue of fact. It is obvious, to my mind, that, as regards both that which was done under the common law jurisdiction of the court and that which may be done under the more extensive jurisdiction now given to the courts, although it should not be lightly done, may often be required by the very essence of justice to be done.

The summons taken out in the present case was

"that this action be dismissed as frivolous, vexatious, and harassing, or [in the alternative], that all proceedings herein be stayed until the costs in the action of *Pooley v. Royal Exchange Bank* are paid."

A The Divisional Court, not having, I think, perceived, in consequence of not having had their attention called to it, that the new rule [Ord. 25, r. 4] which had come into operation and had extended their jurisdiction, thought that this was a case in which they had jurisdiction at common law, and if the case was properly made out upon affidavits they had jurisdiction. They also thought (I do not know whether they can be said to have decided) that whether the action was frivolous and vexatious or not, it was a strong and serious thing (and undoubtedly it was) for the court summarily, in the exercise of their common law jurisdiction, against which there would originally have been no appeal, to stay the action altogether, and they thought that justice would be fully done if the order were that it should be stayed until the costs of the former action were paid. That would be a right thing to do if it was a proper case. Whether it was the proper course to take in this case, whether the former action is shown to be so much the same action, being against parties in the same interest as in the present one, that it would be a right thing to stay the action, it would require a minute examination of affidavits to say. But it is quite unnecessary to examine that, as we have a more extensive jurisdiction now given to the courts; and this is, in my opinion, a very proper case for exercising that jurisdiction by staying the action altogether.

D What is this action brought for? The statement of claim is, that

“the plaintiff has suffered damage by the wrongful acts of the defendants in fraudulently and without reasonable cause procuring the plaintiff to be adjudicated bankrupt.”

E After some things which merely go to show why it was maliciously and without reasonable or probable cause procuring him to be adjudicated bankrupt, he goes on to add:

“The plaintiff by reason of the before-mentioned acts of the defendants claims damages for the maintenance of such bankruptcy proceedings.”

F What he means by that I am sure I do not know. I do not enter into the question of what are the grounds on which an action may be maintained for maintenance. I do not inquire further into that at all, but I simply say that here upon the face of this claim there are two things clear. If, according to the decisions which have been come to, a proceeding for suing out maliciously and without probable cause a commission in bankruptcy cannot be maintained so long as the commission in bankruptcy stands unreversed and unappealed from (and though G I certainly am not aware that any case has ever come up to the House of Lords upon the point, it may perhaps be a proper question in some future case), yet, if that be so, as long as the commission in bankruptcy stands, the first ground of claim, namely, “in fraudulently and without reasonable cause procuring the plaintiff to be adjudicated bankrupt,” is clearly not a matter for which an action would lie unless he shows, what on the face of the claim he does not show, that the commis- H sion or adjudication in bankruptcy has been got rid of. As regards the second ground, assuming for the moment that it means something which was an injury to his estate for which an action could be maintained to recover damages, as long as the commission in bankruptcy remains and his creditors are entitled to take those damages, that would be a thing which the assignees would recover for the benefit of the creditors and not of the bankrupt himself. On both those grounds I on the face of this claim it appears that there is no cause of action.

Under the new powers which have been given the court are entitled, if the action is frivolous and vexatious, to stay it, and for that purpose affidavits are to be brought in. On the affidavits in the present case it appears distinctly that the not saying that the adjudication in bankruptcy had not been got rid of was no mere slip, but that the plaintiff himself had tried to have it set aside and had had his application refused with costs; that he had tried to prosecute persons before a magistrate for what he imagined to be maintenance, but had been refused with costs; that he brought an action for a supposed conspiracy against half-a-dozen

persons, and the result of that action was that he was defeated and non-suited, and had £1,800 to pay as taxed costs, which his opponents could not get paid; that the plaintiff with all these matters before him has brought this action without paying a farthing of those costs. If that is not frivolous and vexatious and annoying, I find great difficulty in seeing what can be frivolous and vexatious and annoying. Frivolous it is, in the sense that, unless all the decisions which have been come to hitherto have been wrong, he has no ground of action. Vexatious it is, if anything can be vexatious. Why, therefore, this action should not be stayed absolutely I do not know. The Court of Appeal thought that they were treating the matter at common law, and that they were confined solely to the alternative on which the Divisional Court had gone. I do not inquire whether upon that assumption they were right or not, but I do say that, if their attention had been called to the extended jurisdiction which had come into force at that time, they could hardly have avoided seeing that this was a case in which the action ought to be stayed altogether.

LORD WATSON.—I am of the same opinion. We are bound to assume that the proceedings for having the respondent adjudicated a bankrupt were taken with reasonable and probable cause, and that no ground exists for annulling the adjudication. In these circumstances the respondent cannot maintain the claim for damages against the appellants upon the mere allegation that these proceedings were taken fraudulently or maliciously. If a claim for damages would lie against the appellants for maintenance committed in the course of these bankruptcy proceedings, as to which I entertain some doubt, the right of action for such damage was vested in the respondent's assignees. I can hardly conceive of an action which could more justly be described as frivolous and vexatious than the present. This is a very proper case for the application of the new rule, and I concur in the judgment proposed.

LORD FITZGERALD.—I do not intend to advert to the facts of the case, save to express my entire concurrence in the view that the action now before us is beyond question a vexatious and a harassing action, and one which is frivolous in the sense that upon the face of the pleadings it is manifest that it never can be maintained. I apprehend that, under such circumstances, in applying the new rule which has been adverted to, the only course to pursue is to stay the action altogether.

I should not say another word but that I was surprised in the course of the argument to find that any doubt could be thrown on the proposition that in an action such as this it was necessary to show that the adjudication had been annulled. I had a very early recollection of the authorities upon the subject proceeding in one uniform course, and not leaving it open to entertain any doubt upon that proposition. The action here is for "fraudulently and without reasonable cause procuring the plaintiff to be adjudicated bankrupt." Paragraph 4 of the statement of claim is this:

"The matters hereinbefore complained of [the procuring this adjudication to be made fraudulently and without reasonable cause] were done in order to enable the defendants, the Metropolitan Bank, to possess themselves of the plaintiff's property, or the greater part thereof, which they have wrongfully and fraudulently done."

He claims £30,000 for that. The adjudication subsists and remains in full force. It is said that it was procured with the view to get possession of property, and it is for injury to property alone that this action is brought, whereas upon the face of it it is manifest that, if the action were otherwise well founded, the interest in that property would not be in the plaintiff, but in the assignees in bankruptcy.

I wish to advert to *Whitworth v. Hall* (1) and the doubt which was thrown at the Bar, if any doubt could be thrown, on the law there laid down. The reference to that case emanated from the Lord Chancellor, and did not come originally from the Bar. It is remarkable that the question upon that case and the question upon

A the rule was not raised at all either before MATHEW, J., or in the Divisional Court or in the Court of Appeal. I thought it well to look into the precedents as they stand; for after all, upon a question of this kind, precedent is everything; and, having a vivid recollection of the old rules of pleading, I went at once to WENTWORTH ON PLEADING, a book which, although now forgotten, was regarded as a book, in its time, of considerable authority as giving none but precedents which
B had stood the test of actual practice. Your Lordships will find in vol. 8 of this work, at p. 315, the form of declaration in an action of this kind. The expression then used was "maliciously suing out a commission of bankruptcy"; but it is more properly expressed in modern practice to be "maliciously procuring the party to be adjudicated a bankrupt." At that time the bankrupt, or the person against whom a commission had been sued out, not surrendering or not yielding to it, became a
C felon and was liable to be treated accordingly, and WENTWORTH says here (I mention that as expressly averred) that the plaintiff averred that at the peril of his life he had yielded to the commission and surrendered to that commission, and then he adds:

"And the plaintiff saith that the said commission afterwards [on such and such a day] was duly superseded."

D The commission, therefore, was at an end—it was superseded and gone, and the plaintiff had a right then to bring an action for a malicious abuse of that procedure. The precedents up to 1831 will be found to be uniform, although in an early edition of CHITTY ON PLEADING there is a recommendation to add a count omitting the averment in question, but no serious doubt existed.

E Before the decision in *Whitworth v. Hall* (1) the point now before us arose in Ireland in *Crean v. Hodgins* (3), and was very well argued indeed. The action was for maliciously suing out a commission of bankruptcy, and contained an averment "that the said commission was afterwards duly superseded," following the established precedent and putting in an averment which required to be proved, and proved by a writ of supersedeas. The plea was that the action had been commenced by suing out a writ of common law subpoena, and that at the time of issuing that writ the commission was in full force and had not been superseded. To that
F plea there was a demurrer. The court held the plea bad on special grounds, and added that the proper course for the defendant would have been to have pleaded traversing the supersedeas before the filing of the declaration, but the court held the averment to be material and necessary for the maintenance of the action. After that decision, but before it was printed, the decision in *Whitworth v. Hall* (1) was
G published, and the learned editor of HAYES' REPORTS mentions with approval in a note the decision of that case.

Whitworth v. Hall (1) will be found cited also in *Atkinson v. Raleigh* (4), and certainly with no mark of disapproval. It was an action for maliciously suing out a fiat of bankruptcy, there being an averment that the Court of Review afterwards annulled the fiat. The plea was, not guilty. It appeared on the trial that the fiat
H had been annulled by the Lord Chancellor, and not by the Court of Review; so that there there was, what according to the then practice would have been, a fatal variance. But after a verdict for the plaintiff, the defendant moved to enter judgment for him or non-suit, upon the ground that there had been no annulment of the fiat, inasmuch as it had been made by the Lord Chancellor in place of having been
I made by the Court of Review. It was, however, held that the plea of Not Guilty did not put in issue the due annulling of the fiat, and, therefore, the plaintiff obtained his judgment.

But the law upon this subject has been properly and scientifically put in a later case, *Munce v. Black* (5), showing exactly how the law stands and the ground upon which it ought to rest. That was an action on the case for maliciously, by means of a false affidavit, causing an injunction to be issued out of the Incumbered Estates Court, under which the plaintiff was turned out of possession of his estate. There was a demurrer to the declaration, because it did not show the termination of the

process of injunction in the Incumbered Estates Court. In fact, it not only did not show the termination of it, but showed that it was in full force. Upon that demurrer the court gave judgment for the defendant, and PRIGOR, C.B., put the reason thus, and it is the ground upon which it ought to rest and stand :

“In an action for a malicious prosecution of proceedings, when the particular proceeding is the immediate result of the adjudication of a court of competent jurisdiction, the pleading is bad unless it shows that the proceeding is at an end.”

He adds at the conclusion of his judgment :

“The case is one *primae impressionis* to make a process still remaining in full force and effect the subject of a suit for maliciously putting in force the order of the court. The case has not terminated. A proceeding emanating from that order of the court remaining unreversed cannot be the subject of an action.”

So here, it appearing that this adjudication is still in full force and the plaintiff complaining that by reason (that is the foundation of the action) of that adjudication his property has been taken possession of by the assignee, and he is deprived of it, I say, in the words of PRIGOR, C.B., that as long as that adjudication remains in full force and effect, no action can be maintained at law for the proceedings under that adjudication.

Upon these two grounds I am perfectly clear that this action is not sustainable, that upon the face of it it cannot be sustained, and that there is no doubt whatever upon the law. I am equally clear that it is harassing and vexatious.

Appeal allowed.

Solicitors : *Newman, Stretton & Hilliard; Randolph Chamberlain.*

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

A

R. v. LABOUCHERE

[QUEEN'S BENCH DIVISION (Lord Coleridge, C.J., Denman, Field, Hawkins and Mathew, JJ.), May 10, 11, 1883, February 9, 1884]

[Reported 12 Q.B.D. 320; 53 L.J.Q.B. 362; 52 L.T. 177;
48 J.P. 165; 32 W.R. 861; 15 Cox, C.C. 415]

B

*Libel—Criminal libel—Intention or tendency to cause breach of the peace—
Libel on dead person—Principles guiding court on application for leave to
file criminal information.*

C

The criminality of a libel, as distinguished from the civil liability of the person who publishes a libel, depends on whether there is an intention that the words complained of should lead to a disturbance of the public peace or whether those words tend to such a disturbance. A prosecution will lie for words defaming a dead person where they satisfy either of these conditions.

Observations on the principles guiding the court on an application for leave to file a criminal information for a libel.

D

Notes. Criminal informations are practically obsolete, and none has been filed for more than 50 years, when an information was filed for a libel on King George V. The subject is dealt with at 10 HALSBURY'S LAWS (3rd Edn.) 380. By s. 8 of the Law of Libel Amendment Act, 1888, no criminal prosecution for libel can be commenced against any proprietor, publisher, editor, or any person responsible for the publication of a newspaper for any libel published in that newspaper without the order of a judge in chambers being first obtained.

E

Considered: *R. v. Ensor* (1887), 3 T.L.R. 366. Applied: *R. v. Masters* (1889), 6 T.L.R. 44. Referred to: *R. v. Yates* (1885), 1 T.L.R. 193; *Re Application for Attachment for Contempt of Court* (1886), 2 T.L.R. 351; *Wood v. Cox* (1888), 4 T.L.R. 652; *R. v. Russell, Ex parte Morris*, [1904-7] All E.R.Rep. 292; *Ex parte Freeman-Mitford* (1914), 30 T.L.R. 693; *Weld-Blundell v. Stephens*, [1919] 1 K.B. 520.

F

As to criminal proceedings for libel, see 24 HALSBURY'S LAWS (3rd Edn.) 5, 133-139; and for cases see 32 DIGEST 188 et seq.

Cases referred to:

G

(1) *R. v. Topham* (1791), 4 Term Rep. 126; 100 E.R. 931; 32 Digest (Repl.) 227, 2465.

H

(2) *Case De Libellis Famosis* (1605), 5 Co. Rep. 125a; 77 E.R. 250; 32 Digest (Repl.) 101, 1222.

(3) *R. v. Paine* (1696), 5 Mod. Rep. 163; Carth. 405; Comb. 358; Holt, K.B. 294; 87 E.R. 584; 32 Digest (Repl.) 92, 1146.

(4) *R. v. Critchley* (1734), 4 Term Rep. 128, n.

(5) *R. v. Mead* (1840), 4 Jur. 1014; 32 Digest (Repl.) 233, 2575.

I

(6) *Mr. Prynne's Case* (1690), 5 Mod. Rep. 459.

(7) *R. v. Kinnersley* (1761), 1 Wm. Bl. 294.

(8) *R. v. Epps* (1831), cited in Grady and Scotland's Crown Practice at p. 6.

(9) *R. v. Rintoul, Ex parte Duke of Beaufort* (1831), cited in Grady and Scotland's Crown Practice, at p. 7.

(10) *R. v. Smith* (1831), cited in Grady and Scotland's Crown Practice, at p. 8; 14 Digest (Repl.) 398, 3886.

(11) *R. v. Gregory* (1838), 8 Ad. & El. 907; 1 Per. & Dav. 110; 1 Will. Woll. & H. 666; 112 E.R. 1083; 32 Digest (Repl.) 233, 2569.

(12) *R. v. Latimer* (1850), 15 Q.B. 1077; 20 L.J.Q.B. 129; 16 L.T.O.S. 233; 14 J.P. 782; 15 Jur. 314; 117 E.R. 767; 14 Digest (Repl.) 684, 6990.

(13) *R. v. Winchelsea* (1865), unreported.

(14) *R. v. Headley* (1875), cited in 12 Q.B.D. at p. 327.

(15) *R. v. Plimsoll* (1873), 37 J.P. 422.

(16) *R. v. Yates* (1884), unreported.

Also referred to in argument :

R. v. Ridgway, The Broad Arrow Case (1881), Times, May 9.

Munster v. Lamb (1881), Times, Mar. 17.

Pisani v. Lawson (1839), 6 Bing.N.C. 90; 8 Dowl. 57; 8 Scott, 182; 9 L.J.C.P. 12; 3 Jur. 1153; 133 E.R. 35; 2 Digest (Repl.) 172, 19.

R. v. Alderton (1756), Say. 280; 96 E.R. 880; 32 Digest (Repl.) 72, 950.

R. v. Williams (1822), 5 B. & Ald. 595; 1 State Tr.N.S. 1291; 1 Dow. & Ry.K.B. 197; 106 E.R. 1308; 32 Digest (Repl.) 226, 2463.

R. v. Pocock (1740), 7 Mod. Rep. 310; 2 Stra. 1157; 87 E.R. 1260; 15 Digest (Repl.) 848, 8153.

Ex parte Chapman (1836), 4 Ad. & El. 773; 111 E.R. 974; 15 Digest (Repl.) 848, 8155.

Ex parte Duke of Marlborough (1844), 5 Q.B. 955; 1 Dav. & Mer. 720; 1 New C Mag. Cas. 26; 1 New Sess. Cas. 195; 13 L.J.M.C. 105; 3 L.T.O.S. 110; 8 Jur. 664; 114 E.R. 1508; 15 Digest (Repl.) 848, 8141.

R. v. Lord George Gordon (1787), 22 State Tr. 177; 32 Digest (Repl.) 228, 2490.

R. v. D'Eon (1764), 1 Wm. Bl. 510, 517; 96 E.R. 289, 295; 15 Digest (Repl.) 874, 8426.

R. v. Vint (1799), 27 State Tr. 627; 15 Digest (Repl.) 875, 8428.

R. v. Peltier (1803), 28 State Tr. 529; 15 Digest (Repl.) 875, 8429.

R. v. Most (1881), 7 Q.B.D. 244; 50 L.J.M.C. 113; 44 L.T. 823; 45 J.P. 696; 29 W.R. 758; 14 Cox, C.C. 583, C.C.R.; 15 Digest (Repl.) 875, 8430.

R. v. Long (1870), cited in Folkard on Libels, 4th Edn., 680.

R. v. Cuthbert (1875), Times, May 24.

R. v. Beaumont (1881), Times, Nov. 17.

Rule Nisi obtained by the Duke of Vallombrosa, a foreign subject resident abroad, for a criminal information against the defendant, the proprietor of "Truth," for a libel published in that journal imputing infamous and disgraceful conduct to the duke's deceased father, who was also a foreigner and in his lifetime resident abroad.

The words complained of were published in "Truth" on Feb. 22, 1883, and were as follows :

"Society at Cannes, headed by the Duke of Vallombrosa, has been very indignant with Lord Wolverton for introducing M. Clémenceau to Mr. Gladstone. This was regarded as a species of defiance to the Legitimists and Orleanists, whose social position is based upon their ostracising Republicans. The Duke of Vallombrosa is, of course, *plus royaliste que le Roi*, his father having been an army contractor, who was nearly hanged on the charge of supplying, as meat to a French Army Corps, the flesh of soldiers who had died in hospital, or who had been killed in battle. Luckily for him the First Empire came to an end before the trial could take place, and the contractor, having retired to Italy and purchased a dukedom, became a *grand seigneur* and an ardent adherent of the Bourbons."

The rule nisi was obtained on an affidavit of the Duke's which stated that these statements and imputations were without foundation. The affidavit, which was sworn at Cannes, stated that the duke was a foreigner and resident abroad, and that he believed that the libel was published maliciously and with intent to bring scandal and reproach upon the memory of his father, and to convey a gross insult upon himself and his family, and to bring them into hatred, contempt, and ridicule. It further stated that his father had inherited an ancient peerage and had never been an army contractor at all, and that his grandfather acquired the dukedom in 1775. The defendant also made an affidavit, in which he stated that he did not write the paragraph himself, nor was it written in this country, but that it had been sent to him by a person of position abroad in whose judgment and truthfulness he placed confidence. In reply to a letter from the duke's solicitor, the defendant wrote as follows :

A "The writer of the paragraph is abroad, and I will refer to him to learn to what he alludes. In the meantime, if you wish to contradict it, I will with pleasure insert a contradiction. As to the threat of legal proceedings, it seems to me an historical statement. It is only stated that the charge was made, and not substantiated or disproved."

B The defendant's affidavit further stated that he had since made inquiries, and from various sources had ascertained, and that he fully believed, that the historical statement made in the paragraph complained of was not accurate, but that the duke was descended as he had stated, and the dukedom was conferred on his grandfather in 1775. The defendant went on to state that in Italy such titles conferred no political or social distinction; that there were no peers in Italy; that the duke was resident in France where such titles were not recognised, and that he held no office there nor any public position or station. Upon these affidavits the rule now came on to be argued, the fiat of the Public Prosecutor not having been obtained.

Charles Russell, Q.C., and Poland for the defendant, showed cause.

Sir Hardinge Giffard, Q.C., Archibald and Woodfall supported the rule.

D *Cur. adv. vult.*

Feb. 9, 1884. **LORD COLERIDGE, C.J.**, read the following judgment of the court, except DENMAN, J. (see p. 967 post).—This was a case in which a foreign nobleman applied to this court for a rule calling upon the defendant, the proprietor of the newspaper called "Truth," to show cause why a criminal information should
E not be filed against him in this court, for a libel published in his said paper upon the deceased father of the foreign nobleman. The applicant resided abroad, and the affidavit on which the rule was moved for was sworn out of this country.

Several points were made against the rule—namely, that the applicant was a foreigner, and a foreigner not residing or even sojourning in this country; that the subject of the paragraph was not the applicant himself, but his deceased
F father; and that on any view it was not a case in which this court, in its discretion, would interfere by way of extraordinary remedy, but would leave the applicant to indict or bring an action. As to the point that the present Duke of Vallombrosa, the applicant, is neither resident nor sojourning in this country, it may be sufficient to observe, that we do not intend to lay it down as a rule of law that this court will not interfere, under any circumstances, by way of criminal information, on
G the application of a person so situated. Cases may be put, or may actually arise in fact, in which this court would so interfere beyond all question, if the person applying to it were an English subject or were resident in England, and the single fact that the applicant was situated as the applicant is situated here might not, in such a supposable case, be an answer to the application. But it is obvious that, if we have regard to the principles on which, from very early times, this
H court has acted, the non-residence of the applicant in England is a very cogent argument against the interference of the court. It makes it, as a general rule, very unlikely that there should be any intention to provoke a breach of the peace on the part of him who publishes the defamatory matter, and also, generally speaking, very unlikely that in fact any breach of the peace would follow. It is a matter, therefore, very important for the court to consider when the appeal is
I to its discretion—a reason, further, why, in the exercise of that discretion, the court should be unwilling to interfere. We do not preclude the duke from his remedy, if he thinks fit to pursue it, by way of action or indictment; but, in this particular case, we should be prepared on this ground to discharge the rule.

Next, as to the point that the subject of the libel is dead, the authorities are not absolutely conclusive; but it seems to us that the weight of authority inclines upon the whole in favour of the objection. The locus classicus upon this subject is the judgment of LORD KENYON in *R. v. Topham* (1). LORD KENYON there points out (4 Term Rep. at p. 128) that the general statement in *Case De Libellis*

Famosis (2) that publications defamatory of dead persons are libellous, was a statement extra-judicial, that it was not the point in judgment, and that the judgment might well have been sustained without going into it. He shows, further, that the passage in *HAWKINS PLEAS OF THE CROWN*, Bk. 1, c. 73, s. 3, which deals with informations as well as ordinary indictments, puts the whole criminality of libels, as distinguished from the civil liability of those who publish them, on private persons on their tendency to disturb the public peace. *HAWKINS*, indeed, in a passage immediately following the words quoted by *LORD KENYON*, puts his own view beyond all doubt, and shows that he would have discouraged, or even disallowed, many of the indictments for libel—to say nothing of informations—with which the courts of late years have been occupied. For he says :

“The court will not grant this extraordinary remedy by information, nor should a grand jury find an indictment, unless the offence be of such signal enormity that it may reasonably be construed to have a tendency to disturb the peace and harmony of the community. In such a case the public are justly placed in the character of an offended prosecutor to vindicate the common right of all, though violated only in the person of an individual; for the malicious publication of even truth itself cannot in true policy be suffered to interrupt the tranquillity of any well-ordered society.”

R. v. Paine (3) (a strange and unsatisfactory case, and very loosely reported), *LORD KENYON* explains, as he does also *R. v. Critchley* (4), by stating that in both cases an intention to subvert and slander the government of the country was charged in the indictment, and he supports both cases distinctly on this ground. It may be doubted, if the cases are looked at, whether *LORD KENYON* did not support the decisions (what the actual decision in the case in *CARTHEW* was does not appear) upon grounds which the judges who decided them did not think of, and which most certainly they did not state.

The libel in *R. v. Paine* (3) was on King William, who was alive, and Queen Mary, who was dead; the case, therefore, is a very weak one on the point now before us in any view of it. The libel in *R. v. Critchley* (4) stated of a certain Sir Charles Nicoll, who was dead, that “he changed his principles for a red riband, and voted for that pernicious project the Excise.” This was the whole libel, and *LORD KENYON* may well have been puzzled to uphold the propriety of a criminal information in respect of it, even though the deceased Sir Charles was the father of the wife of a Secretary of State. But in *R. v. Topham* (1), in which the libel on a deceased *LORD COWPER* was of the most virulent possible description, imputing to him “unmanly vices and debaucheries,” *LORD KENYON*, after time taken to consider, with the assent of *BULLER, J.*, who had tried the case, arrested the judgment, on the ground that it was not the subject-matter of indictment for libel to asperse the memory of the dead unless it was done with a design to break the peace. The court of King’s Bench in that case appears to assent to the principle laid down by *HAWKINS*—that private character is to be vindicated by private action, and that an indictment or information for libel is only to be justified where there are some incidents in it which concern the public, such as an attempt to injure the government, or an intention or tendency to break the public peace. This necessity of the person who applies for the criminal information being himself individually aspersed, is laid down in very strong terms by *PATTESON, J.*, in *R. v. Mead* (5). There is no instance of an action for libel by the representative of a deceased person; it must be some very unusual publication to justify an indictment or information for aspersing the character of the dead. If such a case should ever arise, it must stand upon its own footing. But this is not that case, and on this ground also we should, in our discretion, decline to interfere.

There remains to be considered the more general objection, viz., that the form of proceeding being in the discretion of the court, the case before us is not one in which that discretion, which must be legal and exercised on legal principles, ought to sanction the filing of the information. From the very nature of the

A case it is useless to examine, because it is not possible to reconcile, the various decisions on the subject. However much men may honestly endeavour to limit the exercise of their discretion by definite rule, there must always be room for idiosyncrasy, and idiosyncrasy, as the word expresses, varies with the man. But there is, besides this, that of which every student of legal history must be aware, the leaning of the courts for a certain time in a particular direction, balanced at least, if not reversed, by the leaning of the courts for a certain time in a direction opposite. The current of legal decision runs often to a point which is felt to be beyond the bounds of sound and sane control, and there is danger sometimes that the retrocession of the current should become itself extreme.

Many of us are old enough to have seen, or at least to have heard from those who have seen, the great diversity of which I have spoken in this matter of granting rules for criminal information. It is much too late to question the perfect legality of criminal informations. The statute 4 & 5 Will. & Mar., c. 18 [relating to malicious informations in the Court of Queen's Bench and repealed by the Administration of Justice (Miscellaneous Provisions) Act, 1938], to which so much reference was made on the argument, is conclusive to show their legality. It was a statute passed to correct the abuse of them, and to fix the conditions on which, for the future, they were to be allowed, the statute either assuming that the court had power to allow them, or conferring the power if it did not exist. But two years before the passing of this statute their legality had been denied, in *Mr. Prynne's Case* (6), by SIR FRANCIS WINNINGTON, who, in the course of a very learned argument, stated that LORD HALE himself had said that on argument they could not stand. LORD HOLT decided, however, to the contrary, intimating that LORD HALE must have been speaking only against the abuse of them. Without going through the list of cases since the days of LORD HOLT, it is certain that at times they have been granted by the court under circumstances, and for reasons, which could hardly satisfy now the discretion of the court. For example, in *R. v. Kinnerley* (7), a rule was made absolute against the proprietor of a paper for giving a ludicrous account of the then LORD CLANRICARDE's appearing with an actress in a theatre, LORD MANSFIELD observing, as his chief reason apparently, that "it was high time to stop this intermeddling in private families."

It is not necessary to go through the cases, but the practice of granting these informations appears to have reached its greatest height in the time of LORD TENTERDEN. In *R. v. Epps* (8), there was a rule granted against a man for saying that the clergy in general, and the applicant in particular, were harsh and rigorous in exacting their tithes. The excitement on the subject of tithes was actually given by LORD TENTERDEN as a reason for making the rule absolute. In *R. v. Rintoul* (9) the whole libel was this:

"The amount of public money received by the Somersets since the late Duke of Beaufort came of age far exceeds the value of the estates he bequeathed to the present Duke."

LORD TENTERDEN said: "Whatever may be the opinion of others, it is our opinion that this is a libel." And apparently upon no other ground the rule was made absolute. In *R. v. Smith* (10) there had been a riot at Oxmore, followed by conviction of the rioters. The defendant, after the trial and conviction, published an advertisement soliciting subscriptions for the prisoners, and asking whether a large number of acres (under an inclosure), including thirty-one in lieu of tithes, had been given to Sir Alexander Croke, and whether Oxmore Common before had not been tithe free? Sir Alexander Croke denied the facts suggested, and had published a pamphlet on the subject. The defendant swore that he believed the proceedings against him arose from his having supported a candidate for the county opposed in politics to Sir Alexander Croke. Under these circumstances the court actually made a rule absolute for a criminal information.

It is needless to multiply examples. These are selected almost by chance from a number of other cases equally opposed to later practice; and in all of them LORD

TENTERDEN was the presiding judge. LORD TENTERDEN was a great and upright magistrate, and needs no eulogy from me. But it is impossible for anyone not to see the great change which had come over the feeling of the court between the days of LORD HALE, LORD HOLT, and HAWKINS, and those of LORD TENTERDEN. But the general dissatisfaction of the legal profession with this state of things led, in the time of LORD DENMAN and LORD CAMPBELL, to a much stricter practice in the court in the granting of these informations. I am quite aware that *R. v. Gregory* (11), *R. v. Latimer* (12), and some few cases of this sort, occurred during this period of time; but there can be no doubt that the cases were rare, except where some person, in a public or official position, was attacked in relation to such position, or where the attack was of so cruel and outrageous a sort as to make it, according to the view of HAWKINS, a matter which interested the public, and called for the interference of the court, as representing the public and charged with the defence of its interests. So it was during the greater part of the time of SIR ALEXANDER COCKBURN, though, towards the close of his life, the practice of the court became somewhat easier and laxer.

I have, however, by the kindness of a learned friend been furnished with the reports of fifty cases of criminal information, running over the years from 1860 to 1880 inclusive, and, out of these fifty cases, four only were cases of informations granted at the suit of persons who were not in some public office or position. And during that time there were repeated declarations by various members of the court, not indeed that as matter of law the information would not be granted at the suit of private persons, but that the court would, as a general rule, leave private persons to their private remedies. For example, in *R. v. Lord Winchelsea* (13), in 1865, BLACKBURN, J., says:

"This remedy had usually and properly been confined to cases of magistrates, ministers, public officers, and persons in a high position whose character was of such public importance as to require immediate vindication."

The Lord Chief Justice (SIR ALEXANDER COCKBURN) adds that

"the extraordinary intervention, by means of a criminal information, was a procedure of a high prerogative character reserved for cases of public importance."

In *R. v. Headley* (14), in 1875, I find BLACKBURN, J., reported as saying:

"It is not enough that it should appear that there has been a libel [differing apparently in terms from LORD TENTERDEN, who seems, if rightly reported, to have thought it was enough]; it must also appear that it is a publication as to which we ought to put the prerogative process of the court in operation against the writer. It should not be done too lightly, or otherwise our jurisdiction to grant criminal informations, though very useful, may be brought into odium."

Again, in 1877, in the matter of a gentleman named Middleton, in which the libel was very gross, the rule was refused, and I find MELLOR, J., with the concurrence of LUSH, J., saying this:

"We must be chary of making the high jurisdiction of this court a sort of substitute for the ordinary jurisdiction of the magistrates. The court used to be far more strict, in the exercise of its extraordinary jurisdiction in granting criminal informations, than it has been perhaps in later times; but this is hardly a case for its exercise. It is not like the case of a serious imputation on a magistrate or a public officer, like a town clerk, for misconduct in his office."

Again, in 1878, in the case of an application on the part of Mr. Davidson, the musical critic of the "Times" newspaper, against the present defendant for imputing to the applicant personal corruption, the rule was refused by MELLOR, J., and HUDDLESTON, B., the court saying that

A "the libel was one which might well warrant an indictment or an action, but it did not follow that it was the fit subject of a criminal information. That was an exercise of the extraordinary jurisdiction of the court, which, as a general rule, was reserved for cases of libel upon persons in an official or judicial position, and filling some office or post which made it for the public interest necessary that such jurisdiction should be exercised for the refutation of the
B libellous charges made."

Examples might be multiplied, but these are sufficient. Very few of these cases are to be found in the volumes of reports. They are cases of discretion, and turn generally upon facts, and have seldom been reported; and the passages which I have been reading have been furnished me by a gentleman of the Bar who reported them for the "Times," and who is able to vouch for the substantial correctness
C of his own reports. The circumstance that so few cases on this subject out of the many which come before this court are to be found in the books must be my excuse, if I need one, for citing reports from newspapers, which, however accurate or valuable they may be for their own objects, are generally reported rather with a view to the facts than to the law, and to cite which, therefore, except where there seems to be, as here, a real reason for it, would be of bad example. I am
D able from my own recollection to state two cases, each of them, I think, important. This court, in the time of LORD CAMPBELL, refused Sir Charles Napier a criminal information for a libel imputing to him great misconduct in regard to his conquest of Scinde, on the ground, among others, that he had ceased to be Commander-in-Chief in India, and was at the time of his application to the court only a private
E person. In *R. v. Plimsoll* (15), in which I was myself counsel, a rule for a criminal information for a libel, in which a member of Parliament was accused of sending his ships to sea overloaded in order that they might sink and he might gain the insurances on them, was discharged after argument; and it was discharged without costs, inasmuch as the applicant had cleared his character; but the court left him to his ordinary remedy as a shipowner against any one who libelled him in that character.

F We are thus brought down to the last case upon the subject with the authority of which we were pressed very properly. I mean that of *R. v. Yates* (16). I know nothing of the merits of that case, and if I did, as the litigation is still depending, it would be unfit to say a word upon it. But a libel upon the private
G character of LORD LONSDALE, certainly not so aggravated as some of those as to which informations have been refused, was made the subject of an application to this court, and the rule for a criminal information was made absolute. It is said that it was granted, almost as of course, because the applicant was a peer. I am unaware of what my learned brothers may have said; but, if this was the ground of their decision I must respectfully dissent from it. I can find nowhere
H any trace of the doctrine that a peer, as such, is entitled to exceptional and most important privileges in the administration of the law. If a peer is libelled as a peer, for his conduct in Parliament, or as Lord Lieutenant (if he is one), or as magistrate, or as the holder of a public office, it would undoubtedly be almost of course (all other legal conditions being fulfilled) that the court would interfere in his behalf. But that a peer in private matters is entitled to any interference
I at the hands of this court, which the court would not exercise in favour of the humblest subject of the Queen, I respectfully but emphatically deny. I am not aware of any authority for such a proposition. *R. v. Gregory* (11) is certainly no such authority, and I decline to make one. It is said, on the other hand, that the point now under consideration was not taken, or, at any rate, not pressed upon the court, in *R. v. Yates* (16), and the probable explanation of this, which I understand on the best authority to be the fact, is this, namely, that with several of the cases decided in the latter years of SIR ALEXANDER COCKBURN it was felt that a Divisional Court must act on those later authorities, which no doubt formed a complete justification for the course there taken by this court.

I have said, however, that it is not possible to reconcile the cases; it is not easy. perhaps it is not possible, to lay down any rule which can guide discretion amid the ever-varying facts to which discretion has to be applied. If we go back to principle we find it well stated by BLACKSTONE (bk. 4, c. 23, p. 309), as follows:

"The objects of the other species of informations filed by the master of the Crown Office upon the complaint or relation of a private subject, are, any gross or notorious misdemeanours, riots, batteries, libels, and other immoralities of an atrocious kind, not peculiarly tending to disturb the government (for those are left to the care of the Attorney-General), but which, on account of their magnitude or pernicious example, deserve the most public animadversion."

In 1 STARKIE ON LIBEL (2nd Edn.), p. cxlvii, it is said:

"It must, however, be recollected that in granting or refusing criminal informations in case of libels, the Court of King's Bench exercises a discretionary power, acting on principles which are peculiar to that proceeding, and that the practice, in the instance of a criminal information for a libel, is not only peculiar to that proceeding, but irreconcilable with the ordinary principles of jurisprudence on which the law of libel in England is founded. The general rule is, that the truth or falsity of a libel is immaterial, whilst in this instance it is made the first and essential object of preliminary inquiry—of an inquiry conducted in a mode foreign to the ordinary forms of criminal justice, not by evidence before a jury, but by affidavit. Such a mode of investigation, at all times unsatisfactory, is the more so when the defendant, though the alleged libel be perfectly true, has no means of compelling those who know the truth to establish it by their affidavits; and yet, when the information has been granted, he is excluded from giving evidence of the truth, although the information was granted only on the assumption that the statement was false—a circumstance which necessarily tends to raise an unfavourable prejudice against him at the trial. Notwithstanding such considerations, the result is far more beneficial than might have been expected, or than possibly could have happened, had the practice been general. The truth is that, although the Court of King's Bench is open to all applicants for criminal informations, yet in cases of libel it is seldom resorted to but by persons of rank or wealth. The proceeding by information for a libel is a kind of intermediate course between treating the insult as an affair of honour, and the more vulgar and plebeian course of presenting a bill of indictment at the sessions or assizes. The libelled party has an opportunity of exculpating himself by means of a denial of the imputation on his conduct and character in the most public manner, and under a solemn sanction; his adversary is the more ready to make concession where, from the form of the proceeding, his character for courage is not implicated, and where the truth of the fact having been solemnly denied, an opportunity is afforded for explanation, concession, or apology. And thus it happens that a course of proceeding, which is to a certain extent inconsistent with general principles, is, in its limited application, rendered beneficial by particular considerations."

If this passage in STARKIE be looked at, it will appear at once that that great writer would have met this application before us with a summary refusal, and as not at all within those considerations, which, "in spite of the anomaly of the proceeding, bring about a result far more beneficial than might have been expected."

It is under these circumstances that, acting under the powers conferred by the Judicature Acts, I have ventured to bring together five judges of the High Court to establish, if possible, upon unusual authority some principles for our guidance in future. My colleagues, with a slight exception to be presently noticed, concur in this judgment, and I trust that the full discussion which this rule has received may be of some advantage, and that, the grounds on which we discharge it become

A ing generally known, the practice of the court may be brought back to that greater and more wholesome strictness which prevailed for at least a generation and a half, and that criminal informations may hereafter be granted only in cases which come fairly within the language of SIR WILLIAM BLACKSTONE already quoted, which I will not repeat and which I certainly cannot improve. The rule must, therefore, be discharged, but, according to the opinion of all my learned brothers, from which B I will not formally dissent, it will be discharged without costs.

DENMAN, J. (read by LORD COLERIDGE, C.J.)—I agree with the Lord Chief Justice that this rule ought to be discharged on the first two grounds upon which he rests his judgment, but I desire to add that I cannot accept the passage from BLACKSTONE upon which he comments as being quite an exhaustive description C of the cases in which the court ought to interfere. For example, if a newspaper or an individual were to show by repeated attacks and by wide circulation of these attacks upon a private individual, whether a British subject or a foreigner, and whether resident in England or abroad, a persistent determination to persecute, I, as at present advised, should think it would be the duty, in many cases, of this court to protect that individual by granting a rule, and even, in case of further D persistence, by making it absolute.

Rule discharged.

Solicitors: *Benbow, Saltwell & Tryon; Lewis & Lewis.*

[*Reported by HENRY LEIGH, Esq., Barrister-at-Law.*]

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MILLEN v. BRASCH & CO.

[COURT OF APPEAL (Baggallay, Brett and Lindley, L.JJ.), November 25, December 20, 1882]

[Reported 10 Q.B.D. 142; 52 L.J.Q.B. 127; 47 L.T. 685;
47 J.P. 180; 31 W.R. 190]

G

Carriage of Goods—Loss of goods—Negligence—Temporary loss—Goods not declared—Liability of carrier—Carriers Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 68), s. 1.

If goods which ought to be declared under s. 1 of the Carriers Act, 1830, and are not declared are lost, whether temporarily or permanently, the carrier is protected from liability for their loss and its consequences.

H

The plaintiff delivered to the defendants, who were carriers for hire from London to Rome, a trunk to be sent by rail from London to Liverpool and thence to Italy. Through the defendants' negligence the trunk was shipped to New York, and a considerable time elapsed before it was delivered to the plaintiff. The trunk contained articles within s. 1 of the Carriers Act, 1830, their value exceeded £10, and no declaration had been made in accordance with the section. The plaintiff was obliged to replace the articles in the trunk within the Act at enhanced prices.

I

Held: the trunk was "lost" within the meaning of s. 1 of the Act of 1830, although the loss was only temporary, but, as the plaintiff had not declared the goods, he could not recover from the defendants damages therefor.

Wallace v. Dublin and Belfast Junction Rail. Co. (1) (1874), I.R. 8 C.L. 341, applied.

Notes. Referred to: *Foster v. Great Western Railway* (1904), 52 W.R. 685.

As to carriage under the Carriers Act, 1830, see 2 HALSBURY'S LAWS (3rd Edn.)

158 et seq.; and for cases see 8 DIGEST (Repl.) 50 et seq. For the Carriers Act, 1830, s. 1, see 2 HALSBURY'S STATUTES (2nd Edn.) 804.

Cases referred to:

- (1) *Wallace v. Dublin and Belfast Junction Rail. Co.* (1874), I.R. 8 C.L. 341; 8 Digest (Repl.) 51, *217.
- (2) *Hearn v. London and South Western Rail. Co.* (1855), 10 Exch. 793; 24 L.J.Ex. 180; 25 L.T.O.S. 23; 1 Jur.N.S. 286; 3 C.L.R. 597; 156 E.R. 660; 8 Digest (Repl.) 50, 315
- (3) *Pianciani v. London and South Western Rail. Co.* (1856), 18 C.B. 226; 139 E.R. 1354; 8 Digest (Repl.) 50, 312.

Also referred to in argument:

- Morritt v. North Eastern Rail. Co.* (1876), 1 Q.B.D. 302; 45 L.J.Q.B. 289; 34 L.T. 940; 24 W.R. 386, C.A.; 8 Digest (Repl.) 51, 319.
- Wilson v. Lancashire and Yorkshire Rail. Co.* (1861), 9 C.B.N.S. 632; 30 L.J.C.P. 232; 3 L.T. 859; 7 Jur.N.S. 862; 9 W.R. 635; 142 E.R. 248; 8 Digest (Repl.) 153, 963.
- Le Conteur v. London and South Western Rail. Co.* (1865), L.R. 1 Q.B. 54; 6 B. & S. 961; 35 L.J.Q.B. 40; 13 L.T. 325; 30 J.P. 148; 12 Jur.N.S. 266; 14 W.R. 80; 122 E.R. 1448; 8 Digest (Repl.) 50, 312.

Appeal by the defendants from a decision of LOPES, J., reported 8 Q.B.D. 35.

By the Carriers Act, 1830, s. 1:

"No . . . common carrier by land for hire shall be liable for the loss of or injury to any article or articles or property of the descriptions following; (that is to say) . . . silks, in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials, furs . . . contained in any parcel or package . . . to be carried for hire . . . when the value of such article or articles of property aforesaid contained in such parcel or package shall exceed the sum of £10, unless . . . the value . . . shall have been declared . . . and such increased charge as hereinafter mentioned . . . be accepted by the person receiving such parcel or package."

C. Russell, Q.C., and *F. P. Tomlinson (R. T. Reid with them)* for the defendants.
Edward Pollock for the plaintiff.

Cur. adv. vult.

Dec. 20, 1882. **LINDLEY, L.J.**, read the following judgment of the court: The facts in this case, which was tried before LOPES, J., without a jury, are, shortly, as follows. The defendants are carriers for hire from London to Rome. On Nov. 13 plaintiff's agent delivered to defendants a trunk to be sent by rail from London to Liverpool, and there shipped in one of Bibbey's steamers for Italy. The defendants had in their possession a case of paper goods (Christmas cards) consigned to Mr. Hamburger, of New York. By the carelessness of the defendants' servants, the trunk belonging to the plaintiff was taken to the Victoria Docks, and shipped as and for Hamburger's case to New York. The defendants were not aware of the mistake until about Dec. 15, 1879. On Dec. 15, the defendants wrote to Hamburger, and on Dec. 19 the trunk arrived in New York. On Feb. 27, 1880, the plaintiff claimed £210 for loss of the trunk and injury to its contents. On Mar. 11, 1880, the trunk arrived at the defendants' offices, and, at the plaintiff's request, was retained there till June, and then delivered to the plaintiff. The miscarriage of the trunk and its loss for the time was admitted. It was also admitted that some of the contents of the trunk were injured in New York owing to the Custom House officers unpacking the trunk, and negligently and unskillfully repacking it. It was also admitted that the silk dresses and sealskin jacket are articles within the Carriers Act, 1830, that their value exceeded £10, and that no declaration was made. If the plaintiff is entitled to a verdict, it is agreed that the damages are—for silk dresses, £36; for sealskin jacket, £4; and for re-purchase

A of other articles at Rome at enhanced prices, £10, and that these several sums should be beyond the £5 paid into court.

LOPES, J., held (i) that the goods were lost within the true meaning of the Carriers Act, 1830, although their loss was only temporary; (ii) that the defendants were liable to pay damages for the loss or detention of those articles of apparel which there was no necessity to declare; (iii) that the defendants were not liable B to pay damages for the loss of or injury to the silks and furs which ought to have been declared, and were not declared; but (iv) that the defendants were, nevertheless, liable to pay damages for the detention of those articles. The learned judge accordingly gave judgment for the plaintiff for £5 beyond the sum of £5 paid into court, with costs. The £5 paid into court was sufficient to cover the damages to which the plaintiff was entitled in respect of the loss and detention of those articles C which there was no necessity to declare; and substantially the question raised by the appeal to this court is as to the liability of the defendants to pay damages for the loss or detention of the silks or furs which were not declared.

In holding that the defendants were liable for damages for the detention, although not for the loss of these articles, the learned judge followed what he understood to be the law as laid down in *Hearn v. London and South Western Rail. Co.* (2). D That case at first sight appears in favour of the plaintiff. But, if the pleadings demurred to are carefully examined, it will be found that the plaintiff, in his new assignment, carefully negatived the loss of the goods for the detention of which he was suing, and the point really decided was that where goods, which ought to be declared and are not declared, are detained by a carrier without being lost by him, he is liable for such detention. This is consistent with the language of the Carriers E Act, 1830, s. 1, which exonerates carriers from liability for loss of or injury to certain kinds of goods if not declared, but does not exonerate carriers from their liability for the undue detention of such goods. In this case, however, the learned judge found as a fact that the goods were lost within the meaning of the Carriers Act, although the loss was only temporary; and, assuming this finding to be correct, it appears to us impossible to hold the carriers irresponsible for the loss, F but responsible for detention caused by the loss. There is nothing in the Carriers Act to warrant such a refinement, nor does the decision in *Hearn v. London and South Western Rail. Co.* (2), as has already been shown.

Let us consider the question apart from authority, and let us take first the case of goods permanently lost. The damage to the owner of goods lost is their value, and possibly, in some cases, further special damage for their non-delivery in proper G time. The damage to the owner of goods never delivered is precisely the same as if they had been lost. The Carriers Act protects the carrier from liability for loss, and it would simply render the Act nugatory to hold him liable for detention, which is itself the result of the loss for which he is not liable. So in the case of a temporary loss by the carrier; to hold him not liable for the loss but liable for the consequences of it is practically inconsistent, and so to construe the Carriers Act H would, in effect, be to render it inoperative. It is to be observed that s. 1 of the Act protects the carrier from "liability for the loss of or injury to" undeclared goods; the Act does not simply relieve him from paying the value of undeclared goods which he loses. He is relieved from liability for their loss, and it would be to fritter away the Act and to depart from sound principles of construction to hold that loss in the Act only means value, as distinguished from loss and its I consequences.

If we turn to authority, we shall find that this view of the Act is supported by two decisions—one in this country and one in Ireland, viz., *Pianciani v. London and South Western Rail. Co.* (3), and *Wallace v. Dublin and Belfast Junction Rail. Co.* (1). Both of these cases were decided on demurrer. The first shows that, where goods are lost and the owner cannot recover the loss, he cannot recover for non-delivery which is occasioned by the loss, and further, that where goods are detained but not lost, the carrier is not protected. *Wallace v. Dublin and Belfast Junction Rail. Co.* (1) appears to have been very like the case now before us, for

the goods were there alleged to have been lost by the carriers, although only for a time, and the court held that the Carriers Act applied, and protected carriers from liability as well for the temporary as for the permanent loss of undeclared articles, and also from liability for the consequences of such loss. This appears to us to be the proper construction of the statute. A

The result comes to this. If goods which ought to be declared and are not declared are lost, whether temporarily or permanently, the carrier is protected from liability for their loss and its consequences. But whether goods not permanently lost are lost within the meaning of the Carriers Act must depend on whether they have been lost by the carrier, as distinguished from lost to the owner (see *Hearn v. London and South Western Rail. Co.* (2)), and this again must depend on the facts of each particular case. If the carrier temporarily loses the goods and delivers them within a reasonable time after he recovers them, he will not be liable; but if he keeps them after he has recovered them, the Carriers Act will not protect him from such subsequent breach of duty. The obligation on the part of the carrier to deliver the goods will remain or revive, and he will be responsible for future breaches of that obligation. It is, therefore, a mistake to suppose that it will be against the carrier's interest to try and find undeclared goods temporarily lost. The utmost that can be said on that subject is that he will gain nothing by finding them. On the other hand, to hold him liable for their detention when temporarily lost, but not when permanently lost, would be to make it beneficial to him not to find them. B

If that were the law, it would be to his interest to convert all temporary losses into permanent losses. This anomaly would, no doubt, be obviated by holding the carrier also liable for the detention of goods permanently lost; but, in our opinion, this cannot be done. As already stated, the learned judge held that, in this particular case, the goods were temporarily lost by the carrier within the true meaning of the Carriers Act. The defendants naturally supported that view of the facts; but the plaintiff contested the conclusion arrived at on this point, and we have, therefore, considered it, and we agree with the learned judge in thinking that the trunk was lost. As we understand the facts, the plaintiff's trunk was shipped and sent to New York as *Hamburger's case*, and was incapable of being traced and found until the mistake in the substitution of one package for the other was discovered. This was, in our opinion, a loss of the trunk by the carrier, for, though he had the bill of lading, the trunk was not referred to in it, and the carrier had lost possession of the trunk, and did not in fact know where it was, nor what had become of it. C

For the reasons above given, we are of opinion that, the trunk being lost, the defendants were not liable for any damages in respect of the loss or detention of or injury to the silks and furs contained in the trunk, and that, having paid into court enough to cover their liability for the other articles, they are entitled to judgment in the action with costs, and to the costs of the appeal. D

Appeal allowed. E

Solicitors: *Wilson, Bristow & Carpmael; Goldberg & Langdon.*

[Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.] F

A

Re POWERS. LINDSELL v. PHILLIPS

[COURT OF APPEAL (Cotton, Lindley and Bowen, L.JJ.), July 22, 1885]

[Reported 30 Ch.D. 291; 53 L.T. 647]

B

Limitation of Action—Mortgage—Charge on land—Surety—Claim against surety—Real Property Limitation Act, 1874 (37 & 38 Vict., c. 57), s. 8.

Limitation of Action—Acknowledgment—Part payment—Payment by principal—Effect on claim against surety.

Administration of Estates—Administration action—Summons—Payment sought of disputed debt—Dispute on law, not on fact.

C

Land was mortgaged to secure a debt of £1,000 and interest. By a separate bond, made between two sureties and the mortgagees, the sureties gave a guarantee for part of the debt. The mortgagor paid the interest under the mortgage for a time, and then defaulted. More than twelve, but less than twenty, years after the sureties gave the bond, one of them died, and the mortgagees took out a summons for administration of his estate, claiming to be creditors.

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Held: (i) where a bond was given by sureties to guarantee payment of a sum secured by a mortgage of land given by another person, the sum secured by the bond was not money "charged upon or payable out of" land within the meaning of the Real Property Limitation Act, 1874, s. 8, and, accordingly, the period of twelve years prescribed by that section did not apply to the present claim, which was, therefore, not statute-barred; (ii) where a part payment was made by a mortgagor before the remedy under the mortgage was barred, it operated to keep alive the mortgagee's claim against the surety, and for this reason also the claim was not statute-barred; (iii) although an administration summons ought not to be taken out to obtain payment of a disputed debt where the dispute turned on matters of fact, an administration summons was an appropriate procedure in this case as the dispute depended merely on a point of law.

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Sutton v. Sutton (1) (1882), 22 Ch. Div. 511, *Fearnside v. Flint* (2) (1883), 22 Ch. Div. 579, and *Cockrill v. Sparkes* (3) (1863), 1 H. & C. 699, distinguished.

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Notes. The Real Property Limitation Act, 1874, s. 8, has been in part replaced by the Limitation Act, 1939, s. 18 (1), the wording of which is substantially the same. The period of limitation for an action on a personal covenant in force when this case was tried was twenty years, under a provision in the Civil Procedure Act, 1833, s. 3. This section has been repealed, and replaced by the Limitation Act, 1939, s. 2 (3), under which an action upon a specialty shall not be brought after the expiration of twelve years from the date on which the cause of action accrued, provided that this subsection shall not affect any action for which a shorter period of limitation is prescribed by any other provision of the Act.

Considered: *Re Frisby, Allison v. Frisby* (1889), 43 Ch.D. 106. Followed: *Nutter v. Holland*, [1894] 3 Ch. 408. Considered: *Weld v. Petre* (1928), 97 L.J.Ch. 399.

As to limitation of actions in respect of money secured on land, see 24 HALSBURY'S LAWS (3rd Edn.) 264-271; as to acknowledgment of joint obligations, see *ibid.* 314-315; as to commencement of administration proceedings, see 16 HALSBURY'S LAWS (3rd Edn.) 433; and for cases, see 32 DIGEST (Repl.) 482 et seq. For the Limitation Act, 1939, see 13 HALSBURY'S STATUTES (2nd Edn.) 1159.

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Cases referred to:

(1) *Sutton v. Sutton* (1882), 22 Ch.D. 511; 52 L.J.Ch. 333; 48 L.T. 95; 31 W.R. 369, C.A.; 32 Digest (Repl.) 462, 794.

(2) *Fearnside v. Flint* (1883), 22 Ch.D. 579; 52 L.J.Ch. 479; 48 L.T. 154; 31 W.R. 318; 32 Digest (Repl.) 475, 895.

- (3) *Cockrill v. Sparkes* (1863), 1 H. & C. 699; 1 New Rep. 439; 32 L.J.Ex. 118; 7 L.T. 752; 9 Jur.N.S. 307; 11 W.R. 428; 158 E.R. 1065; 32 Digest (Repl.) 458, 731.

Also referred to in argument:

- Whitcomb v. Whiting* (1781), 2 Doug.K.B. 652; 99 E.R. 413; 32 Digest (Repl.) 415, 387.

Appeal by the plaintiffs, Lindsell and Archdale, mortgagees, from a decision of BACON, V.-C., refusing to discharge an order of the chief clerk by which the chief clerk declined to make an administration order in respect of the estate of Edmund Powers, a co-surety in respect of the mortgage, the respondents to the appeal being the personal representatives of Edmund Powers.

On May 23, 1867, Edmund Powers and Charles Powers executed a joint and several bond in the penal sum of £400, payable to Lindsell and Archdale. The bond recited an indenture of May 23, 1867, to which neither of the obligors was a party, whereby freehold and copyhold estates were mortgaged to Lindsell and Archdale to secure £1,000 and interest. The mortgage contained a covenant by T. Powers with Lindsell and Archdale for payment to them of the £1,000, with interest at 5 per cent., on Nov. 23 then next. The bond also recited that Lindsell and Archdale had advanced the £1,000 at the request of the obligors, and that at the time of the agreement for the loan of the £1,000 and interest,

"and as a better security for part thereof, it was agreed that the said E. Powers and C. Powers should execute a bond in the penal sum of £400 conditioned for the repayment of the sum of £200 and interest, part of the said sum of £1,000 and interest, at the rate of 5 per cent., secured by the said indenture of mortgage,"

and continued as follows:

"Now, therefore, if the said Thomas Powers, his heirs, executors, or administrators, shall pay to the said R. H. Lindsell and F. Archdale, or the survivor of them, or the executors or administrators of such survivor, their or his assigns, the said sum of £1,000, together with interest for the same at the rate, and on the days, and in manner as by his covenant in the said indenture of mortgage of May 23, 1867, is mentioned, then the above written bond shall be void."

Down to December, 1877, an agent of the mortgagor received the rents of part of the mortgaged property, and paid the interest on the mortgage. From that time to December, 1879, the rents were insufficient to pay the interest, which fell into arrear, and in January, 1880, the mortgagees entered into possession of the whole of the mortgaged property. In December, 1883, Edmund Powers died, without having made any payment to the obligees, or given them any acknowledgment. Charles Powers had paid to the obligees £100 with interest. On Mar. 27, 1885, the obligees took out a summons, as creditors, for the administration of the estate of Edmund Powers. On May 14, 1885, the chief clerk of BACON, V.-C., dismissed the summons. The obligees moved before BACON, V.-C., that the order of the chief clerk might be discharged, and an order for administration made. The representatives of Edmund Powers contended that the remedy on the bond was barred by the Real Property Limitation Act, 1874. BACON, V.-C., held that, as the court had, under R.S.C., 1883, Ord. 55, r. 10 [revoked. See now R.S.C. (Revision), 1962, Ord. 85, r. 5], a discretion as to whether it would grant an administration order, the decision of the chief clerk must be affirmed, and the plaintiffs left to their remedy by action. The plaintiffs appealed.

By the Real Property Limitation Act, 1874, s. 8:

"No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have

A accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case, no such action or suit or proceeding shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given."

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Warrington for the plaintiffs.

Upjohn, for the defendants, the representatives of Edmund Powers.

C **COTTON, L.J.**—It is contended that this bond is barred by s. 8 of the Real Property Limitation Act, 1874. As a merely personal bond it clearly is not barred, for it is not twenty years old; but the defendants urge that it is barred by that section. [His LORDSHIP read the section.]

The first question we have to decide is, whether this bond comes within the scope of that enactment. It is true that the bond appears on the face of it to be given to secure the payment of £200, part of a sum of £1,000, which £1,000 is secured by mortgage of real estate; and in some sense it may be said that the £200 for which the bond is given is part of the sum secured by the mortgage. But in fact the one debt is not a part of the other. The two sums are different debts, one being the debt of Thomas Powers, the other the debt of the two sureties. The case is quite different from *Sutton v. Sutton* (1), where it was sought to make the mortgagor liable on his covenant in the mortgage deed, although the remedy against the land was barred by the statute. The debt there was one and the same debt, and we held that full effect must be given to the words of the section, and that the debt could not be recovered from the mortgagor personally any more than out of the land. In *Fearnside v. Flint* (2), FRY, L.J., extended this rule to the case of a bond given as a separate instrument. In my opinion, those authorities have no application to a case where a bond is given by another person, conditioned to be void if the mortgagor pays the mortgage debt, and the mortgage is still alive.

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If the remedy on the bond taken by itself was barred, I am of opinion that no payment by the mortgagor would keep it alive; but where a bond, which by itself is not barred, is given for the purpose of guaranteeing the payment by the mortgagor of the mortgage debt, and the mortgagor makes payments which prevent the remedy on the mortgage from being barred, I am of opinion that the remedy on the bond is not barred. The decision in *Cockrill v. Sparkes* (3) is not inconsistent with this view. In that case there were two makers of a joint and several promissory note, and it was decided that, under s. 14 of the Mercantile Law Amendment Act, 1856, [repealed] a part payment by one did not take the case out of the Statute of Limitations as regards the remedy against the other. I do not think that this rule applies where a separate bond is given by sureties to guarantee the payment of a mortgage debt, and the mortgagor makes payments.

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There will be a declaration that the claim of the plaintiffs is not barred, and unless the defendants admit assets the usual order for administration must be made. As regards the view taken by BACON, V.-C., it is true that it is not a right course to take out an administration summons for the purpose of obtaining payment of a disputed debt where the dispute turns on matters of fact; but when the question depends merely on a point of law, the point ought to be decided without putting the parties to another proceeding.

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LINDLEY, L.J.—I think that BACON, V.-C., hardly understood that there were no facts in dispute in the case. A summons is not the proper way of trying a disputed debt where the dispute turns on questions of fact; but where there is no dispute of fact the validity of the debt can be decided quite as well on a summons as in an action. I think, therefore, that the Vice-Chancellor took an erroneous view when he declined to entertain the application.

The question on the merits is whether the plaintiffs are creditors. The bond is not twenty years old, which *prima facie* shows that they are. But it is said that the money secured by the bond is part of the sum secured by a mortgage of land, and that therefore the remedy for it is barred by the lapse of twelve years. Is that so? This is not a case where a bond is given for a debt secured on land, and though the bond speaks of the £200 as part of a sum of money secured on land, we must not allow ourselves to be misled by that expression. The mortgage was given by Thomas Powers, the bond by other persons, and it is difficult to say that the bond is for the same debt. A

We are asked to hold that the money secured by the bond is money charged on land, but, in my opinion, that is not so. I agree that the surety, on paying the debt, would be entitled to the benefit of the mortgage, but that does not make the money secured by the bond a charge on land at the present time. But suppose the twelve years' limitation to apply to the bond, can the remedy under it be considered as barred while the mortgage is yet alive? In order that we may be able to decide that question we must look at the condition of the bond, which is, that if Thomas Powers, his heirs, executors, or administrators, shall pay the mortgage money and interest the bond shall be void. The mortgage money and interest have not been paid or satisfied, and the mortgagor is still liable to pay them, so the bond remains in force. In order that we may be able to decide that question we must look at the condition of the bond, which is, that if Thomas Powers, his heirs, executors, or administrators, shall pay the mortgage money and interest the bond shall be void. The mortgage money and interest have not been paid or satisfied, and the mortgagor is still liable to pay them, so the bond remains in force. If the defendants, therefore, admit assets, there will be an order for payment, and if they do not, an order for administration. B C D

BOWEN, L.J.—I think that the Vice-Chancellor must have been under the impression that there was some dispute as to the facts, or some other complication in this case, otherwise he would hardly have dealt with it as he has done. The point of law on which the defendants fail is, whether this case is within s. 8 of the Real Property Limitation Act, 1874. Is this an action brought to recover a sum of money charged on or payable out of land? In a mortgage deed the money is secured on land, and is also either a specialty or a simple contract debt of the mortgagor. An action against the mortgagor for the debt is an action to recover money which is charged on land. But an action on a bond given by another person to guarantee payment of that debt is not a proceeding against the same person, nor to recover the same sum; it is an action to recover damages from a third person because the mortgagor does not pay. E F

In *Sutton v. Sutton* (1) we thought that an action by the mortgagee against the mortgagor to recover the mortgage debt was none the less an action to recover money charged on land because it was an action on covenant, and not a proceeding against the land. Fry, L.J., in *Fearnside v. Flint* (2), extended the rule to a collateral bond given by the mortgagor; and I think his decision was right, for to hold otherwise would be to give an instrument a different effect on account of its not being on the same sheet of paper. In the present case the proceeding is not between the same parties, nor to recover the same sum, as it would be if an action had been brought on the mortgagor's covenant. It is a proceeding to recover an indemnity against the nonpayment by another person of a sum of money which he had charged on land. Even if the bond could be brought within the section, I think it must be held that the part payments by the mortgagor would prevent that clause from barring the remedy. G H

Appeal allowed.

Solicitors: *Stibbard, Gibson & Co.; Ullithorne & Co.*

[Reported by FRANK EVANS, Esq., Barrister-at-Law.] I

A

Re WITTON. Ex Parte ARNAL

[COURT OF APPEAL (Baggallay, Cotton and Lindley, L.JJ.), June 21, 1883]

[Reported 24 Ch.D. 26; 53 L.J.Ch. 134; 49 L.T. 221]

- B *Bankruptcy—Disclaimer—Lease—Landlord kept out of possession—Payment of compensation as condition of disclaimer—Benefit to bankrupt's estate—Bankruptcy Act, 1869 (32 & 33 Vict., c. 71), s. 23.*

On giving leave to a trustee in bankruptcy to disclaim the lease of the bankrupt where the landlord has been kept out of possession and in determining whether compensation is payable to the landlord as a condition of disclaimer, regard must be had to whether the occupation has either in fact produced a benefit to the bankrupt's estate or was calculated to produce a benefit.

C

Notes. Section 23 of the Bankruptcy Act, 1869, has been replaced by s. 54 of the Bankruptcy Act, 1914 (2 HALSBURY'S STATUTES (2nd Edn.) 389). Rule 28 of the Bankruptcy Rules, 1871, has been replaced by r. 278 of the Bankruptcy Rules, 1952 (3 HALSBURY'S STATUTORY INSTRUMENTS).

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Followed: *Re Salkeld, Ex parte Good* (1884), 13 Q.B.D. 731.

As to disclaimer of lease in bankruptcy, see 2 HALSBURY'S LAWS (3rd Edn.) 460; and for cases see 5 DIGEST (Repl.) 1009 et seq.

Cases referred to:

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(1) *Re Turner, Ex parte Ladbury* (1881), 17 Ch.D. 532; 50 L.J.Ch. 838; 45 L.T. 5, C.A.; 5 Digest (Repl.) 1010, 8152.

(2) *Re Knight, Ex parte Isherwood*, ante, p. 120; 22 Ch.D. 384; 52 L.J.Ch. 370; 48 L.T. 898; 31 W.R. 442, C.A.; 5 Digest (Repl.) 1010, 8150.

(3) *Re Bushell, Ex parte Izard* (1883), 23 Ch.D. 115; 48 L.T. 502, C.A.; 5 Digest (Repl.) 1011, 8161.

F

Appeal from a decision of Mr. Registrar PEPYS, acting as Chief Judge in bankruptcy, in which the trustee in bankruptcy was given unconditional liberty to disclaim the debtor's lease.

G

The debtor, Henry Witton, a pianoforte manufacturer, filed a petition in bankruptcy in the London Bankruptcy Court on Dec. 13, 1882. The first meeting of creditors was held on Jan. 3, 1883, when resolutions were passed for liquidation by arrangement, and the appointment of a trustee. The debtor's business premises were held by him under a lease, dated Aug. 22, 1881, from L. C. Arnal, for a term of twenty-one years from Dec. 25, 1880, at a yearly rent of £160 payable quarterly. At the date of the filing of the petition there were unpaid the quarter's rent due at Michaelmas, 1882, and a sum of £10, part of the previous quarter's rent. The landlord, shortly after the filing of the petition, distrained for the £50 thus due, and on Jan. 16, 1883, the trustee paid out the distress. The bailiff had then been

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in possession for twenty-three days. He continued in possession under a distress for the Christmas rent, which was paid out by the trustee on Jan. 24, 1883, and the bailiff withdrew. Afterwards the business was carried on by the debtor during part of February at the request of the trustee, and then closed. Negotiations took place between the landlord and the trustee for a surrender of the lease, but no agreement was come to. The landlord had been allowed by the trustee to put up

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bills on the premises in January, stating that the premises were to be let, and that application was to be made to the landlord and some applications were consequently made to him. The trustee retained possession of the premises and kept some of the debtor's goods there until about the end of the third week in February, 1883, and on Mar. 6, 1883, he tendered the key of the premises to the landlord, who declined to accept it. The trustee afterwards applied to the court for leave to disclaim the lease, and alleged that, with the exception of a few trifling sales, no pecuniary or other advantage had accrued to the debtor's estate by means of the occupation of the premises since Dec. 25, 1882. On Apr. 3, 1883, Mr. Registrar PEPYS, acting

as Chief Judge in bankruptcy, gave the trustee unconditional liberty to disclaim. A
The landlord appealed.

E. Cooper Willis, Q.C., and *J. W. Mansfield* for the landlord.

Wyatt Hart (Nicholson with him) for the trustee in bankruptcy.

BAGGALLAY, L.J.—Until the decision of the Court of Appeal in *Re Turner, Ex parte Ladbury* (1) the general opinion was that r. 28 of the Bankruptcy Rules, 1871, did not apply as between the landlord and the trustee. But a different view was taken in *Re Turner, Ex parte Ladbury* (1), and that case was followed by *Re Knight, Ex parte Isherwood* (2) and *Re Bushell, Ex parte Izard* (3). The principles on which the court acts in imposing terms on the trustee are very fully laid down and almost settled by these cases; but I agree rather with the larger view expressed by **COTTON, L.J.**, in *Re Knight, Ex parte Isherwood* (2) than with the more limited view of **SIR GEORGE JESSEL, M.R.**, in *Re Bushell, Ex parte Izard* (3). In *Re Bushell, Ex parte Izard* (3) it was only necessary for the court to adopt the more limited view, that it was necessary to show that a benefit had actually resulted to the bankrupt's estate from the trustee's occupation of the property, because there it was held that such a benefit had resulted. But in *Re Knight, Ex parte Isherwood* (2), **COTTON, L.J.**, said (22 Ch.D. at p. 395):

"In determining what he [the trustee] ought to pay, regard must be had to . . . whether the occupation has either in fact produced a benefit to the bankrupt's estate, or was contemplated as likely to produce a benefit."

The present case seems a very trumpery one, and it is not desirable to encourage appeals in such cases. If the registrar had not misapprehended the effect of *Re Bushell, Ex parte Izard* (3), which was not fully reported when this case was heard, I should have felt inclined to say that the appeal ought to be dismissed. But the landlord is within his rights, and I think that £20 is the proper sum which should be paid to him. I do not think, however, that any order should be made as to costs.

COTTON, L.J.—I concur.

LINDLEY, L.J.—I concur, and consider that under the circumstances £20 is fair and reasonable compensation.

Appeal allowed.

Solicitors: *Cheston & Sons; Gowing & Co.*

[Reported by **FRANK EVANS, ESQ., Barrister-at-Law.**]

A

STUDDS v. WATSON

[CHANCERY DIVISION (North, J.), November 20, 1884]

[Reported 28 Ch.D. 305; 54 L.J.Ch. 626; 52 L.T. 129;
33 W.R. 118; 1 T.L.R. 83]

B

Sale of Land—Contract—Memorandum—Separate documents without reference to each other, but together containing all necessary terms—Statute of Frauds, 1677 (29 Car. 2, c. 3), s. 4.

A memorandum consisting of separate documents which, although without reference to each other, referred to the same parol contract and together supplied all the necessary terms, **held** to be sufficient to satisfy s. 4 of the Statute of Frauds, 1677.

C

Notes. Section 4 of the Statute of Frauds, 1677, so far as it applied to "any contract or sale of lands tenements or hereditaments or any interest in or concerning them" has been replaced by s. 40 (1) of the Law of Property Act, 1925 (20 HALSBURY'S STATUTES (2nd Edn.) 500).

D

Considered: *Oliver v. Hunting* (1890), 44 Ch.D. 205. Distinguished: *Chaproniere v. Lambert* (1917), 86 L.J.Ch. 726. Referred to: *Walford v. Narin*, [1948] 2 All E.R. 85; *Timmins v. Moreland Street Property Co.*, [1957] 3 All E.R. 265.

As to memorandum in more than one document, see 8 HALSBURY'S LAWS (3rd Edn.) 96; and for cases see 12 DIGEST (Repl.) 158 et seq.

E

Cases referred to:

(1) *Shardlow v. Cotterell* (1881), 20 Ch.D. 90; 51 L.J.Ch. 353; 45 L.T. 572; 30 W.R. 143, C.A.; 12 Digest (Repl.) 158, 1018.

(2) *Long v. Millar* (1879), 4 C.P.D. 450; 48 L.J.Q.B. 596; 41 L.T. 306; 43 J.P. 797; 27 W.R. 720, C.A.; 12 Digest (Repl.) 158, 1017.

(3) *Cave v. Hastings* (1881), 7 Q.B.D. 125; 50 L.J.Q.B. 575; 45 L.T. 348; 46 J.P. 56, D.C.; 12 Digest (Repl.) 159, 1022.

F

Action for specific performance of a verbal contract for sale to the plaintiff of the defendant's share in the reversion of leasehold property. The defendant pleaded that there was no sufficient memorandum within s. 4 of the Statute of Frauds, 1677.

G

The defendant, as owner of a share in the reversion of some leasehold premises, entered into a verbal contract for the sale of her share to the plaintiff for £200, and on Sept. 22, 1882, the defendant signed the following receipt:

"Received of J. Studds £1 of my share in the Barrett's Grove property, the sum of £200."

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On Mar. 19, 1883, the defendant's agent wrote to the plaintiff:

"Mr. Studds—Sir,—If the balance of £199 on account of the purchase of my share of the property be not paid on or before the 22nd inst., I shall consider the agreement (made on Sept. 22, 1882) not any longer binding."

An action having been brought by the plaintiff for specific performance, one of the defences was that there was no sufficient memorandum of the agreement within the statute.

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Barber, Q.C., and *Hall Hall* for the plaintiff.

Karslake, Q.C., and *Maidlow* for the defendant.

NORTH, J., after stating that there was no definite contract, but negotiation only, until the giving of the receipt of Sept. 22, 1882, continued: The question arises how far the contract is evidenced by a receipt and a letter. The evidence is clear that a parol contract for the sale of the property in question was come to

between the plaintiff and defendant on Sept. 22, 1882, and that it was an open contract, no time being fixed for completion or payment of the purchase money, and therefore a reasonable time for completion would be inferred.

The principal defence is that there is no sufficient memorandum in writing within s. 4 of the Statute of Frauds, 1677. Two documents are relied upon for that purpose. One is a receipt and the other is a letter, written on behalf of the defendant by a Mr. Mallam. The receipt by itself is clearly an insufficient memorandum, and somewhat difficult to understand. I should have to add some words to it in order to explain it. I read it as meaning :

"Received £1 part of the sum of £200 on account of my share in the Barrett's Grove property."

The other document is the letter of Mar. 19, 1883, which refers to the agreement made on Sept. 22, 1882. Counsel for the defendant says that the receipt is not here referred to, because an agreement is referred to and the receipt is not an agreement. It seems to me that the agreement referred to is the parol agreement which was made on that day for the sale of the property of which the receipt forms part.

But it is said that the letter does not contain the name of the purchaser. It is addressed to Mr. Studds, and it treats him as the purchaser by asking him for the price, and in fact he is the purchaser. I do not dwell upon this point, however, because I think it is concluded by authority. In *Shardlow v. Cotterell* (1) it was held that a receipt, memorandum, and conditions of sale contained a sufficiently definite description of the property sold to enable the court to receive parol evidence as to what the property consisted of. So in the present case, when I look at the statement to the person who is called upon to pay, it seems to me that Mr. Studds is sufficiently indicated as the purchaser when he is called upon to pay the balance of the purchase money. The reference to the purchaser is not conclusive, for it might have been shown aliunde that Mr. Studds was not the purchaser, but that is not the case here. It is said that the letter does not state what the purchase money is, and that it might have been £200 or any other sum. But there is the receipt, which shows clearly the amount of the purchase money, for it is equivalent to a receipt for £1 on account of £200, as I have said before.

Is there a sufficient connection between the two documents to enable the court to read them together? I think there is. For the principles of the rule according to which two documents may be read together I will refer to *Long v. Millar* (2). In that case the word "purchase" used in a receipt was held equivalent to "agreement to purchase," so as to connect the receipt with the agreement. Another illustration is *Cave v. Hastings* (3), where the plaintiff signed a memorandum setting forth the terms of a contract by which he agreed to let a carriage to the defendant for the period of a year, and the defendant in a subsequent letter to the plaintiff, referred to "our arrangement for the hire of your carriage." It was held that the defendant's letter sufficiently referred to the document containing the terms of the contract to constitute a good memorandum of the contract within the Statute of Frauds.

In my opinion there is in this letter ample to connect it with the receipt by the use of the word "balance." What is a "balance" of purchase money? It is the sum remaining unpaid, generally the larger portion of the purchase money. I find, therefore, that there is sufficient connection between the documents, and that the receipt supplies what is wanting in the letter. But there is a further point, namely, that even assuming the word "balance" is not sufficient to connect the two documents, yet there is a parol agreement proved, to which both of these documents refer. Each term of the agreement is found in one or other of the documents, which are in themselves sufficient to constitute a memorandum within the statute. It has been decided that a parol contract may be evidenced by an affidavit made at a different time. And supposing that there were two affidavits evidencing a parol contract, I do not think that it would be necessary for those affidavits to refer to

A one another. It would, I think, be sufficient if both referred to the same parol contract. That being so, it is not necessary that the two documents in this case should refer the one to the other. In my opinion, therefore, the Statute of Frauds is no defence to the action.

Judgment for the plaintiff.

Solicitors: *G. Hall Hall; Stocken & Jupp.*

[*Reported by F. GOULD, Esq., Barrister-at-Law.*]

Re JUDKIN'S TRUSTS

[CHANCERY DIVISION (Kay, J.), January 25, February 1, 1884]

[Reported 25 Ch.D. 743; 53 L.J.Ch. 496; 50 L.T. 200;
32 W.R. 407]

Will—Legacy—Contingent legacy—Application for benefit of legatee—Time of vesting.

Will—Legacy—Interest—Severance from testator's estate—Severance from causes connected with legacy.

A testator devised and bequeathed his real and personal estate to trustees upon trust to sell and convert the same, and, out of the moneys to be produced by such sale and conversion, upon trust that they should pay his funeral and testamentary expenses, etc., and should stand possessed of the residue of the money upon trust thereout to pay the sum of £1,500, to be equally divided among the six younger children of F.S.H. who should be alive at the death of the testator's grandson, share and share alike, such shares to be paid to them respectively on their attaining twenty-one or marrying, "and as to the rest and residue of" his "residuary estate" in trust for his sister for her separate use. The testator's sister, as residuary legatee, claimed to be entitled to the whole income of the £1,500 during the life of the grandson, but the six younger children of F.S.H. contended that, upon attaining the age of twenty-one years or marrying, they took vested interests in the fund, or that, at any rate, the income thereof should be accumulated during the period of twenty-one years from the testator's death (if the grandson should live so long) for their benefit. The testator's next-of-kin also claimed to be entitled to the income of the fund during the life of the grandson.

Held: (i) the income of a contingent legacy was not applicable, under the Conveyancing Act, 1881, s. 43, for the benefit of the legatee, unless the event on which the legacy was to vest in him must occur before he attained the age of twenty-one years, and the residuary legatee, and not the next-of-kin, was entitled to the whole income of the fund during the life of the grandson; (ii) in order to make a legacy carry interest, on the ground of its having been severed from a testator's estate, the severance must have arisen from causes connected with the legacy itself, and not merely, as in this case, from the residue having become payable before the legacy, or other causes unconnected with the legacy.

Festing v. Allen (1) (1844), 5 Hare, 573, applied.

Lloyd v. Lloyd (2) (1841), 4 Beav. 231, and *Simmons v. Rudall* (3) (1851), 1 Sim.N.S. 115, considered.

Notes. Except in so far as it relates to instruments coming into operation before 1926, the Conveyancing Act, 1881, s. 43, was repealed by the Law of Property Act, 1925, s. 207 and Sched. 7, and replaced by the Trustee Act, 1925, s. 31. As to

the intermediate income on contingent and future testamentary gifts generally under wills coming into operation after 1925, see the Law of Property Act, 1925, s. 175; but this section does not apply to contingent pecuniary legacies.

Considered: *Re Inman*, *Inman v. Rolls*, [1893] 3 Ch. 518. Referred to: *Re Medlock*, *Ruffle v. Medlock* (1886), 55 L.J.Ch. 738; *Re Holford*, *Holford v. Holford*, [1894] 3 Ch. 30; *Re Boulter*, *Capital and Counties Bank v. Boulter*, [1918-19] All E.R.Rep. 350; *Re Stapleton*, *Stapleton v. Stapleton*, [1946] 1 All E.R. 323.

As to interest on legacies, see 16 HALSBURY'S LAWS (3rd Edn.) 327-329; as to maintenance under statutory powers under pre-1926 trusts, see 21 HALSBURY'S LAWS (3rd Edn.) 169-170; and for cases see 23 DIGEST (Repl.) 415-417. For the Conveyancing Act, 1881, s. 43, see 20 HALSBURY'S STATUTES (2nd Edn.) 416; for the Law of Property Act, 1925, ss. 175, 207 and Seventh Schedule, see *ibid.*, pp. 789, 844, 895; for the Trustee Act, 1925, s. 31, see *ibid.*, vol. 26, p. 94.

Cases referred to:

- (1) *Festing v. Allen* (1844), 5 Hare, 573; 67 E.R. 1038; 28 Digest (Repl.) 574, 881.
- (2) *Lloyd v. Lloyd* (1841), 4 Beav. 231; 10 L.J.Ch. 327; 5 Jur. 673; 49 E.R. 328; 23 Digest (Repl.) 472, 5431.
- (3) *Simmons v. Rudall* (1851), 1 Sim.N.S. 115; 15 Jur. 162; 61 E.R. 45; 44 Digest 312, 1447.
- (4) *Acherley v. Wheeler and Vernon* (1721), 1 P.Wms. 782.
- (5) *Boddy v. Dawes* (1836), 1 Keen, 362; 6 L.J.Ch. 145; 48 E.R. 346; 23 Digest (Repl.) 460, 5322.
- (6) *Saunders v. Vautier* (1841), Cr. & Ph. 240; 4 Beav. 115; 10 L.J.Ch. 354; 41 E.R. 482, L.C.; 23 Digest (Repl.) 403, 4745.
- (7) *Vawdry v. Geddes* (1830), 1 Russ. & M. 203; Taml. 361; 8 L.J.O.S.Ch. 63; 39 E.R. 78; 44 Digest 1095, 9447.
- (8) *Lister v. Bradley* (1841), 1 Hare, 10; 11 L.J.Ch. 49; 5 Jur. 1034; 66 E.R. 930; 44 Digest 1100, 9498.
- (9) *Re George* (1877), 5 Ch.D. 837; 47 L.J.Ch. 118; 37 L.T. 204; 26 W.R. 65, C.A.; 23 Digest (Repl.) 466, 5390.

Also referred to in argument:

Dundas v. Wolfe Murray (1863), 1 Hem. & M. 425; 32 L.J.Ch. 151; 71 E.R. 185; sub nom. *Dundas v. Murray*, 1 New Rep. 429; 11 W.R. 359; 44 Digest 1100, 9500.

Page v. Leapingwell (1812), 18 Ves. 463; 34 E.R. 392; 23 Digest (Repl.) 433, 5028.

Williams v. Haythorne, *Williams v. Williams* (1871), 6 Ch. App. 782, L.C.; 44 Digest 1080, 9321.

Re Cotton (1875), 1 Ch.D. 232; 45 L.J.Ch. 201; 33 L.T. 720; 24 W.R. 243; 23 Digest (Repl.) 459, 5303.

Skrymsher v. Northcote (1818), 1 Swan. 566; 1 Wils. Ch. 248; 36 E.R. 507; 23 Digest (Repl.) 470, 5420.

Petition by Eliza Ann Morison, the residuary legatee of the testator, Charles H. E. Judkins, claiming to be entitled to the whole income of the sum of £1,500 during the life of Charles J. Anderson, the testator's grandson.

Charles H. E. Judkins made his will, dated April 13, 1876, and thereby, after a specific devise and certain specific and pecuniary bequests, devised and bequeathed all his real and personal estate, except what he otherwise disposed of by his will or any codicil thereto, to E. S. Judkins, P. C. Dutton, W. Duckworth, and T. Stockley, upon trust to sell as therein mentioned, and convert into money such parts thereof as should not consist of money, and out of the moneys to be produced by such sale and conversion, and the ready money of which he should be possessed at his death, upon trust that they should pay his funeral and testamentary expenses, debts and legacies; and should stand possessed of the residue of the same moneys upon trust, in the first place, thereout to pay the sum of £1,500, to be

A equally divided between and amongst such of the under-mentioned six younger children of Frederic S. Hull who should be alive at the death of the testator's grandson, Charles J. Anderson, share and share alike, that was to say Nina Hull, Ernest Hull, Alfred B. Hull, Winifred Hull, Janet M. Hull, and Reginald L. Hull, such shares to be paid to them respectively on attaining the age of twenty-one years, or marriage, which should first happen; "and as to the rest and residue of"

B his "residuary estate," in trust for his sister Eliza Ann Morison for her separate use. The testator appointed F. S. Judkins, P. C. Dutton, and T. Stockley executors of his will.

The testator died on Oct. 7, 1878. The trustees paid, or otherwise provided for, all the testator's debts and funeral and testamentary expenses and pecuniary legacies, and, after making such payment and provision, they set apart £1,500 out

C of the assets of the testator to answer the legacy of that amount mentioned in the will. They invested the sum of £1,250, part thereof, upon mortgage in pursuance of the powers and directions in that behalf contained in the will, and kept in their hands the balance, £250, being unable to find any suitable investment for the same. On Sept. 16, 1882, the mortgage was paid off. The trustees received the sum of £201 13s. 4d in respect of interest accrued due under the mortgage up to the date

D when the same was paid off. There remained in their hands the sums of £1,500 and £201 13s. 4d., making together £1,701 13s. 4d., which they paid into court under the provisions of the Trustee Relief Act.

The testator's grandson, Charles J. Anderson, was living and was of the age of about nineteen years. The testator's sister, Eliza Ann Morison, as residuary legatee, claimed to be entitled to the whole income of the sum of £1,500 during

E the life of Charles J. Anderson, but the six younger children of Frederic S. Hull contended that, upon attaining the age of twenty-one years, or marrying, they took vested interests in the fund, or that, at any rate, the income thereof should be accumulated during the period of twenty-one years from the testator's death (if Charles J. Anderson should live so long) for their benefit. Nina Hull, Ernest Hull, and Alfred B. Hull had respectively attained the age of twenty-one years, but Winifred Hull, Janet M. Hull, and Reginald L. Hull were still respectively infants and unmarried. The testator's widow, Margaret Judkins, and Charles J. Anderson, as

F next-of-kin of the testator, claimed to be entitled to the income of the fund during the life of Charles J. Anderson.

A petition was presented by Eliza Ann Morison asking that £200 13s. 3d. Consolidated Three per Cent. Annuities, being the proportionate part of the sum of

G £1,693 4s. like annuities in court, and representing the sum of £201 13s. 4d. (the income of the legacy of £1,500 accrued down to the time of payment thereof into court) might be sold, and that out of the money to arise by such sale, and any dividends to accrue on the sum of £1,693 4s. annuities prior to such sale, the costs and legacy duty might be paid; that the residue of the moneys and dividends might be paid to the petitioner; and that the dividends as they accrued during

H the life of Charles J. Anderson upon the residue of the sum of £1,693 4s. annuities, after the sale of part thereof, might also be paid to the petitioner.

Christopher James for the petitioner.

E. S. Ford for the respondents, the children of F. S. Hull.

A. D. Tyssen for the respondents, the testator's widow and grandson.

I **KAY, J.**—In this case the testator by his will gave the bulk of his real and personal estate upon trust to be converted, and, after directing his debts and legacies to be paid, he continued thus: [His LORDSHIP stated the terms of the will and proceeded:] It is clear that the legacy of £1,500 had not vested in the children of F. S. Hull, for only such of them are to share therein as shall be alive at the death of the testator's grandson, who is still living. It is also clear that the testator was in no sense in loco parentis to those children, so as to entitle them to maintenance out of the income on that ground.

The question arises: Who during the lifetime of the grandson is entitled to the income of the £1,500 until the shares vest in the children? If not vested, it is argued that this fund has been severed and set apart from the rest of the testator's estate, and must therefore be treated as carrying interest which will go with the capital. The doctrine on this head is well defined by WIGRAM, V.-C., in *Festing v. Allen* (1), where he says (5 Hare, at pp. 577, 578):

"Now, although a direction to sever a legacy from the bulk of an estate has often been relied upon as an argument favourable to a claim of interest upon a deferred legacy (*Acherley v. Wheeler and Vernon* (4); *Boddy v. Dawes* (5); *Saunders v. Vautier* (6); *Vawdry v. Geddes* (7); *Lister v. Bradley* (8)), it is impossible to hold that the mere necessity of making such a severance in some events only (as in the case of the residue becoming payable before the legacy itself is payable, or other cause unconnected with the legacy itself) can have the effect of giving interest upon a deferred legacy before it becomes payable. There is not one instance in twenty of deferred legacies in which that might not happen."

That is exactly the case before me. This is not a case in which there is any direction to sever the legacy, or any necessity for severance connected with the legacy itself. The reason for severance arises here under the circumstances which the Vice-Chancellor referred to in the words that I have just read. That is a reason unconnected with the legacy itself. I am very clear, therefore, that this legacy of £1,500 cannot be treated as severed nor vested; therefore, it is not a legacy which carries interest.

Then arises another question which is of a very peculiar nature. It is said that the court will apply the income of property, held in trust for infants, for the maintenance of such infants, and the Conveyancing Act, 1881, s. 43, was referred to, sub-s. (1) of which provides that:

"Where any property is held by trustees in trust for an infant, either for life or for any greater interest, and whether absolutely or contingently on his attaining the age of twenty-one years, or on the occurrence of any event before his attaining that age, the trustees may, at their sole discretion, pay to the infant's parent or guardian, if any, or otherwise apply for or towards the infant's maintenance, education, or benefit, the income of that property or any part thereof, whether there is any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance or education, or not."

This is an extension of the power given by Lord Cranworth's Act, 1860 (23 & 24 Vict., c. 145), s. 26, which in *Re George* (9) was held not to include income which would not go to the legatee if and when he became entitled to the corpus. Such income is within this section. I observe that the note to s. 43 of the Conveyancing Act, 1881, in WOLSTENHOLME'S work upon the CONVEYANCING STATUTES (3rd Edn.), p. 95, states, and, as I think, accurately, that

"The short effect of the section appears to be capable of being stated thus: Where the income will go along with the capital, if and when the capital vests, then the income is applicable under the section for the benefit of the infant, otherwise not."

The reason for this being so is clear from the terms of the section itself, for sub-s. (2) provides that

"The trustees shall accumulate all the residue of that income in the way of compound interest, by investing the same and the resulting income thereof from time to time on securities on which they are by the settlement, if any, or by law, authorised to invest trust money, and shall hold those accumulations for the benefit of the person who ultimately becomes entitled to the property from which the same arise; but so that the trustees may at any time, if they think fit, apply those accumulations, or any part thereof, as if the same were income arising in the current year."

- A This provision is no doubt intended to meet any increased expense which may be incurred as the infant becomes older. That is why I said that the reason given in the note in *WOLSTENHOLME*'s work was a good one. Trustees are bound to accumulate the income, because they have power to resort to accumulation to maintain the infant. But the whole section only applies to property to which an infant is entitled absolutely or contingently on attaining the age of twenty-one years, "or
B on the occurrence of an event before his attaining that age," which last words no doubt point, among other events, to the ordinary form of gift to an infant on attaining twenty-one or marrying, which shall first happen. It is otherwise where, as in this case, an infant is unable to predicate of himself that he will be so entitled, for it is evident that any one, or all, of these six children may die before the testator's grandson, and thus never become entitled at all. In such a case neither
C trustees nor the court can apply income for maintenance.

- The only question which remains is, whether the income is payable to the residuary legatee or to the next-of-kin of the testator. On behalf of the next-of-kin it is argued that, as the gift under which the petitioner claims is of "the residue of residuary estate," the income is undisposed of and lapses. Two cases have been cited in support of this view; the one, *Lloyd v. Lloyd* (2), is a case which
D I confess, if I had had to decide it, I should have decided differently, but which at all events does not apply to the case before me, as it dealt with the gift of an aliquot part of residue minus a given sum, and not with a given sum to be deducted out of the entire residue, as in the present case. The other case was *Simmons v. Rudall* (3), where an aliquot part of the residue proved to be undisposed of under the will. Neither does that case apply to the present one. The will disposes of
E the whole property upon trust to pay debts, etc., and then upon trust to pay £1,500 equally between the children mentioned in the will, and the residue is to go to the testator's sister; and why that residuary gift should not include the income of the £1,500 passes my comprehension. I must hold, therefore, that the income is payable to the residuary legatee.

- F *Order as prayed. Costs to come out of the fund.*

Solicitors: *John Wilkinson*, for *Wright, Becket & Co.*, Liverpool; *Gregory, Rowcliffes, Rawle & Johnstone*, for *Stone, Fletcher & Hull*, Liverpool; *Longbourne, Longbourne & Stevens*.

[Reported by *EDWARD A. SCRATCHLEY, Esq., Barrister-at-Law.*]

Re PINK

[COURT OF APPEAL (Baggallay, Lindley and Fry, L.JJ.), May 5, 1883]

[Reported 23 Ch.D. 577; 52 L.J.Ch. 674; 49 L.T. 418; 31 W.R. 728]

Mentally Disordered Person—Maintenance—Insolvent estate—Past and future maintenance—Rights of creditors.

Where a lunatic is insolvent, the court will have regard to his maintenance and comfort in preference to the claim of creditors.

The master in lunacy made a certificate finding that the annual income of the lunatic's property was £163 and that his debts amounted to about £7,000 including £250 for his past maintenance in an asylum and £374 for the past maintenance of his wife and children. On a summons taken out under Ord. 45 of the Lunacy Orders, 1883, on which some of the creditors appeared and claimed payment of their debts,

Held: the expenses of the past maintenance of the lunatic and of his wife and children must be paid in full capital producing £110 per annum must be set aside for the future maintenance of the lunatic and the residue must be divided pro rata among the ordinary creditors who were to have a charge on the reserved capital with liberty to apply on the lunatic's death.

Notes. For the management by the court of the property and affairs of mental patients, see now the Mental Health Act, 1959 (39 HALSBURY'S STATUTES (2nd Edn.), Part 8, p. 1048), and the Court of Protection Rules, 1960 (S.I. (1960), No. 1146).

Explained: *Horne v. Pountain* (1889), 23 Q.B.D. 264. Referred to: *Re Plen-leith*, [1893] 3 Ch. 332; *Re Farnham* (1896), 65 L.J.Ch. 456.

As to general functions of the judge with respect to property and affairs of a mentally disordered person, see 29 HALSBURY'S LAWS (3rd Edn.) 573 et seq.; and for cases see 33 DIGEST (Repl.) 649 et seq.

Case referred to in argument:

Ex parte Dikes (1802), 8 Ves. 79; 32 E.R. 282, L.C.; 33 Digest (Repl.) 657, 1019.

Summons for administration of property of mentally disordered person.

In December, 1878, Charles Pink became insane, and from Dec. 24 to April 8, 1881, he resided at a private asylum called Fisherton House, near Salisbury. On Mar. 5, 1880, he was found lunatic by inquisition, and on July 9, 1880, his son, C. R. Pink, was appointed committee of his estate. On Mar. 15, 1883, the master made his certificate as to the fortune, maintenance and debts of the lunatic. He found that his fortune consisted of real and personal estate, the annual income of which amounted to about £163; that his debts amounted to about £7,000, including £250 due to the proprietors of Fisherton House Asylum, and £374 for advances made by C. R. Pink for the maintenance of the lunatic's wife and younger children down to December, 1882, a part of it having been advanced by him before and a part after he had been appointed committee of the lunatic's estate. The master proposed that the two sums of £250 and £374 due for the past maintenance of the lunatic should be paid in full, and that a sufficient sum to produce £2 2s. a week should be invested in four per cent. Indian Stock, which should be applied for the future maintenance of the lunatic, and that the residue of his fortune should be applied in payment of his creditors pro rata, without prejudice to their ultimate rights in the fund proposed to be set aside. Some of the creditors attended before the master, and disapproved of the proposal. The matter came before LINDLEY, L.J., in chambers, who directed the committee to take out a summons under Ord. 45 of the Lunacy Orders, 1883, in the terms of the proposal, and directed that the creditors should have notice of the application, and that the summons should be

A adjourned into court. The summons was not served on the creditors, but a circular letter was sent to all of them, informing them of the application, and two of the principal creditors, to whom the lunatic owed together more than £5,000, appeared.

The Lunacy Orders, 1888, Ord. 34, provided :

B "Immediately after inquisition found, the party having the conduct of the proceedings shall take out a summons before the masters to inquire into the matters following: (1) The lunatic's situation; (2) the nature of his lunacy; (3) who are his next-of-kin and heir-at-law; (4) who ought to be appointed committee of his person and of his estate; (5) of what his fortune consists and the particulars thereof; (6) the amount of his income; (7) in what manner, at what expense, by whom, and where, he has been maintained; what should be allowed for his past maintenance; what, if anything, is due, and to whom, in respect thereof, and to whom and out of what fund the same ought to be paid; (8) what should be allowed for future maintenance, when the allowance ought to commence, and out of what fund it should be paid."

C By Ord. 36 :

D "The masters may also, when it shall seem to them expedient, inquire what debts (if any) not open to dispute are due from the lunatic, and to whom, and whether the same or any of them ought to be paid, and out of what funds or property, and they may entertain proposals for the settlement thereof, and for the compromise of any disputed debt, claim, or demand, against the lunatic or his estate."

E *S. Dickinson*, for the committee, supported the proposal in the certificate. *Barber, Q.C.*, and *Russell Roberts* for one of the creditors. *Vaughan Hawkins* for another creditor.

F **LINDLEY, L.J.**—This case was adjourned into court by my direction, and I may state at once why I did it, because certainly I have invited the controversy which there has been on this occasion, but which I did not at all anticipate. I never intended, when I suggested that notice of this summons should be given to the creditors, to lay myself or the court open to the argument that the creditors had a right, or something equivalent to a right, to be paid in full, which would result in the lunatic being placed in a pauper lunatic asylum. I never dreamt of raising such a controversy as that. However, as the controversy has been raised, I wish, most emphatically, to protest against it.

G It appears to me that the practice of the court for the last 150 years has been to protect the lunatic and to do what is most for the benefit of the lunatic—of course having regard to the interest of the creditors as far as possible. That is the duty imposed on us by the statute, and that has been settled by the long-established practice of the court. The reason I adjourned this matter into court was that H there was a proposition to pay two creditors in full, and to pay a dividend to others. It appeared to me that that was a proposition which deserved consideration, and for that reason I directed the creditors to be served with notice in order that I might hear what they had to say upon the point.

I The matter stands in this way: The two creditors who now appear are creditors to a very large amount. If we were to pay them in full, the result would be that there would be next to nothing left for the lunatic, and he would have to go to a pauper lunatic asylum. It has been urged on behalf of the creditors that that is what we ought to do on the ground alleged that a pauper lunatic asylum is now a much more comfortable place than it was some time ago. I protest against that suggestion. That is not my view of what would be for the benefit of the lunatic, nor is it the duty of the court to do it. The two sums which it is proposed in the summons to pay are these: there is first of all a debt of £250, which is due to the keepers of an asylum where this lunatic was placed for some time, the payment of

which is not opposed; and there is a sum of £374, which the committee, who is a son of the lunatic, has expended in the maintenance of the lunatic's wife and family between the dates that have been mentioned both prior and subsequent to the lunacy. In dealing with that, we must have regard to what is the ordinary practice, and that is stated in Ord. 34 of the Lunacy Orders, 1883. [His LORDSHIP read the order, and continued:] The expression there used is "past maintenance," and for the purpose of making that inquiry it has always been construed as the maintenance of the lunatic's wife and children. That is a matter of practice. It is not limited to his personal maintenance.

The real question comes to this, whether, supposing the master had certified that this £374 ought to be allowed for the past maintenance of the lunatic in the sense in which the expression is used in the order, it ought to be paid in full or not. We all agree that, the certificate being in that form, we should allow the payment in full. The order to which I have been referring does not even allude to creditors. That subject is dealt with by another order. The point of my observations is that the first thing to ascertain is what is for the benefit of the lunatic, and, when you have provided for that, you see what you can do for the creditors. In our opinion, the sum ought to be paid, and, therefore, we propose to allow it in full.

As regards the allowance for the lunatic of two guineas per week, that is obviously right. He has been maintained at an expense of £1 per week, in an asylum at St. Andrews, Northampton, but that was a temporary arrangement and cannot go on. He cannot be supported properly on that scale. Therefore, it appears to us that we should make our order in the terms of the summons. Of course the creditors will have their costs, because they have been invited by me to come here in order to relieve the court from the difficulty of dealing with preferential payments, and that difficulty has been got over. The order will be according to the summons, with liberty to the creditors to apply for payment when the time comes for them to do so.

BAGGALLAY, L.J.—I am of the same opinion, and have but very few words to add. The practice of this court in lunacy has been uniform for a period, certainly as long as I can recollect, as well when practising as counsel as when sitting as judge, and proper provisions for payment of past and future maintenance have always been the first matters to be considered and inquired into. Order 34 of the Lunacy Orders, 1883, is really to the same effect as what was provided and acted on before. [His LORDSHIP read the order, and proceeded:] Then there is a provision in Ord. 36 that, after the master has inquired what sums have been expended, he shall take an account of the debts. I think that further order was very properly added, for this reason, that, though provision in the first instance must be made for the maintenance of the lunatic, the amount must depend on the amount of the property, of course taking into consideration the amount of debts which he owes; but the fact that the amount of debts which he owes may be sufficient to exhaust the whole of the estate will afford no ground whatever for applying the whole of the estate for or towards payment of the lunatic's debts, and so sending him to a pauper lunatic asylum. I do not think that it has been seriously pressed on us by counsel for the creditors that we should take that course. To do so would be utterly contrary to all I have known of the practice of the court.

I will only add this: that I think the present case illustrates the policy of the practice of not allowing creditors to appear on applications of this kind except under special circumstances; but, having regard to what has taken place in the master's office, I am of opinion that the judge exercised a very wise discretion in allowing creditors to be served with notice of this summons. I think, however, that the arguments should have been limited to the question whether the two particular creditors should be paid in full, or *pari passu* with the other creditors. A number of topics have been gone into which are entirely beside the question which we have to decide.

A **FRY, L.J.**—I concur.

BAGGALLAY, L.J.—I think that it would be fair to the creditors to declare that the creditors have a charge on the corpus of the fund for the balance of their debts.

Order accordingly.

B Solicitors: *Lambert, Petch & Shakespear; Harries, Wilkinson & Raikes; Reep, Lane & Co.*

[*Reported by W. C. Biss, Esq., Barrister-at-Law.*]

C

Re COWBURN. Ex Parte FIRTH

D [COURT OF APPEAL (Sir George Jessel, M.R., Brett and Holker, L.JJ.), January 19, 1882]

[*Reported 19 Ch.D. 419; 51 L.J.Ch. 473; 46 L.T. 120; 30 W.R. 529*]

Bill of Sale—Consideration—Part of advance retained by lender—Payment of existing debts—Expenses of transaction.

E If a part of the money agreed to be advanced on the security of a bill of sale is retained by the lender, or handed over to other persons who are creditors of the borrower, in order to pay existing debts of the borrower, such money retained or handed over may properly be included in the consideration stated in the bill of sale, but money retained out of the sum agreed to be advanced on the security of the bill of sale to pay what will not be debts till after the transaction has been completed, as, for instance, the expenses of the transaction, is not properly included in the consideration.

F *Re Haynes, Ex parte National Mercantile Bank* (1) (1880), 15 Ch.D. 42, and *Re Rogers, Ex parte Challinor* (2) (1880), 16 Ch.D. 260, distinguished and explained.

G *Court of Appeal—Argument—Point not taken in court below.*

If a point can be taken before the tribunal which hears the evidence and evidence can possibly be adduced which will prevent the point succeeding, such point should be taken so as to enable the other party to bring in the evidence. It cannot be taken for the first time in the appeal court.

H **Notes.** The Bills of Sale Act, 1878, s. 8, was in terms repealed by the Bills of Sale Act (1878) Amendment Act, 1882, s. 15, but notwithstanding that, the effect of s. 3 of the Bills of Sale Act (1878) Amendment Act, 1882, is that the repeal applies only to bills of sale to which the latter Act applies, so that s. 8 of the 1878 Act remains in force as regards bills of sale not given as a security for money. The Bills of Sale Act (1878) Amendment Act, 1882, s. 15, was amended by the Statute Law Revision Act, 1898.

I Distinguished: *Re Cann, Ex parte Hunt* (1884), 13 Q.B.D. 36. Considered: *Wales v. Carr*, [1902] 1 Ch. 860. Applied: *Re Foster, Barnato v. Foster*, [1920] 3 K.B. 306. Considered: *London and Provinces Discount Co. v. Jones*, [1914] 1 K.B. 147.

As to consideration for a bill of sale, see 3 HALSBURY'S LAWS (3rd Edn.) 284-287; as to costs of a mortgage, see 27 HALSBURY'S LAWS (3rd Edn.) 208-209; as to the hearing of appeals by the Court of Appeal, see 30 HALSBURY'S LAWS (3rd Edn.) 468-473. For cases see 7 DIGEST (Repl.) 52-55; DIGEST (Practice) 775-782. For

the Bills of Sale Act, 1878, s. 8, and the Bills of Sale Act (1878) Amendment Act, 1882, ss. 3, 15, see 2 HALSBURY'S STATUTES (2nd Edn.) 565, 575 and 582 respectively. A

Cases referred to :

- (1) *Re Haynes, Ex parte National Mercantile Bank* (1880), 15 Ch.D. 42; 49 L.J.Bey. 62; 43 L.T. 36; 44 J.P. 780; 28 W.R. 848, C.A.; 7 Digest (Repl.) 53, 269.
- (2) *Re Rogers, Ex parte Challinor* (1880), 16 Ch.D. 260; 51 L.J.Ch. 476, n.; 44 L.T. 122; 29 W.R. 205, C.A.; 7 Digest (Repl.) 52, 263. B
- (3) *Hamilton v. Chaine* (1881), 7 Q.B.D. 319; 50 L.J.Q.B. 456; 44 L.T. 764; 29 W.R. 676, C.A.; 7 Digest (Repl.) 53, 264.

Also referred to in argument :

- Re Parker, Ex parte Charing Cross Advance and Deposit Bank* (1880), 16 Ch.D. 35; 50 L.J.Ch. 157; 44 L.T. 113; 29 W.R. 204, C.A.; 7 Digest (Repl.) 52, 262. C
- Re Brenner, Ex parte Saffery* (1881), 16 Ch.D. 668; 44 L.T. 324; 29 W.R. 749, C.A.; 7 Digest (Repl.) 120, 705.
- Re Spindler, Ex parte Rolph* (1881), 19 Ch.D. 98; 51 L.J.Ch. 88; 45 L.T. 482; 46 J.P. 181; 30 W.R. 52, C.A.; 7 Digest (Repl.) 49, 251. D

Appeal by Mr. Henry Firth, trustee in the liquidation of S. Cowburn & Co., from a decision of BACON, Chief Judge, reversing a decision of the county court judge at Dewsbury holding that a bill of sale was void.

By a bill of sale, dated June 10, 1881, and made between Sidney Cowburn and Samuel Cowburn, manufacturing chemists, trading as "S. Cowburn & Co." at Gomersal, in the county of York (thereinafter called "the mortgagor"), of the one part, and Joseph Freedman, money-lender (thereinafter called "the mortgagee"), of the other part, reciting that the mortgagee had "agreed to lend to the mortgagor the sum of £40 upon having the repayment thereof, together with the further sum of £20, being the amount of interest and expenses attending the said advance, making altogether the sum of £60," thereinafter referred to as the said advance, and all further moneys which might become payable, as thereinafter mentioned, secured; it was witnessed that, "in consideration of the sum of £40 now lent and paid by the mortgagee to the mortgagor," the mortgagor assigned certain furniture and goods at a messuage, factory, and premises at Rawfolds then in the occupation of the mortgagor, to the mortgagee to secure the £60, which was repayable by monthly instalments. A receipt for £40 at the foot of the deed was signed by the mortgagors. The bill of sale was duly registered. A petition for liquidation in respect of Cowburn & Co. was filed on July 30, 1881, in the Dewsbury County Court, and Mr. Henry Firth was appointed the trustee in the liquidation; he then moved the court that the bill of sale might be declared void on several grounds, the principal of which was that the consideration was not truly stated therein, and that an interim order made by the court, restraining proceedings under the bill of sale, might be made perpetual. E

The motion was heard by the county court judge on Oct. 6, 1881. Affidavits were filed on behalf of the trustee and of the bill of sale holder. Some of the affidavits stated that only £38 10s. had been paid to the debtor, one pound being retained and paid to the solicitor who attested the bill of sale, and ten shillings being paid to a clerk of the mortgagee's solicitor for expenses. The other affidavits stated that the whole £40 had been paid to the debtors in cash immediately after the bill of sale was executed. Richardson, the auctioneer, alleged as follows : F

"In consequence of an execution having been levied upon the goods of the above-named debtors at Rawfolds aforesaid, on July 27 last past I levied the bill of sale, and I advertised the sale of the effects, and I should have sold them had I not been restrained by the order of the court." G

All the deponents except the auctioneer were cross-examined *viva voce* on their affidavits before the county court judge. The only question argued was whether H.

A the consideration was truly stated, and the county court judge found as a fact that only £38 10s. had been paid to Samuel and Sidney Cowburn; held on the authority of *Hamilton v. Chaine* (3) that the bill of sale was void, and made the restraining order perpetual. Freedman appealed to the Chief Judge.

B Freedman's counsel produced no note of the oral evidence taken before the county court judge, and it was shown that the judge had not taken a sufficient note of the evidence, and that no note of it could be produced, except the report of the case in a country newspaper. Freedman's counsel objected to this report being admitted, and the Chief Judge excluded the oral evidence, and heard the case on the affidavit evidence alone. One of the points taken before the Chief Judge was, that the Bills of Sale Act, 1878, did not apply at all, as there was evidence to show that when the petition for liquidation was filed the goods were not in the apparent ownership of the debtors. The Chief Judge found, as a fact, that the full consideration stated in the bill of sale had been paid, and reversed the decision of the county court judge. The trustee appealed.

By the Bills of Sale Act, 1878, s. 8 (so far as material):

D "Every bill of sale to which this Act applies . . . shall set forth the consideration for which such bill of sale was given, otherwise such bill of sale . . . shall be deemed fraudulent and void so far as regards the property in or right to the possession of any chattels comprised in such bill of sale."

Millar, Q.C., and *J. G. Wood* for the trustee.

Winslow, Q.C., and *Finlay Knight* for the bill of sale holder.

E **SIR GEORGE JESSEL, M.R.**—In my opinion, there was a miscarriage in the hearing before the Chief Judge. The county court judge decided the case upon affidavits and the cross-examination of the witnesses who had made the affidavits. The cross-examination was oral, and it appears that no request was made to the county court judge to take a note of the evidence, and he did not take a note. When the case came on before the Chief Judge, there being no note taken by the county court judge, and no sufficient note taken by anybody else, there was no proof before the Chief Judge of what the effect of the cross-examination was, and thereupon the Chief Judge decided the case without knowing what it was, and upon the affidavits only. It appears to me that that was a miscarriage. The trustee was bound, if he appealed, to have presented to the Chief Judge a sufficient note of the cross-examination. When he intended to appeal, he might have got a shorthand note, or his counsel's note, or his solicitor's note, probably verified by affidavit. But if he had not intended to appeal, or by some accident—for accidents will occur—the notes were lost, the judge's notes were lost, and the counsel's notes were lost, then, of course, he could apply by way of indulgence to the Court of Appeal to have the evidence taken over again, and the court might, or might not, accede to that application. But, in my opinion, the court cannot decide the appeal H in the absence of the evidence.

I Before us that defect has been cured by admitting a newspaper report, which appears to be very full. Therefore, we know the evidence. Some of the witnesses appear to have sworn exactly contrary to each other, and the county court judge, who saw the witnesses, says that he believes those who made the statement on which the trustee relies, and does not believe those who made the statement on which the holder of the bill of sale relies. In that state of circumstances it is not the practice of the Court of Appeal to overrule the decision of the judge of the court below. It has been stated over and over again in many reported cases that it requires a very strong case indeed for the Court of Appeal to interfere when there has been conflicting evidence before a tribunal, whether composed of a judge alone or judge and jury, which has seen the witnesses. Therefore, on the present materials, the court must come to the conclusion that the sum of £38 10s. only was paid to the grantor of the bill of sale, and not £40, as stated in the bill of sale.

If that is so, how can it be said that the true consideration was stated? It is

stated that £20 was kept for interest and expenses, so that we have £20 plus £40, and a bill of sale given for £60. Then it is suggested that there was a sum of thirty shillings, which was not paid over, but was retained by Freedman for expenses incident to the transaction itself. If it was so, in my opinion the consideration is not truly stated. There is a great distinction between a sum of money being advanced on terms of paying out of it a debt to a third person, and a portion of that sum being handed back again to the lender, or handed over to other people who are creditors of the borrower, and a sum of money which is not truly a debt until after the transaction itself is completed—that is, the sum of money which consists of the expenses of the transaction. When the mortgage is completed the mortgagor is liable to pay to the mortgagee the expenses incident to the mortgage transaction. The mortgagee is primarily liable to his own solicitors, and others, for these expenses. The mortgagor is only liable to pay over to the mortgagee what the latter has incurred for expenses, but there is no debt until the transaction is completed. Indeed, it has been decided that, if the transaction falls through, the intended mortgagee cannot recover his expenses from the mortgagor, and it is to avoid that difficulty that solicitors have for many years, before engaging in a mortgage transaction, usually taken an undertaking by the borrower's solicitor to pay the expenses. I have known cases where the mortgagee's solicitors have taken an actual contract, in large transactions, from the intending borrower, to pay if the title was not a good one. That being so, though it may be true that the borrower was liable to pay these expenses in the absence of a special contract, he could not be liable until after the deed was executed. Therefore, this sum of thirty shillings could not have been treated in the deed as a part of the costs he was liable to pay.

But in this particular instance, in my opinion, there was no liability at all to pay the sum. A sum of twenty pounds was mentioned in the deed as being charged for interest and expenses generally; that is, for the expenses attending the loan. Therefore, there was no additional liability whatever and consequently there was not even, if I may call it, an inchoate debt in this case.

That would finish what I had to say on this part of the case were it not that our attention had been called to the two decisions of *Re Haynes, Ex parte National Mercantile Bank* (1), and *Re Rogers, Ex parte Challinor* (2). I am quite satisfied to take as the effect of those decisions what was said by JAMES, L.J., in *Ex parte Challinor* (2). He says, after saying what he thought the Act meant (16 Ch.D. at p. 266):

“But when a man borrows money he generally does so for the purpose of paying his debts; at any rate he ought to employ it in paying them, and, if by his direction the money stated as the consideration is applied by the lender in the honest discharge of the borrower's debts, there is no reason for saying that that is not a payment of the money to him. That was the principle of our decision in *Ex parte National Mercantile Bank* (1), and in that case, besides the promissory notes of the borrower, which were taken up, there were deducted some charges for the preparation of the security. It appears to me quite right to deduct the costs of preparing the bill of sale, and the auctioneer's charges for valuing the property, for that is what happens upon every mortgage transaction.”

Then he goes on to say:

“And it does not seem to me that the money was the less paid to the borrower because part of it was with his consent applied in payment of a debt for costs to his solicitor, which was not indeed strictly payable, because a bill of costs had not been delivered, but which was really owing to the solicitor.”

It is plain, therefore, that JAMES, L.J., in dealing with this small sum for costs, thought it was a debt. He treats it as the principle that you can only apply it in the payment of a debt. When he treated this as a debt, the thing that struck me, viz., that it was not a debt until after the transaction was completed, was not

A present to his mind—that point was not brought before the court. All he intended to decide, therefore, was, that a debt, strictly so called, that is, a debt existing at the time, might be deducted. I think that reconciles the case with the other decisions. All I can say is, if it cannot be reconciled, though we are bound by the decision in *Ex parte Challinor* (2) in a similar case, we do not feel inclined to extend that case any further.

B The other point taken was this: The allegation on the part of the holder is that this order can be supported on the ground that the possession had changed before the presentation of the petition for liquidation. It is quite true there is some evidence about that, but the point was not taken in the county court; and the rule is that if a point can be taken before the tribunal which hears the evidence, and evidence can be adduced which by any possibility will prevent the point succeeding,

C you are bound to take the point so as to enable the other party to bring in the evidence. The Bills of Sale Act, 1878, does not allow mere possession to prevail, because it may be a formal possession, and not a real possession. It may be taken for the sake of form only, or it may not be a bona fide possession, or it may not be a continuing possession; and we have to consider what the evidence of possession is on which reliance is placed, and whether it does show conclusively that such a state of things existed that no answer can be given. It appears to me that it falls far short of that. Therefore, the point cannot now be taken with success.

The evidence is that an auctioneer, in consequence of an execution being issued, “levied the bill of sale.” What that means I do not know. It was suggested by counsel for the holder that it meant that he took possession. Perhaps it did; but he could not do it, because, according to the statement in the affidavit, the sheriff

E was in possession under an execution. Therefore, it was impossible he could have taken possession unless he paid out the sheriff. I am told he did, but I cannot listen to that unless supported by evidence. Then the auctioneer does not go on to say that he retained possession until after July 30, when the liquidation petition was filed, nor does he say that he did any ostensible act. All that he proves in evidence is, that there was an advertisement for a sale. That does not prove

F possession. A bill of sale holder may advertise a sale without taking possession. Then it is said that there was an injunction moved for. There was an injunction against the auctioneer and the bill of sale holder against taking possession, but the injunction does not show they were then in possession. You can grant an injunction against a man who has taken possession or who threatens to take possession. He has no right to threaten. Therefore, the evidence is not complete.

G There is not sufficient evidence to show he has had continued possession up to the time of the presentation of the petition for liquidation or an actual bona fide possession sufficient within the meaning of the Bills of Sale Act, 1878. Therefore, it appears to me that the appeal must be allowed with costs.

BRETT, L.J.—I am of the same opinion on all the points which have been raised. As to *Ex parte Challinor* (2) and *Ex parte National Mercantile Bank* (1), I think they can only now be treated as binding authorities in cases which come within the principle enunciated by JAMES, L.J., in the words which have been read by the Master of the Rolls, as the ground of those decisions. That is to say, they are only authorities for saying that, if a part of the money, stated to be the consideration paid at the time for the bill of sale, is retained in order to satisfy debts (then existing) of the borrower, by his direction given at that time, then the money so retained in respect of existing debts by his direction given at that time may properly be stated in the bill of sale as money then paid. Beyond that it seems to me those cases have no binding authority.

I HOLKER, L.J.—I am of the same opinion. The only question before the county court judge seems to have been whether £40 was paid or £38 10s. Besides reading the affidavits filed, which were not conclusive either way, he had the opportunity of seeing the witnesses, noticing their demeanour, and coming to a proper conclusion on the subject; and he came to the conclusion that only £38 10s. was paid.

I do not think counsel for the holder would argue that if £40 is stated as the consideration in the bill of sale and only £38 10s. is paid, and there is no explanation, that the consideration would be truly stated within the language of the Act. Unfortunately, it appears that the learned Chief Judge has reversed the decision of the learned county court judge without being made acquainted with the viva voce evidence upon which that decision was come to. That viva voce evidence does not appear to have been in any way before him, and he seems, as far as I understand his judgment, to have come to the conclusion that the £40 was paid mainly because the borrowers had signed a receipt at the foot of the bill of sale for that sum of money. No doubt it is a very important fact against the borrowers that they signed a receipt for £40, but that is easily explained if you take an account of the matter. They say they were told they were only paid £38 10s., because £1 was deducted in order to pay over to the solicitor who attested the execution of the bill of sale, and who thoroughly explained it, as he says, and 10s. to somebody else. If they were under a liability to pay £1 to the solicitor and 10s. to somebody else, they would in effect have been paid £40, and that explains why they signed the receipt for it.

However, I must say that, if the evidence which has been read from the newspaper report had been before me on this question, I should have come to the same conclusion as the learned county court judge did come to upon the matter. Counsel for the holder argues in this way: "Take the account of the debtors themselves. They say that £1 was deducted in order to pay the solicitor, and 10s. to pay to somebody else, and that was a perfectly fair and proper deduction. Therefore, the true consideration was stated in the bill of sale." But, unfortunately there is nothing to show us that the £1 was deducted for any such purpose or applied to any such purpose, or that the 10s. was ever deducted for the purpose mentioned or applied for such purpose. On the other points, I agree with what has been said in the judgments of other members of the court.

Appeal allowed.

Solicitors: *W. & J. Flower & Nussey*, for *Carr & Cadman*, Gomersal; *Hamlin & Grammer*, for *B. C. Pullan*, Leeds.

[*Reported by FRANK EVANS, Esq., Barrister-at-Law.*]

A
Re MARSDEN. BOWDEN v. LAYLAND. GIBBS v. LAYLAND

[CHANCERY DIVISION (Kay, J.), May 22, 23, 1884]

[Reported 26 Ch.D. 783; 54 L.J.Ch. 640; 51 L.T. 417;
33 W.R. 28]

B
Executor—Liability—Payment to beneficiary when debts still unsatisfied.

Limitation of Action—Executor—Claim against executor—Payment to beneficiary when debts still unsatisfied.

C
An executor of a deceased mortgagor distributed the assets of the estate among the legatees without providing for the mortgage debt, which he (the executor) had previously acknowledged. In an action brought by the mortgagees against the executor more than six years after distribution of the estate,

Held: (i) an executor was personally liable in equity for all breaches of the ordinary trusts which, in courts of equity, were considered to arise from his office, and where an executor had acknowledged a debt, it was a breach of trust to pay the assets to the legatees leaving a debt unpaid; (ii) the Statute of Limitations did not apply to such a claim.

D
Re Gale, Blake v. Gale (1) (1883), 22 Ch.D. 820, not followed.

Notes. As a result of the Limitation Act, 1939, s. 2 (2), (7), it is thought that a period of six years would now be applied in the case of a claim by a creditor for an account against a personal representative who has improperly parted with assets: see 16 HALSBURY'S LAWS (3rd Edn.) 495 note (h).

E
Considered: *Re Hyatt, Bowles v. Hyatt* (1888), 38 Ch.D. 609; *Lacons v. Warmoll*, [1907] 2 K.B. 350. Referred to: *Re Blow, St. Bartholomew's Hospital v. Camden*, [1914] 1 Ch. 233.

As to the effect of acceptance of executorship, see 16 HALSBURY'S LAWS (3rd Edn.) 130–131; as to liability of an executor on a devastavit, see *ibid.* 474–475; as to limitation of actions by creditors against executors, see *ibid.* 494–495; and for cases see 23 DIGEST (Repl.) 298–299; 24 DIGEST (Repl.) 722–723, and 32 DIGEST (Repl.) 472–473. For the Limitation Act, 1939, s. 2, see 13 HALSBURY'S STATUTES (2nd Edn.) 1160–1161.

Cases referred to:

(1) *Re Gale, Blake v. Gale* (1883), 22 Ch.D. 820; 53 L.J.Ch. 694; 48 L.T. 101; 31 W.R. 538; 24 Digest (Repl.) 720, 7073.

G
(2) *Thorne v. Kerr* (1855), 2 K. & J. 54; 25 L.J.Ch. 57; 26 L.T.O.S. 233; 2 Jur.N.S. 322; 4 W.R. 131; 69 E.R. 691; 24 Digest (Repl.) 720, 7072.

(3) *Fordham v. Wallis* (1853), 10 Hare, 217; 22 L.J.Ch. 548; 21 L.T.O.S. 190; 17 Jur. 228; 1 W.R. 118; 68 E.R. 905; 23 Digest (Repl.) 363, 4313.

Also referred to in argument:

H
Re Baker, Collins v. Rhodes, Re Seaman, Rhodes v. Wish (1881), 20 Ch.D. 230; 51 L.J.Ch. 315; 45 L.T. 658; 30 W.R. 858, C.A.; 24 Digest (Repl.) 712, 6993.

Charlton v. Low (1734), 3 P.Wms. 328; 2 Eq. Cas. Abr. 463; 24 E.R. 1087, L.C.; 23 Digest (Repl.) 352, 4205.

I
Obee v. Bishop (1859), 1 De G.F. & J. 137; 29 L.J.Ch. 148; 1 L.T. 151; 6 Jur.N.S. 132; 8 W.R. 102; 45 E.R. 311, L.J.J.; 24 Digest (Repl.) 685, 6699.

Brittlebank v. Goodwin (1868), L.R. 5 Eq. 545; 37 L.J.Ch. 377; 16 W.R. 696; 24 Digest (Repl.) 685, 6701.

Woodhouse v. Woodhouse (1869), L.R. 8 Eq. 514; 38 L.J.Ch. 481; 20 L.T. 209; 17 W.R. 583; 32 Digest (Repl.) 578, 1675.

Busby v. Seymour (1844), 1 Jo. & Lat. 527.

Cleverly v. Brett (1772), 5 Term Rep. 8, n.; 101 E.R. 5; 24 Digest (Repl.) 757, 7446.

Hindsley v. Russell (1810), 12 East, 232; 104 E.R. 90; 24 Digest (Repl.) 808, A
7994.

Objections to an account under an administration order in respect of the estate of Charles Marsden to ascertain whether the executors or either of them had committed any *devastavit* in distributing the estate to beneficiaries while certain secured debts were unsatisfied.

By an indenture, dated Sept. 20, 1872, Charles Marsden mortgaged certain leasehold hereditaments in the Kingsland Road, Shoreditch, to John Mordaunt, George Louis Monck Gibbs, and William Cobham Gibbs, as security for the sum of £1,721 17s. 7d., with the usual covenant by the mortgagor for payment of the principal money and interest, as therein mentioned. By an indenture, dated Sept. 24, 1872, Charles Marsden mortgaged the leasehold hereditaments comprised in the before-mentioned indenture, and also certain other leasehold hereditaments in John Street, Kingsland Road, to George Henry Gibbs, as security for the sum of £528 2s. 5d., with the usual covenant by the mortgagor for payment of the principal money and interest as therein mentioned. Charles Marsden made his will, dated Oct. 31, 1871, and thereby gave the interest of all his property, real and personal, to his wife Harriet Elizabeth Marsden, as long as she remained his widow, the interest to be paid to her half yearly; at her marriage or death, he gave half of his property, real and personal, to his youngest daughter Jane Fort, the remaining half to be divided between his other children share and share alike. He appointed Thomas Layland and William Fort executors of his will.

The testator died on April 17, 1873, and his will was, on May 22, 1883, duly proved by both the executors. William Fort died intestate in September, 1881, in wholly insolvent circumstances. The testator's property, at the time of his death, consisted of cash at his bankers, debts owing to him, stock-in-trade and fixtures in his business as a paper stainer, and the leasehold premises which he had mortgaged. Apart from the mortgaged properties, the testator's estate was only of the value of about £700. Although, under the terms of the testator's will, it was the duty of the executors to have converted his property, they did not do so; but they continued the testator's business, and managed the mortgaged properties, at the same time making his widow an allowance. They stated that they acted in the belief that they were carrying out the terms of the testator's will, and that they informed the mortgagees' solicitors of their intentions, and made them acquainted with the contents of the will. No step was taken by the mortgagees' solicitors, beyond collecting the interest as it accrued due, until July, 1882, when they were informed by Thomas Layland, the surviving executor, that he was unable to continue payment of the interest to them. The immediate result of this communication was that endeavours were made to effect a settlement upon the basis of Thomas Layland paying over to the mortgagees the balance of cash then in his hands, and purchasing in a third person's name the mortgaged properties for a sum sufficient to indemnify the mortgagees from loss. These endeavours were frustrated by the administration summons in the action of *Bowden v. Layland*, on behalf of Mrs. Bowden, claiming as a legatee, being served whilst the negotiations were pending.

The mortgagees then commenced an action against Thomas Layland, claiming by their statement of claim, delivered in November, 1882, administration of the testator's personal estate; that the defendant might be declared answerable for the *devastavit* which they alleged he had committed, and for all moneys forming part of the testator's estate received by him and not applied in payment of the testator's debts, etc.; and that their mortgage securities might be realised, and the proceeds applied in or towards payment of their debts. To this claim Thomas Layland by his statement of defence, delivered in December, 1882, raised three defences: First, that the mortgagees had elected to rely upon their securities, and had in fact waived all claim on the testator's general assets, and tacitly at least sanctioned

A their distribution amongst the beneficiaries under the will and were not, therefore, entitled to be considered as creditors as against those assets; secondly, that the payments constituting the alleged devastavit (if any), or the greater part of them, were made more than six years before the commencement of the action, and that the claim as to them was, therefore, barred by the Statute of Limitations; and thirdly, that the mortgagees were not entitled to call for an account of rents
B which they had allowed the mortgagor, or those representing the mortgagor, to receive. The action was set down for trial, and appeared likely shortly to come on for hearing, when Mrs. Bowden having, on April 10, 1883, at length obtained an ordinary legatee's administration order, the mortgagees, with a view as they alleged, to saving expense of useless accounts and inquiries under that order, applied to have the two causes consolidated and their conduct given to them, and
C that declarations, accounts, and inquiries, which would in effect have given them all they asked in their own action, should be added to the administration order.

By the order made upon this application, on June 20, 1883, KAY, J., stayed all further proceedings in the mortgagees action and gave them liberty to attend the proceedings in Mrs. Bowden's action, at their own expense, and his Lordship added to the administration order of April 10, 1883, an inquiry whether the executors,
D or either of them, had committed any and what devastavit of any and what part of the testator's estate, and under what circumstances, and whether Thomas Layland and his late co-executor's estate were under any liability in respect thereof. Against this order the mortgagees appealed, and the Court of Appeal, endeavouring to dispose of the matter summarily, made an order of Nov. 6, 1883, virtually transferring Mrs. Bowden's order from a legatee's into a creditor's administration
E order, and preserving Thomas Layland's defences in the mortgagees' action merely by the direction that, in taking the account of the testator's personal estate, no payment made by the executors, or either of them, with the consent or acquiescence of the mortgagees, was to be disallowed as between the mortgagees and the executors. Pending this appeal, Thomas Layland's account had been carried into chambers in Mrs. Bowden's action, and after the order of the Court of Appeal had been made the mortgagees
F took three objections to this account before it was vouched. They objected to the payments to the testator's widow as tenant for life; to the payments to William Fort, Thomas Layland's late co-executor; and to the items in respect of the carrying on of the testator's business being allowed. The chief clerk required evidence of the mortgagees' consent or acquiescence in these three classes of items to be brought in, and he decided that, on the general evidence, the mortgagees must be taken to have
G known of the carrying on of the testator's business and of the payments to his widow, but not that these payments were in excess of income; and further, that they were precluded from questioning any payment made more than six years before the commencement of their action. The view taken by the chief clerk being so far adverse to the mortgagees, the matter was adjourned into court at their instance.

H *W. Pearson, Q.C., and Edwin Ward for the executors.*
Graham Hastings, Q.C., and Hadley for the mortgagees.

KAY, J.—In this case a testator mortgaged a certain part of his property, and the mortgage deed contained the usual covenant for payment of the mortgage debt. He died, and appointed executors, and the executors possessed his estate,
I and they paid, for a long time, the interest due upon the mortgage, clearly recognising, therefore, the debt. They paid it as executors. They had also possession of the property which was the subject of the mortgage, and which was leasehold property. A judgment has been obtained in an administration action by the mortgagees against those executors, and the accounts are brought into chambers. The executors charge themselves with the receipt of assets—and in the discharge they attempt to introduce the payments made more than six years ago, but, of course, since the death of the testator, by them to some of the legatees. The ordinary rule of course is to disallow such payments. They are not a proper

discharge as between the executors and creditors. But it is said those payments were made more than six years ago, and therefore all remedies in respect of them are now barred by the lapse of time. The argument is founded on what takes place at law. It is said, at law, a creditor by covenant gets the judgment against the executors *de bonis testatoris*, and if that judgment be executed by *fi. fa.*, and the sheriff finds the executor had once assets, but has parted with them, he may return a *devastavit*. Then it is said the remedy at law would only be against the executor by a personal action for *devastavit*, which personal action would be barred by the statute after six years.

All that is very familiar law, but the attempt is now to apply this in equity; and to test the argument I asked the counsel how far it would go, and I suggested this: "Can you say here, that if the executors, in circumstances like these, having recognised the mortgagee and paid him interest for many years, are bringing their accounts into chambers, that they can claim a discharge of money which they had put in their own pockets more than six years ago?" Counsel very frankly answered that his argument must go as far as that. That is rather startling, certainly. I never yet heard that executors, by way of discharge in equity, as against a creditor whose debt they have acknowledged, as they have been paying interest upon it for many years, could set up their own wrong by way of *devastavit*, and say, "We admit a *devastavit*, knowing of your debt, because we have been paying interest all the while, but seeing that we did it more than six years ago we can set up a defence by way of *devastavit*." It is a novel doctrine to me, but I have listened attentively to it, as I was told there were cases which laid that down, namely, *Thorne v. Kerr* (2), and a recent case of *Re Gale, Blake v. Gale* (1), which were supposed to support that doctrine. I entirely dissent from any doctrine of the kind.

It seems to me as plain as can be that, where an administrator or executor accepts that office, he accepts the duties of the office, and he becomes, in the language of WILLIAMS ON EXECUTORS (8th Edn.), p. 1803, a trustee in this sense:

"An executor is personally liable in equity for all breaches of the ordinary trusts which, in courts of equity, are considered to arise from his office."

What is the ordinary trust when an executor acknowledges a debt and pays interest upon it? Is it not to preserve the assets for payment of that creditor so far as there are assets, and to take care not to dispose of the assets, either by putting them into his own pocket, or by paying them away to the legatees, or by otherwise committing a *devastavit*? Most certainly it is; and in equity the executor is bound, by a most direct trust, to apply them in the due course of the administration of the estate for the creditor he has acknowledged. That is exactly the language used by TURNER, V.-C., in *Fordham v. Wallis* (3). He says (10 Hare, at p. 226):

"We come then to the case of the residuary legatees; and as to these parties also I am of opinion that, so far as their interests in the residue are concerned, the [Statute of Limitations] furnishes no bar. The payment over to them by the executors, while the debts were unpaid, was an absolute and unqualified breach of trust."

Breach of trust as regards whom? Of course, a breach of trust as regards the creditors for whom they were trustees. Having accepted their office, and the creditors being bona fide creditors, the trustees were bound to apply the assets to the payment of their debts before they handed over anything to the residuary legatees. The breach of trust was the breach of the trust which they accepted for these creditors, and that language shows that the residuary legatees cannot set up the statute, because, having received assets from the executors while the debts were unpaid, they of course had concurred in the breach of trust by which those assets were handed over.

Therefore, I must hold that there should have been a disallowance in this case of those items of discharge, while the debt was unpaid, and there will be a direction

A to the chief clerk to disallow such items. All payments in respect of the business must be disallowed, but the executors should be credited with all receipts. The receipts might not all go out of the accounts, because whatever was correct would come in. I will deal with the thing before me. I do not make any general directions. These payments must be disallowed.

B With regard to the question of acquiescence, in my opinion the onus of proving acquiescence is, by the ordinary rule, on the person alleging it, and in order to prove acquiescence he must show a standing by with full knowledge of what was being done, and an acquiescence in the devastavit. Nothing at all of that kind has been proved, and the only evidence given of that sort has been an attempt to make out, not knowledge, but constructive notice. Because the solicitor to the mortgagees was in communication with the executors it is said he had such notice.

C But, on the other hand, the solicitor absolutely denies it. Even if it were true that the mortgagees' solicitor happened to be dealing with the executors, and had a notice of that kind, I could not treat that as constructive notice for the purpose of fixing the mortgagees, in a case like this, with acquiescence in the devastavit. I think the case is utterly void of proof, and, therefore, there can be no discharge in respect of those payments on that ground. The costs will be D costs in the action.

Solicitors: *J. W. T. Miles; E. Brodribb Randall.*

[*Reported by E. A. SCRATCHLEY, ESQ., Barrister-at-Law.*]

E

F

Re REYNOLDS. Ex Parte REYNOLDS

[COURT OF APPEAL (Sir George Jessel, M.R., Cotton and Lindley, L.JJ.), March 16, 1882]

[Reported 20 Ch.D. 294; 51 L.J.Ch. 756; 46 L.T. 508; 46 J.P. 533;
G 30 W.R. 651; 15 Cox, C.C. 108]

Evidence—Criminating questions—Privilege—Need for witness to show reasonable apprehension of danger—Duty of court.

H The assertion by a witness that a proposed question might tend to criminate him is not sufficient to justify his refusal to answer that question and to entitle him to the privilege of silence. The court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. Once it is apparent that a witness is in danger great latitude should be allowed him in judging for himself the effect of any particular question.

R. v. Boyes (1) (1861), 1 B. & S. 311, approved.

I

Notes. Followed: *Re Genese, Ex parte Gilbert* (1886), 3 Morr. 233. Referred to: *National Association of Operative Plasterers v. Smithies*, [1906] A.C. 434; *Triplex Safety Glass Co. v. Lancegaye Safety Glass* (1934), Ltd., [1939] 2 All E.R. 613.

As to scope of examination in bankruptcy proceedings, see 2 HALSBURY'S LAWS (3rd Edn.) 407, 408; and for cases see 5 DIGEST (Repl.) 667, 668. As to criminating questions, see 8 HALSBURY'S LAWS (3rd Edn.) 6; *ibid.*, vol. 12, pp. 50–53; *ibid.*, vol. 15, p. 422; and for cases see 22 DIGEST (Repl.) 391 et seq.

Cases referred to :

- (1) *R. v. Boyes* (1861), 1 B. & S. 311; 30 L.J.Q.B. 301; 5 L.T. 147; 25 J.P. 789; 7 Jur.N.S. 1158; 9 W.R. 690; 9 Cox, C.C. 32; 121 E.R. 730; 22 Digest (Repl.) 391, 4191.
- (2) *Osborn v. London Dock Co.* (1855), 10 Exch. 698; 3 C.L.R. 313; 24 L.J.Ex. 140; 24 L.T.O.S. 262; 1 Jur.N.S. 93; 3 W.R. 238; 156 E.R. 620; 18 Digest (Repl.) 225, 1927.
- (3) *Sidebottom v. Adkins* (1857), 29 L.T.O.S. 310; 3 Jur.N.S. 631; 5 W.R. 743; 18 Digest (Repl.) 225, 1916.
- (4) *Re Firth, Ex parte Schofield* (1877), 6 Ch.D. 230; 46 L.J.Bey. 112; 37 L.T. 281; 26 W.R. 9, C.A.; 5 Digest (Repl.) 658, 5779.
- (5) *Adams v. Lloyd* (1858), 3 H. & N. 351; 27 L.J.Ex. 499; 31 L.T.O.S. 219; 4 Jur.N.S. 590; 6 W.R. 752; 157 E.R. 506; 18 Digest (Repl.) 202, 1743.

Also referred to in argument :

- R. v. Delaval* (1763), 3 Burr. 1434; 1 Wm. Bl. 439; 97 E.R. 913; 14 Digest (Repl.) 129, 918.
- R. v. Garbett* (1847), 2 Car. & Kir. 474; 1 Den. 236; 9 L.T.O.S. 51; 13 J.P. 602; 2 Cox, C.C. 448, Ex. Ch.; 14 Digest (Repl.) 465, 4494.
- Fisher v. Ronalds* (1852), 12 C.B. 762; 22 L.J.C.P. 62; 20 L.T.O.S. 100; 17 Jur. 393; 1 W.R. 54; 138 E.R. 1104; 22 Digest (Repl.) 391, 4187.
- Short v. Mercier* (1851), 3 Mac. & G. 205; 20 L.J.Ch. 289; 16 L.T.O.S. 453; 18 L.T.O.S. 266; 15 Jur. 93; 42 E.R. 239, L.C.; 18 Digest (Repl.) 158, 1405.
- Ex parte Fernandez* (1861), 10 C.B.N.S. 3; 30 L.J.C.P. 321; 4 L.T. 324; 7 Jur.N.S. 571; 9 W.R. 332; 142 E.R. 349; 22 Digest (Repl.) 391, 4188.

Appeal from an order of BACON, Chief Judge, that G. K. M. Reynolds, a witness in bankruptcy proceedings, should answer questions put to him by counsel for the trustee in bankruptcy, which questions he had refused to answer on the ground that his answers might tend to criminate him.

Ledru Rollin Reynolds, brother of the witness, was adjudicated a bankrupt on a petition filed in the London Bankruptcy Court on Sept. 23, 1881. On Dec. 4, 1880, he had executed a post-nuptial settlement in favour of his wife and others, of which settlement his brother, George Kossuth Mazzini Reynolds, was one of the trustees. On June 24, 1881, G. K. M. Reynolds was examined on oath before Mr. Registrar Hazlitt, by counsel for the trustee in the bankruptcy, touching his knowledge of the bankrupt's property, and particularly with regard to the circumstances under which the settlement had been executed, and the property comprised in it. Various questions were put to the witness, the greater number of which the witness, by the advice of his counsel, declined to answer on the ground that his answers might tend to criminate him. It was obvious that answers to some of the questions could not possibly have such a tendency.

The registrar expressed an opinion that some of the questions were legal and proper questions; but, as the witness persisted in his refusal, a formal order was made by the registrar, which, after stating that the questions referred to in the transcript of the shorthand notes of the examination had been put, that the witness had refused to answer them on the ground that his answers might tend to incriminate him, and that it appeared to the registrar that some of the questions were legal and proper questions and that the witness was bound to answer them, referred the further examination to the Chief Judge, with a view of rendering a special application to his Lordship for the committal of the witness for refusing to answer the questions unnecessary, and directed the witness to attend before the Chief Judge on a certain day for such further examination. February 20, 1882, was the day appointed for hearing the reference from the registrar, and on that day the Chief Judge, after reading the transcript and hearing counsel for the trustee and the witness, ordered that the witness

"do answer all lawful questions put to him, and that the examination be referred back to the registrar for that purpose."

A and that the witness should attend the examination at his own expense, and pay the costs of the application. The witness appealed.

*Horton Smith, Q.C., and Montagu Williams (Terrell with them) for the witness.
Arthur Charles, Q.C., and F. C. Willis for the trustee.*

B **SIR GEORGE JESSEL, M.R.**—There are two questions to be decided in this case. One is of general importance; the other question arises on the circumstances of the particular case. The question of general importance is, whether, when a witness objects to answer a question on the ground that the answer to the question put to him may criminate him or may tend to criminate him, the mere statement of the belief of the witness himself will be sufficient, or whether the judge is entitled to decide, not merely accepting the witness's statement that he believes it, whether
C the proposed question has really a tendency to criminate the witness, or might fairly be considered to have that tendency under all the circumstances of the case.

Upon that question there are various dicta, and one express decision. I am quite aware that the express decision, being one of the Court of Queen's Bench, is not technically binding on this court; but at the same time it is a decision of the full court of Queen's Bench, which was composed at that time of very eminent
D judges, and I need not say that I should differ from them with very great hesitation. That was in *R. v. Boyes* (1). It was heard in the year 1861, and this very point, as I read that case, was not merely the subject of dicta, but clearly of decision. COCKBURN, C.J., gave judgment, and BLACKBURN, CROMPTON and HILL, JJ., concurred in that judgment. In the judgment given by COCKBURN, C.J., he says (1 B. & S. at pp. 329, 330):

E "It was also contended that a bare possibility of legal peril was sufficient to entitle a witness to protection; nay, further, that the witness was the sole judge as to whether his evidence would bring him into danger of the law, and that the statement of his belief to that effect, if not manifestly made mala fide, should be received as conclusive. With the latter of these propositions we
F are altogether unable to concur. Upon a review of the authorities, we are clearly of opinion that the view of the law propounded by LORD WENSLEYDALE in *Osborn v. London Dock Co.* (2), and acted upon by STUART, V.-C., in *Sidebottom v. Adkins* (3), is the correct one, and that, to entitle a party called as a witness to the privilege of silence, the court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give,
G that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. We indeed quite agree that, if the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself of the effect of any particular question, there being no doubt, as observed by ALDERSON, B., in *Osborn v. London Dock Co.* (2), that a question which might appear at first sight a very innocent one,
H might, by affording a link in a chain of evidence, become the means of bringing home an offence to the party answering. Subject to this reservation, a judge is, in our opinion, bound to insist on a witness answering, unless he is satisfied that the answer will tend to place the witness in peril."

That decision, it appears to me, states the law correctly, and if it were necessary
I for the Court of Appeal to affirm it, we should be doing well and wisely in saying we did affirm it.

It is unnecessary, after that, to refer to the prior decisions. They are all mere dicta, but I may say that, as regards the subsequent case, in 1877, of *Re Firth, Ex parte Schofield* (4), I am not sure that it is a dictum; I rather think it is a decision. That was the case where JAMES, L.J., said, with regard to an examination under s. 96 of the Bankruptcy Act, 1869 (6 Ch.D. at p. 238):

"Of course when a witness objects on this ground to answer a question the judge will satisfy himself whether the objection is a genuine one."

As regards the prior cases, we not only have the opinion of a very eminent judge, the late LORD WENSLEYDALE, which was given in *Osborn v. London Dock Co.* (2), but we have citations from three standard works, namely, BEST ON EVIDENCE (6th Edn.), p. 176, PHILLIPS ON EVIDENCE (10th Edn.), vol. 3, p. 488, and TAYLOR ON EVIDENCE (7th Edn.), p. 1225; and they all state the rule in the same way as it was in effect ultimately decided. They also state this, which is obvious, that, if you allowed the witness, merely on his own statement of his belief that an answer to the question would tend to criminate him (for that is all; he is only bound to believe that), to refuse to answer the question, it would enable a friendly witness, who wished to assist one of the parties, to escape examination altogether, and to refuse to give his evidence; an evil so great that, when weighed even against the chance of occasionally assisting to convict a guilty man, it would certainly far overbear, as a question of public policy, the danger, if it is to be treated as a danger, of assisting to convict a guilty man occasionally out of his own mouth. Perhaps our law has gone even too far in that direction; and, without at all impugning the policy of the law, there certainly must be a larger policy, which requires a person to answer, where the judge thinks that he is not bona fide objecting with the view of claiming privilege to protect himself, but to prevent other parties getting that testimony which is necessary for the purposes of justice.

Even as regards judges who entertain the contrary opinion, it is quite plain that they make the exception of mala fides. I have only to refer, for that, to the statement of POLLOCK, C.B., in *Adams v. Lloyd* (5), where, having stated the rule in favour of protection on a witness's own oath, he says this (3 H. & N. at p. 362):

"The only exception I know of is this,—where the judge is perfectly certain that the witness is trifling with the authority of the court, and availing himself of the rule of law to keep back the truth, having in reality no ground whatever for claiming the privilege, then the judge is right in insisting on his answering the question."

So that even those judges who hold to the other rule make that exception.

That being so, the second question we have to consider is, whether it does appear to the court in this case that there is any reasonable fear of the questions, when answered, tending to convict the witness of a criminal offence, or tending to criminate him in any way. When the court has to decide that point, it must consider what the nature of the case is, and what the witness has said. When you look at these questions, and what he has refused to answer, the conviction, I think, must force itself upon the mind of anyone that the witness refused to answer because he did not want to give the information, and that he was trifling with the court. The kind of questions which he refused to answer seemed to me to lead to that conclusion. But it is suggested that, though the witness did not say so, and though there was no evidence before the court, there was a real danger of his being indicted together with his brother for what would be, no doubt, a conspiracy if proved, that is, a deliberate combining with his brother to cheat the brother's creditors by withdrawing from them a portion of the brother's property. That, no doubt, would be an indictable offence, but we must see whether there is any indication of anything of the kind. In the first place, all that is alleged against the witness is, that he is the trustee of a voluntary settlement, and that in that capacity certain stocks, etc., were transferred to him. Then he is asked whether he is the trustee, what stock, etc., were transferred to him, and what has become of them. There is nowhere any suggestion in the proceedings in bankruptcy that there was anything like conspiracy between himself and his brother. There is produced a document, not issued by any of the parties in the bankruptcy, but by some creditors of the brother, who have filed a statement of claim, in which the same facts are alleged, but it is there also alleged that the transfer was made to this witness, and as he well knew by the bankrupt, with the view to defraud his creditors. But even that allegation does not make a charge of conspiracy; it is only made to defeat the operation of the settlement as against the creditors, who

A were the plaintiffs in that action. I do not think for a moment that the witness is under any bona fide belief that any such charge of conspiracy will be made, or that he had any idea of such a charge; in fact, I think the notion of an indictment for such a conspiracy could only present itself to the mind of someone who was very familiar indeed with the law of conspiracy.

B The real position of matters appears to me to be, that the witness did not wish to afford any assistance to the creditors in obtaining possession of the property of the bankrupt which had been kept from them. I think that was the real prevailing motive with him, and not any real fear of criminal proceedings. That being so, I think he ought to answer the questions, subject, however, to this observation, that he will be entitled to object to any particular question which obviously has a tendency to criminate him, or which, in the opinion of the presiding judge, would tend to criminate him in regard to any matter, or may be reasonably held to criminate him; that is to say, we do not intend to decide that he must answer every question that he has been asked, but that he must answer the questions subject to his objecting to particular questions, on a reasonable ground that that particular question, or those particular questions, might criminate him, or might tend to criminate him.

D

COTTON, L.J.—I am of the same opinion, and on the same grounds. There is but little for me to add. As I understand, the contention of counsel for the witness was this, that a witness, on being called, may at the very first question which is asked him, at once put down his foot and say, "I refuse to answer that question, because it may tend to criminate me," although there is nothing stated by him, and no facts appear in the case which would render that even possible. In my opinion that would lead to the most monstrous conclusion. I will say no more than that I think the rule is correctly stated in *R. v. Boyes* (1), and that to that decision, and the rule there laid down, I adhere.

E

As regards the other point, whether the witness in this particular case can protect himself effectually, I think we have got the rule laid down by JAMES, L.J., in *Re Firth, Ex parte Schofield* (4); that is to say, that the judge must satisfy himself and decide whether the objection is a genuine one. Looking at the way in which this witness claims his privilege, I am satisfied, as the registrar seems clearly to have been, that it was not a genuine objection on the ground that it would tend to criminate him. To every question that was asked him, even such a question as this, "Have you ever been at Mr. James's office in Fleet Street in your life?" his answer was, "I object to answer that, on the ground that it may tend to criminate me." I cannot think that that was a genuine objection on the ground stated, but that there was some other reason for the witness putting his foot down at once and saying, "You will get nothing out of me." I think, therefore, that the order was right. Of course this will not decide that, if he does refuse to answer any question as to which there is a reasonable probability that the answer would tend to criminate him, he is bound to answer that. The court will consider any such objection taken by him when, and if, it is taken.

H

LINDLEY, L.J.—I am of the same opinion. The order appealed from was made by the Chief Judge in Bankruptcy, and it was, in substance, that this gentleman should submit to an examination at his own expense, and should answer all lawful questions that might be put to him. That order, of course, must be qualified. The reason it was made was, that he declined to answer anything at all.

I

The effect of the examination satisfies me that his objection was not taken bona fide for his own protection at all. He did not, in fact, know of this claim; the claim had not then come to his knowledge. But, apart from that, the tone of his answers satisfies me that he was not considering his own protection, but that he was considering how he could prevent those interested in upsetting this settlement from succeeding in that object. That was what was passing through his mind, and not any danger of a criminal proceeding.

Twenty years ago this question as to how far the oath of a witness was conclusive was settled by the Court of Queen's Bench in *R. v. Boyes* (1), and that decision has never been disturbed since. There were, as to that, differences of opinion before, but to the rule so laid down then, which I have never heard questioned since, we are all disposed to adhere. I have always thought that the rule as laid down there was perfectly well settled, and it is not for us now to disturb it.

As to what is to be done in the future; of course, I do not mean to say there may not be some indictment for conspiracy against this gentleman. I do not know whether there will or will not, and I do not know whether he is open to it or not; possibly he is. I can well understand that some ingenious gentleman like the witness's junior counsel might suggest how an indictment for conspiracy might be framed against him. That is possible enough. If, when further questions are put to him, he declines to answer, and the judge or presiding registrar is of opinion that he is declining to answer bona fide for his own protection, and there is any appreciable danger to him, the witness will be entitled to the benefit of silence; otherwise he will have to answer the questions put to him. This appeal must therefore be dismissed with costs.

Appeal dismissed.

Solicitors: *G. S. & H. Brandon; Bellamy, Strong & Baker.*

[*Reported by FRANK EVANS, Esq., Barrister-at-Law.*]

CLARKE v. BRADLAUGH

[COURT OF APPEAL (Lord Coleridge, C.J., Baggallay and Brett, L.JJ.), November 14, 1881]

[Reported 8 Q.B.D. 63; 51 L.J.Q.B. 1; 46 L.T. 49; 46 J.P. 278; 30 W.R. 53]

Statute—Repeal—New form incorporated in earlier Act by subsequent Act—Repeal of earlier Act—Effect on validity of form—Parliamentary Oaths Act, 1866 (29 & 30 Vict., c. 19), s. 1—Promissory Oaths Act, 1868 (31 & 32 Vict., c. 72), s. 8—Statute Law Revision Act, 1875 (38 & 39 Vict., c. 66), s. 1 and Schedule.

Practice—Writ—Issue—Time of issue—Issue of writ on same day as, but later in time than, accrual of cause of action.

The plaintiff alleged that on July 2, 1880, and before the issue of the writ in the action which was issued on the same day, the defendant sat and voted in the House of Commons after the Speaker had been chosen without having first taken the oath required by s. 1 of the Parliamentary Oaths Act, 1866, as amended by s. 8 of the Promissory Oaths Act, 1868, and the plaintiff claimed a penalty of £500. The defendant entered a demurrer which raised the points of law that the writ was issued before the cause of action arose in that, it being a judicial act, no inquiry could be made as to fractions of a day and it must be taken to have been issued at earliest moment of that day, and, further, that there was no form of oath prescribed to which penalties could attach since s. 1 of the Act of 1866 had been repealed by the Statute Law Revision Act, 1875,

Held: (i) the issue of a writ of summons in an action was not a judicial act, but a personal act of the plaintiff, and the court was enabled to inquire at

- A what hour the writ was issued so as to ascertain whether or not it was issued after the cause of action accrued; (ii) when a particular form was prescribed in an earlier Act and a subsequent Act incorporated a new form to be read into the earlier Act, the subsequent repeal of the words of the earlier Act, did not repeal the form incorporated by the subsequent Act; accordingly the form of oath incorporated in s. 1 of the Act of 1866 by the Act of 1868 was
- B not repealed by the Statute Law Revision Act, 1875.

Notes. Referred to: *Jenkins v. Great Central Rail. Co.*, [1912] 1 K.B. 1; *Re Warren, Wheeler v. Mills*, [1938] 2 All E.R. 331.

- C As to the issue of a writ, see 30 HALSBURY'S LAWS (3rd Edn.) 299, 300; and for cases see DIGEST (Practice) 304 et seq. As to enactments incorporated with other statutes, see 36 HALSBURY'S LAWS (3rd Edn.) 471. As to fractions of a day, see 37 HALSBURY'S LAWS (3rd Edn.) 101, 102. For cases see 42 DIGEST 634 et seq., 766, 961 et seq. For s. 1 of the Parliamentary Oaths Act, 1866, see 17 HALSBURY'S STATUTES (2nd Edn.) 541. For s. 8 of the Promissory Oaths Act, 1868, see 4 HALSBURY'S STATUTES (2nd Edn.) 422. For the Statute Law Revision Act, 1875, see 24 HALSBURY'S STATUTES (2nd Edn.) 195.

D Cases referred to:

- (1) *Pie v. Coke* (1616), Hob. 128; 80 E.R. 277; sub nom. *Pye v. Cooke*, Moore, K.B. 864; 42 Digest 963, 376.
- (2) *Lord Porchester v. Petrie* (1783), 3 Doug.K.B. 261; 99 E.R. 644; 42 Digest 964, 386.
- (3) *Combe v. Pitt* (1763), 3 Burr. 1423; 1 Wm. Bl. 437; 97 E.R. 907; 42 Digest 963, 373.
- (4) *Hutchinson v. Thomas* (1675), 2 Lev. 141.
- (5) *Jackson v. Gisling* (1742), Bull.N.P., 7th Edn., p. 197 b; 2 Stra. 1169; 93 E.R. 1105; 21 Digest (Repl.) 313, 719.
- (6) *Edwards v. R.* (1854), 9 Exch. 628; 2 C.L.R. 590; 23 L.J.Ex. 165; 23 L.T.O.S. 39; 18 Jur. 384; 2 W.R. 333; 156 F.R. 268, Ex. Ch.; 42 Digest 964, 385.

Also referred to in argument:

Wright v. Mills (1859), 4 H. & N. 488; 28 L.J.Ex. 223; 33 L.T.O.S. 152; 5 Jur.N.S. 771; 7 W.R. 498; 42 Digest 964, 390.

Shelley's Case (1581), Moore, K.B. 136; 1 Co. Rep. 93b; 3 Dyer, 373 b; 1 And. 69; Jenk. 249; 72 E.R. 490; 42 Digest 961, 343.

Estwicke v. Cooke (1729), 2 Ld. Raym. 1557; 92 E.R. 509; sub nom. *Eastwick v. Coke*, Fitz-G. 66; 22 Digest (Repl.) 141, 1277.

Walburgh v. Saltonstall, cited in 2 Ld. Raym. at p. 1558.

Storr v. Bowles (1832), 4 B. & Ad. 112.

Westman v. Akt. Ekmans Mekaniska Snickarefabrik (1876), 1 Ex.D. 237; 45 L.J.Q.B. 327; 40 J.P. 712; 24 W.R. 405; 2 Char. Pr. Cas. 217; 13 Digest (Repl.) 354, 1613.

Johnson v. Smith (1760), 2 Burr. 950.

Mostyn v. Fabrigas (1775), 1 Cowp. 161; 98 E.R. 1021, Ex. Ch.; 16 Digest (Repl.) 119, 36.

- I **Appeal** by the defendant in an action by the plaintiff for a penalty from a decision of the Divisional Court (DENMAN and WATKIN WILLIAMS, JJ.), reported 7 Q.B.D. 151, overruling the defendant's demurrer and giving judgment for the plaintiff.

In his statement of claim the plaintiff alleged that the defendant was a member of the House of Commons for the borough of Northampton, and that the defendant, on July 2, 1880, before the issuing of the writ in this action, which was issued on the same day, sat and voted in the House of Commons after the Speaker had been chosen, without having made and subscribed the oath appointed to be taken

by the members of the House of Commons according to the Parliamentary Oaths Act, 1866, s. 1, as altered by the Promissory Oaths Act, 1868, s. 8, and the plaintiff claimed £500 penalty. A

The defendant entered a demurrer on the ground "that it discloses no cause of action in the plaintiff, inasmuch as it alleges that the defendant sat and voted in the House of Commons on the day on which the writ was issued, and on other grounds sufficient in law to sustain the demurrer." The Queen's Bench Division B having given judgment for the plaintiff, the defendant appealed.

The defendant in person.

Sir Hardinge Giffard, Q.C., and *Kydd* for the plaintiff.

LORD COLERIDGE, C.J.—I am of opinion that this demurrer must be overruled, and that the judgment of the court below is correct. The defendant has C contended that, according to a principle of law, for which he cited authorities, it is an absolute and inflexible rule of law that no inquiry can be made as to the fractions of a day; that all writs and judicial acts must be taken to be issued at the earliest moment of the day upon which they are issued; that, although the writ in this case was issued after the act by which the penalties were incurred, the writ must be taken to have been issued at the first moment of the day on which D it was issued; and that, as the act of voting in respect of which the action was brought did not, and could not, take place at the first moment of that day, the demurrer must be allowed. I am of opinion that, regard being had to the decisions and the reasons for them, there has been a distinction observed between the various kinds of writs, a distinction as old as the rule, proved to exist as clearly as the rule, and by the same authorities. I think there is a great deal to be said for E the view that, if it is necessary for purposes of convenience, the court will inquire which of two judicial acts done on the same day was done at the earlier time of the day.

It is to be observed that, in *Pie v. Coke* (1), which, if looked at only in *MOORE*, is an authority for the proposition that, if more than one action be commenced on the same day for the same penalty each may be pleaded in bar to the other, but F when looked at in *LORD HOBART'S REPORTS* there is this important difference, that the court refused to give judgment, and recommended that a plea stating the true facts should be filed. It is not necessary for us to decide that point now, but I cannot assent to the universality of the rule even as to judicial acts. I prefer, however, to rest my judgment on the safer ground that, from the earliest times, there has been a distinction between writs which commence an action and writs G which issue in the course of it; that is, between original and judicial writs. In *JACOB'S DICTIONARY*, tit. "Writ," it is said:

"The writs in civil actions are either original or judicial; original writs are issued out of the Court of Chancery for the summoning a defendant to appear, and are granted before the suit is begun to begin the same; and judicial writs issue out of the court where the original is returned, after the suit is begun." H

COKE LIT. 73 b. is to the same effect. In *Lord Porchester v. Petrie* (2), *LORD MANSFIELD* says (3 Doug.K.B. at p. 293):

"The question in all the cases cited was the priority of the commencement of the suit, which is the act of the party, while the judgment is the act of the court." I

And in an earlier stage of the same case he says:

"As to the fraction of a day, fictions are instituted for general utility and the furtherance of justice. The ground of the rule that there shall be no priority of judgment was to prevent all confusion and all races for preference. No fiction is allowed to be questioned for the purpose of overturning the ground for which it was introduced. For collateral purposes it may. Thus, the actual period of the commencement of a suit may be shown where a question arises

A on the Statute of Limitations, but not for other purposes. The suing out the writ is the commencement for one purpose, the filing of the bill for another."

That is the rule as laid down by judges of great authority. The exact hour of the performance of acts which are judicial may not be inquired into; the exact hour of the performance of acts which are not judicial may be.

B The question, therefore, is which of the two is this. In my opinion it is the act of the party. The Uniformity of Process Act did away with the various forms of writs; and all the fictions connected with them are now swept away. That was done by the Common Law Procedure Act, 1852, and by the Supreme Court of Judicature Act, 1875, which says that "every action shall be commenced by writ of summons." That is the act of the party, not the act of the court. The court has no power, as a court, to issue the writ at all; it cannot inquire *mero motu* into the question between the parties. The principles of the decisions upon that which was analogous to a writ of summons are applicable to a writ of summons. I, therefore, think that the issuing of a writ of summons being the act of the party, the time of day at which it is done can be inquired into, repeating that I do not think that there is any inflexible rule that the time of day at which a judicial act is done cannot be inquired into.

D The defendant's second point shows great ingenuity. Section 1 of the Parliamentary Oaths Act, 1866, prescribes a certain form of oath to be taken by members of Parliament and imposes penalties for not taking it. Section 8 of the Act of 1868 altered the form of oath in these words:

E "The form of the oath of allegiance provided by this Act shall be deemed to be substituted . . . in the case of the Parliamentary Oaths Act, 1866, for the form of the oath thereby prescribed to be taken and subscribed by members of Parliament on taking their seats . . . and all the provisions of the said Act shall apply to the oath substituted by this section in the same manner as if that form of oath was actually inserted in the said Act in the place of the oath for which it is substituted."

F By the Statute Law Revision Act, 1875, the Act of 1866 is repealed, so far as the form of oath is concerned. I know the difficulties that the draftsmen of Acts of Parliament are under from their Bills being subject to alterations in Parliament that are made without due regard to the general scope of the measure. Section 8 of the Act of 1868 seems to be a not very happily concocted section. It would have been better to have repealed the prior Acts altogether; but the substance and effect of it is, that it alters the form of oath prescribed by the Parliamentary Oaths Act, 1866, and applies all the provisions of the Act of 1866 to the form so altered. That is what it means. If that is so, the argument of the defendant fails, because the Statute Law Revision Act, 1875, has left s. 8 of the Promissory Oaths Act, 1868, untouched, and that section applies the penalties of the Act of 1866 for the not taking the form of oath prescribed in the Act of 1868. On neither of the two points that he has argued is the defendant, in my opinion, entitled to succeed. The demurrer must, therefore, be overruled.

I **BAGGALLAY, L.J.**—I am of the same opinion. Upon the face of the statement of claim it appears that the writ issued after the defendant sat and voted; and for the purposes of the demurrer this must be admitted. But we are asked to disregard this admitted state of facts on the ground of a fiction of law. As a general rule, no doubt, judicial acts are to be referred to the earliest moment of the day; but I quite agree with LORD COLERIDGE, C.J., that that is not an inflexible rule.

I found my judgment, however, on the decision in *Combe v. Pitt* (3). That case was decided on the authority of two previous cases, viz. *Hutchinson v. Thomas* (4), and *Jackson v. Gislign* (5). In *Combe v. Pitt* (3) the facts were that, an action for penalties for bribery having been brought, it was pleaded in abatement that another action had been brought in the same term in respect of

the same penalties; and it was held that such other action, unless actually prior in point of time, could not be so pleaded. LORD MANSFIELD said (3 Burr. at p. 1433):

"*Hutchinson v. Thomas* (4) was an information for usury. The memorandum was of Michaelmas Term. The defendant pleaded 'that ante exhibitionem informationis, scilicet the same term, another person exhibited an information also against him for the same usury, and obtained judgment against him.' Upon which the informer demurred, and had judgment; for both informations as those pleaded refer to the first instant of the same term. But if another information was exhibited before in the same term, the defendant should have pleaded 'that the information pleaded to was exhibited such a day of the term; and that, at another day before in the same term, another information was exhibited and judgment thereon obtained.' "

It seems to me, therefore, that the courts will consider the relative position of any two acts whenever it is material to do so; and I may say, as was said in the court below, that I should have been sorry if any authority had been found to overrule what is such plain common sense. As to the other point, I am of opinion that the provisions of the Parliamentary Oaths Act, 1866, as to penalties have not been repealed.

BRETT, L.J.—The defendant's argument is, that the court cannot inquire into the time at which this writ was issued, on the ground that the court cannot inquire at what hour of the day a judicial act was done. It is admitted that the court could inquire into the exact time at which it was done, if this was the act of the party. That distinction was taken in *Edwards v. R.* (6) in a court of error, and is, therefore, binding on this court. But one argument for the plaintiff here is that, even if this is a judicial act, the hour may be looked to where it is necessary for the purposes of justice to do so. *Combe v. Pitt* (3) is cited for that. That is not applicable here, in my opinion. If two informers issue writs on the same day, then I should think it necessary to inquire what was issued first. But, if the issuing of a writ is a judicial act, there are not here two judicial acts of which it becomes necessary to ascertain the priority, but one only; and it is proposed to inquire at what time that judicial act took place. Counsel for the plaintiff says that you must inquire in order to ascertain the truth. But the fiction that we are considering, like other fictions, is for the purpose of disguising the truth.

I think that *Combe v. Pitt* (3) is not applicable here; therefore, in my opinion, the question is whether the issuing of a writ of summons is a judicial act within the principle of the rule of law relied upon by the defendant. The issuing of a writ is unquestionably in part the act of the court; but that is not the question. The rule relied upon is an artificial one, which has been adjudged to be a part of the common law. But it is an artificial rule, and rests on no principle of ethics that I know of. Therefore, it is to be applied as it was when first promulgated. Have those who promulgated this rule declared the issuing of the writ to be the act of the party or the act of the court? It seems to me that those who promulgated this rule declared that the issuing of the writ is, within the meaning of the rule, the act of the party. It is not difficult to see why. The court cannot originate it, it can only be issued by the act of the party; and if the party applies for the writ to issue, by the law of England his application cannot be refused. JACOB'S DICTIONARY is a book of great authority. That says (tit. "Writ"):

"The writs in civil actions are either original or judicial; original writs are issued out of the Court of Chancery for the summoning a defendant to appear, and are granted before the suit is begun to begin the same, and judicial writs issue out of the court where the original is returned after the suit is begun."

That is a positive dictum by a great authority that the original writ in an action is not a judicial writ. Then, without going into the older cases, you have Lord

A *Porchester v. Petrie* (2), decided by LORD MANSFIELD, who says (3 Doug.K.B. at p. 273):

“The question in all the cases cited was the priority of the commencement of the suit, which is the act of the party, while the judgment is the act of the court.”

B The present writ of summons is just as much the act of the party as the original writs of that time. The reason of the thing is the same. In either case it is the commencement of the suit. The commencement of the suit is not a judicial act. It seems to me, therefore, that it is as much to be treated as the act of the party now as it was then.

C With regard to the other point, as to the repeal of the statute, I think one ought to say that it is most ingenious. In the Parliamentary Oaths Act, 1866, a form of oath is prescribed, and a penalty is imposed upon members of Parliament not taking it. The Promissory Oaths Act, 1868, gets rid of the form of oath in the Act of 1866, substitutes a new form of oath, and says that that new form is to be read with the Act of 1866 as if it was actually inserted in that Act in the place of the oath for which it is substituted. Then the legislature have repealed s. 1 of the Act of 1866 by the Statute Law Revision Act, 1875, and, in so doing, D it is argued have repealed the second oath. If the Act of 1868 had been drawn in the ordinary form this point would not have arisen. If the act of supererogation in repealing s. 1 of the Act of 1866 had not taken place this point would not have arisen. But I think it fails in substance and in form. Section 8 of the Act of 1868 is not repealed. That says that the way its provisions are to be read is as if all those other provisions of the Act of 1866 were to be found in the Act of 1868. E It is a rule that the repeal of an earlier Act does not repeal so much of it as may have been incorporated in an intermediate one. Then the Act of 1875 says that s. 1 of the Act of 1866 is repealed “as to the form of oath thereby prescribed,” that is, as to the form of oath prescribed by the Act of 1866, but the form of oath prescribed by the Act of 1868 remains untouched. We affirm this F judgment, not going entirely upon the same lines as the court below.

Appeal dismissed.

Solicitors: *W. G. Stuart; Lewis & Lewis.*

[*Reported by A. H. BITTLESTON, Esq., Barrister-at-Law.*]

CLARK & SON v. CULLEN AND ANOTHER

[QUEEN'S BENCH DIVISION (Pollock, B., and Matthew, J.), June 22, 1882]

[Reported 9 Q.B.D. 355; 47 L.T. 307]

Execution—Partnership—Judgment against partnership firm—Right of action on judgment against individual partners.

A plaintiff who has recovered judgment against a partnership firm in the name of the firm may bring his action on the judgment against the individual members of the firm, and he is not restricted to the procedure provided by R.S.C., 1875, Ord. 42, r. 8, in respect to the issue of execution.

Notes. R.S.C., 1875, Ord. 42, r. 8, is now R.S.C. (Revision), 1962, Ord. 81, r. 5.

As to judgment against partners, see 16 HALSBURY'S LAWS (3rd Edn.) 28, and *ibid.*, vol. 28, p. 544; and for cases see 30 DIGEST (Repl.) 196, and 36 DIGEST (Repl.), *ibid.*, 523 et seq.

Case referred to:

(1) *Jackson v. Litchfield* (1882), 8 Q.B.D. 474; 51 L.J.Q.B. 327; 46 L.T. 518; 30 W.R. 531, C.A.; 36 Digest (Repl.) 524, 876.

Demurrer to a statement of claim.

The plaintiffs in their statement of claim alleged that they supplied goods to a firm of Shand & Co., and on Mar. 20, 1882, they recovered judgment against Shand & Co. for £269, the price of the said goods; and that the judgment remained wholly due and unsatisfied. They further alleged that the defendants in the present action were partners in the firm of Shand & Co. under an agreement dated Aug. 31, 1880, and that on Sept. 20, 1881, the whole of the stock and effects of the business of Shand & Co. were sold by auction under the direction of the defendants, who received the proceeds of such sale, and there were then no assets of the firm Shand & Co. to answer the judgment.

They claimed (i) a declaration that the defendants were jointly and severally liable for the debts of Shand & Co.; and (ii) that the defendants might be ordered jointly and severally to pay to the plaintiffs the amount of the judgment with interest. The defendants demurred to the whole statement of claim on the grounds that the judgment sued on was not a judgment against the defendants, and that the remedy of the plaintiffs, if any, was under R.S.C., 1875, Ord. 42, r. 8.

By R.S.C., 1875, Ord. 42, r. 8:

"Where a judgment is against partners in the name of the firm execution may issue in manner following: (a) Against any property of the partners as such; (b) Against any person who has admitted on the pleadings that he is or has been adjudged to be a partner; (c) Against any person who has been served as a partner with the writ of summons, and has failed to appear. If the party who has obtained judgment claims to be entitled to issue execution against any other person as being a member of the firm, he may apply to the court or judge for leave so to do; and the court or judge may give such leave if the liability be not disputed, or if such liability be disputed, may order that the liability of such person be tried and determined in any manner in which any issue or question in an action may be tried and determined."

Shortt for the defendants.

Gore for the plaintiffs was not called on to argue.

POLLOCK, B.—I should be extremely sorry to allow the plaintiffs by a side wind to avoid that with which they were bound to comply, but I see no ground for saying that a plaintiff, who has recovered judgment against a firm, is confined to the particular remedy given by Ord. 42, r. 8. I think the plaintiff is entitled to do that which he was able to do under the old Chancery practice without the leave of the court. The plaintiffs claim to have a declaration that the defendants are

- A members or partners of a particular firm, and the defendants contend that the plaintiffs must go before a master and get leave for that purpose; and in the present case the master could only direct an issue to try the very point of the action. There is no authority for this proposition. In *Jackson v. Litchfield* (1) the plaintiff had issued his writ against a partnership firm, in the name of the firm, and moved to enter judgment against another person whom he had discovered to be a partner;
- B and in that case BRETT, L.J., said the only mode of putting the judgment into execution was by proceeding under Ord. 42, r. 8. In that case the defendant was admittedly a member of the firm, but in the present case there is no such admission by the defendants, who are entitled to defend the action on the judgment on the ground that they are not partners. We do not think that case touches the present one, and we are not bound by it.

C **MATHEW, J.**—I am of the same opinion.

Judgment for plaintiffs.

Solicitors: *Harper & Battcock; Carr, Fulton & Carr.*

[Reported by W. P. EVERSLEY, Esq., Barrister-at-Law.]

D

E

Re WILLIAMES. ANDREW v. WILLIAMES

[COURT OF APPEAL (Sir Baliol Brett, M.R., Baggallay and Fry, L.JJ.), July 20, 21, 1885]

[Reported 54 L.T. 105]

F

Will—Gift—Condition attached to gift—Obligation of donee accepting benefit to comply with condition—Repair of settled property.

Limitation of Action—Equitable remedy—Claim against beneficiary for failing to comply with terms of gift—Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 2.

G

A testator gave his real estate to trustees upon trust for various persons in succession. The will contained a direction that each tenant for life or in tail of any of the hereditaments should, during her or his estate, keep the buildings thereon in substantial repair; and if any such person should neglect to effect such repairs within six months after being thereunto requested by the trustees, the trustees should be at liberty to effect the repairs. The widow of the testator went into possession of the hereditaments as tenant for life, but omitted to repair the buildings. More than six months after her death, but within six months after probate of her will, a claim was brought against her estate, in an administration action, in respect of her omission to repair, the claimants being the trustees of the will and the then equitable tenant for life. Her executor denied liability, and also contended that the action was statute-barred under s. 2 of the Civil Procedure Act, 1833 (a section applying to actions of trespass or trespass on the case).

H

I

Held: (i) if a person took a benefit under a will, which in the will was made subject to a condition or liability to do a certain thing, or to omit the doing of a certain thing, in equity that person was made liable to the obligation to the same extent as if he had contracted to do or not to do the thing in question, and, therefore, the widow's estate was liable for her failure to repair; (ii) as the remedy which existed was in equity, the Civil Procedure Act, 1833, s. 2, did not apply, and, therefore, the action was not statute-barred.

Notes. The Civil Procedure Act, 1833, s. 2, was repealed by the Administration of Estates Act, 1925, s. 56, Sched. 2, Part I. If a tenant for life is under a personal liability in equity for failure to repair, the remedy would appear to be an action to recover trust property or in respect of a breach of trust, which must be brought within six years from the cesser of the life interest: see the Limitation Act, 1939, s. 19. A

Considered: *Jay v. Jay*, [1924] 1 K.B. 826. Applied: *Re Field, Sanderson v. Young*, [1925] All E.R. Rep. 712. Referred to: *Blackmore v. White*, [1899] 1 Q.B. 293; *Re Darby, Russell v. Macgregor*, [1939] 3 All E.R. 6. B

As to acceptance of gifts to which conditions are attached, see 39 HALSBURY'S LAWS (3rd Edn.) 931-932; as to permissive waste, see 34 HALSBURY'S LAWS (3rd Edn.) 654-655; as to waste as affected by the Limitation Acts, see 24 HALSBURY'S LAWS (3rd Edn.) 287; and for cases see 44 DIGEST 395-400. For the Limitation Act, 1939, s. 19, see 13 HALSBURY'S STATUTES (2nd Edn.) 1179, and for the Civil Procedure Act, 1833, s. 2, see 9 HALSBURY'S STATUTES (2nd Edn.) 675. C

Cases referred to:

- (1) *Gregg v. Coates, Hodgson v. Coates* (1856), 23 Beav. 33; 2 Jur.N.S. 964; 4 W.R. 735; 53 E.R. 13; 44 Digest 397, 2296.
- (2) *Rees v. Engelback* (1871), L.R. 12 Eq. 225; 40 L.J.Ch. 382; 24 L.T. 417; 19 W.R. 809; 44 Digest 397, 2299. D
- (3) *Messenger v. Andrews* (1828), 4 Russ. 478; 38 E.R. 885, L.C.; 44 Digest 396, 2291.
- (4) *Re Skingley* (1851), 3 Mac. & G. 221; 20 L.J.Ch. 142; 16 L.T.O.S. 405; 15 Jur. 958; 42 E.R. 246, L.C.; 44 Digest 398, 2305.

Also referred to in argument: E

Woodhouse v. Walker (1880), 5 Q.B.D. 404; 49 L.J.Q.B. 609; 42 L.T. 770; 44 J.P. 666; 28 W.R. 765, D.C.; 40 Digest (Repl.) 701, 1973.

Kirk v. Todd (1882), 21 Ch.D. 484; 52 L.J.Ch. 224; 47 L.T. 676; 31 W.R. 69, C.A.; 24 Digest (Repl.) 770, 7593.

Phillips v. Homfray, Homfray v. Phillips (1883), 24 Ch.D. 439; 52 L.J.Ch. 833; 49 L.T. 5; 32 W.R. 6, C.A.; on appeal sub nom. *Phillips v. Fothergill* (1886), 11 App. Cas. 466, H.L.; 24 Digest (Repl.) 688, 6731. F

Bagot v. Bagot, Legge v. Legge (1863), 32 Beav. 509; 2 New Rep. 297; 33 L.J.Ch. 116; 9 L.T. 217; 9 Jur.N.S. 1022; 12 W.R. 35; 55 E.R. 200; 2 Digest (Repl.) 105, 726.

Jones v. Hill (1817), 1 Moore, C.P. 100; 7 Taunt. 392; 129 E.R. 156; 31 Digest (Repl.) 396, 5244. G

Gibson v. Wells (1805), 1 Bos. & P.N.R. 290; 2 Smith, K.B. 677; 127 E.R. 473; 31 Digest (Repl.) 395, 5221.

Powys v. Blaggrave (1854), 4 De G.M. & G. 448; 2 Eq. Rep. 1204; 24 L.J.Ch. 142; 24 L.T.O.S. 17; 2 W.R. 700; 43 E.R. 582, L.C.; 40 Digest (Repl.) 699, 1951.

Cole v. Forth (1672), 1 Mod. Rep. 94; 86 E.R. 759; sub nom. *Cole v. Green*, 1 Lev. 309; sub nom. *Greene v. Cole*, 2 Wms. Saund. 228, H.L.; 31 Digest (Repl.) 393, 5181. H

Garth v. Cotton (1753), 1 Ves. Sen. 546; 3 Atk. 751; Dick. 183; 27 E.R. 1182, 1196; 2 Digest (Repl.) 100, 658.

Torriano v. Young (1833), 6 C. & P. 8, N.P.; 31 Digest (Repl.) 396, 5228.

Blake v. Peters (1863), 1 De G.J. & Sm. 345; 1 New Rep. 503; 32 L.J.Ch. 200; 9 L.T. 247; 9 Jur.N.S. 836; 11 W.R. 409; 46 E.R. 139, L.J.J.; 44 Digest 446, 2699. I

Yellowly v. Gower (1855), 11 Exch. 274; 24 L.J.Ex. 289; 156 E.R. 833; 40 Digest (Repl.) 785, 2686.

Powell v. Rees (1837), 7 Ad. & El. 426; 2 Nev. & P.K.B. 571; Will. Well & Dav. 680; 8 L.J.Q.B. 47; 112 E.R. 530; 24 Digest (Repl.) 773, 7620.

Hamblly v. Trott (1776), 1 Cowp. 371; 98 E.R. 1136; 24 Digest (Repl.) 669, 6576.

A **Appeal** by the defendant Charles Edward Howell, the surviving executor of the widow of Pryce Buckley Williames, from a decision of KAY, J., reported in 52 L.T. 41, by which he held that her estate was liable for her omission to repair certain property of which she had been tenant for life.

Pryce Buckley Williames, by his will, dated April 24, 1867, devised his real estate unto and to the use of John Pryce Davies and Charles Watkin Williams Wynn upon trust for his widow and her assigns for life, with remainders over, in events which happened, to John Buckley Williames for life, and, in events which happened, to Rhys Buckley Williames for life, with remainders to his children, if any, in tail, with remainders over. The will of the testator then proceeded as follows:

C "I direct that each tenant for life (or in tail or for any less estate) of any of the said hereditaments shall, during her or his estate, keep the buildings thereon in substantial repair, and insured in some respectable office or offices of insurance, in the names or name of my trustees or trustee for the time being, against damage by fire, to the full value thereof, and that the moneys to be received under every such insurance shall be applied in reinstating the premises in respect whereof the same shall become payable; and if any such person should neglect to effect such repairs as aforesaid within six calendar months after being thereunto requested in writing by my said trustees or trustee, or to effect any insurance, or to produce to my said trustees or trustee, upon demand, the receipt for each premium thereon within fourteen days after the same shall have fallen due, or if any such tenant should be under age, it shall be lawful for, but not incumbent on, my said trustees or trustee, out of any trust moneys in their or his hands, to effect such repairs, or to effect or keep on foot such insurance; and the same, with interest thereon, after the rate of £5 per cent. per annum, shall be deducted and replaced from any moneys which shall then or afterwards be payable to such person, or recovered by distress or entry upon and perception and receipt of the rents and profits of any hereditaments to which such person shall be entitled for any estate or interest under my will."

F The testator died on Mar. 24, 1871. The testator's widow was in possession of the real estate from the death of the testator down to the date of her own death, which occurred on June 12, 1883. On Feb. 9, 1884, probate of her will was granted to Charles Edward Howell, the surviving executor therein named. The testator's widow, during the continuance of her life estate, permitted the buildings to go **G** greatly out of repair, and the cost of restoring them would be very large. No request in writing according to the terms of the will was ever sent by the trustees. John Buckley Williames, who was entitled to the real estate as tenant for life under the will on the death of the testator's widow entered into possession, and died on Sept. 14, 1883, and was thereupon succeeded as to the real estate by Rhys Buckley Williames as tenant for life.

H An action was brought for the administration of the estate of the testator's widow. On Mar. 22, 1884, an order was made for the usual accounts of debts and of personal estate of the testator's widow, and further consideration was adjourned. On taking the account of such debts, a claim was made, on June 6, 1884, by William Withy and Rhys Buckley Williames, to be creditors upon the estate of the testator's widow for the sum of £3,200, for damages for the breach of an implied contract on **I** her behalf to keep the buildings on the real estate in substantial repair, she having accepted the equitable devise of the life estate therein. They stated that that sum was required for the purpose of having the buildings put into substantial repair, and that they held no security whatsoever for such sum. The then trustees of the will of the testator were Charles Edward Howell and William Withy, and having regard to the fact that Charles Edward Howell was also the executor of the testator's widow, the claim for dilapidations was made by his co-trustee jointly with the equitable tenant for life.

The claim was resisted on three grounds: First, that the deceased tenant for life could not be made liable for permissive waste; secondly, that the right to recover, if any, was in the remainderman, and that, therefore, the claim was not preferred by the proper parties; and, thirdly, that the claim was too late, having been brought more than six months after the executor of the will of the widow had taken upon himself the administration of her estate, within the meaning of the Civil Procedure Act, 1833, s. 2. The case was heard in December, 1884, by KAY, J., who held that the claim had been made by the proper parties, and allowed it. From this decision the defendant appealed.

By the Civil Procedure Act, 1833, s. 2:

"An action of trespass, or trespass on the case, as the case may be, may be maintained by the executors or administrators of any person deceased for any injury to the real estate of such person committed in his lifetime, for which an action might have been maintained by such person, so as such injury shall have been committed within six calendar months before the death of such deceased person, and provided such action shall be brought within one year after the death of such person, and the damages, when recovered, shall be part of the personal estate of such person; and further, that an action of trespass, or trespass on the case, as the case may be, may be maintained against the executors or administrators of any person deceased for any wrong committed by him in his lifetime to another in respect of his property, real or personal, so as such injury shall have been committed within six calendar months before such person's death, and so as such action shall be brought within six calendar months after such executors or administrators shall have taken upon themselves the administration of the estate and effects of such person; and the damages to be recovered in such action shall be payable in like order of administration as the simple contract debts of such person."

Kekewich, Q.C., and *G. M. E. Jones* for the defendant.

G. Hastings, Q.C., and *Levett* for the plaintiffs.

SIR BALIOL BRETT, M.R.—It seems to me, upon the true construction of the will of the testator in this case, that every person who took as a tenant for life under the will and went into possession, took the benefit subject to an obligation or burden that, whilst he was tenant for life, he should keep the premises in repair. One of the tenants for life was Mrs. Williams, and it is an admitted fact that to a certain extent she failed to keep the premises in repair in accordance with the obligation under the will. She died, and then the next tenant for life entered into possession, and was only in possession for three months. Now there is a third or fourth tenant for life who is in possession. The estate of the first tenant for life, Mrs. Williams, is being administered, and in that administration action the trustees of the will and the present tenant for life jointly or severally or alternatively made a claim that her estate ought now to make good the damages which are the result of the premises having been left by her out of repair. The question is, whether such a claim can be allowed.

Counsel for the defendant led us into a very difficult consideration of what are the legal conditions of an action for waste, and referred to the Statute of Gloucester, and also what were the legal conditions in every particular of an action on the case for waste. Whenever the matter arises at law only, and an action on the case is brought for waste, we shall have probably to consider the matter; but that would be, as I apprehend, only when the different estates are legal estates only, and there are no trustees. But here there is a will, and there are trustees and devisees under the will. It seems to me the question is, whether there is an equitable remedy under the circumstances of this case; and, if there is an equitable remedy, what it is—whether it is in any way bound by the considerations which would come into view if this were an action on the case for waste? It seems to me that the courts of equity have recognised the equity which I am about to state, wholly regardless

A of the question of waste, or of the action for waste, or of the obligations of a legal tenant for life as to waste. They have recognised this, that if, by the will of a person, which person may do as he likes with his property, that person confers equitable estates for life upon different persons, or upon one person; and if, after the death of the testator, the person so designated avails himself of the benefit given to him by the will, and if the will in giving that benefit attaches to it a certain burden, which is imposed by the will of the testator, and by the will alone—
B if the person takes the benefit thus given by the testator, he must also acknowledge the liability or burden; and that, if he does not, he has come under an equitable liability which a court of equity will enforce.

That seems to me to be best expressed, although I do not think it is wholly expressed, in *Gregg v. Coates* (1), because there it was said by SIR JOHN ROMILLY, C M.R., the question is, whether the person taking the benefit of the bequest does not thereby take it upon the condition to perform the duty imposed upon him. That is, whether a condition that he shall keep the premises in good and tenantable repair, and pay certain rent, is not attached to the gift. He said afterwards (23 Beav. at p. 38):

D “I am of opinion that this must be treated as an implied contract entered into by the person who accepts the estate.”

I take that to mean that the obligation which the person who takes the benefit of the gift has accepted is the same obligation which would lie upon the person if it were a contract. Not that it is a contract, but that the obligation is the same as if the person had entered into a contract to do the thing; not that the remedy would be the same as if it were a contract, but only that the obligation of the person
E who accepts the gift is to the same extent as if the person had contracted to do the thing. SIR JOHN ROMILLY, M.R., then continues:

“If a bequest were made to a person of a house for twenty-one years, upon the condition that he kept it and delivered it up at the end of the term in good and tenantable repair, if he chose to accept the bequest, it would be on the faith that he would perform the conditions which the testator had attached
F to it.”

There, I take it, is the explanation of what SIR JOHN ROMILLY, M.R., meant by an implied contract. Then I think that the remedy is aptly expressed in *Rees v. Engelback* (2) by BACON, V.-C., where he says this (L.R. 12 Eq. at p. 237):

G “Now, upon the authority of the case of *Messenger v. Andrews* (3), and even without the authority of that case, upon very plain principles of justice and law, the defendant, who admits that he has enjoyed the benefit given to him by a will upon the conditions expressed in it, is under a personal liability, which can be enforced in this court, of fulfilling those conditions.”

Therefore, the liability is this: If a person takes a benefit under a will, which
H in the will is made subject to a condition or liability to do a certain thing, or to omit the doing of a certain thing—if that person takes a benefit, in equity that person is made liable to the obligation to the same extent as if he had contracted to do or not to do the thing; and if that person does not fulfil the obligation which he has thus imposed upon himself by taking the benefit, there is a remedy in equity. If that remedy exists in equity, the case, to my mind, is clearly not within the Civil Procedure Act, 1833, because that speaks of actions at law and actions on the case in the nature of actions for waste; and this equitable remedy is not such
I a case of course, and is not within the terms of the statute. Therefore, the moment the courts of equity recognise the equitable liability, that equitable liability is entirely without the statute.

Then who are the persons who are entitled to insist upon that equitable liability in a court of equity? I think it must be the trustees. If it is not the trustees it must be the other plaintiff in this case. Either one or the other must be the right party. The real question in contention here is, whether the estate of Mrs.

Willames is liable, and it is a mere minor question, a question of mere form, whether the right plaintiffs are the persons who are suing or not; but I take it that the trustees are persons who may properly sue at all events, and that, therefore, the decision of the learned judge in this case was right according to the law in equity, and must be affirmed, and that this appeal must be dismissed. A

BAGGALLAY, L.J.—Mr. Pryce Willames by his will devised all his real estates, or certain shares of the real estates, to the trustees of his will in fee, and then created certain equitable interests, and it is sufficient to mention that in the events which have happened there were three successive life interests. [His LORDSHIP then referred to them.] In that view of the case these life estates being created separately and in succession, there is one general provision as far as regards keeping the property in repair: "I direct that each tenant for life (or in tail or for any less estate) of any of the said hereditaments shall, during her or his estate, keep the buildings thereon in substantial repair." I agree with the suggestion of junior counsel for the plaintiffs, that those various life estates and the estates in tail being there all brought together, is equivalent to there being a like provision as regards each of the successive life estates. There is no distinction in that respect. B

Having imposed that liability upon those who take successive estates in this way, I think this case is brought entirely within the authority of the cases of which *Gregg v. Coates* (1) may be regarded as the one most nearly resembling the present case, namely, that if a person has an estate given to him with an obligation imposed upon him of keeping that estate in repair, and if the obligation is not performed, there is, in equity, a claim upon the party so failing during his or her life, or against his or her estate after his or her decease. I think that is clearly settled and established as far as regards the general proposition by *Gregg v. Coates* (1), which, after all, followed and has been followed by other cases which have been referred to by the Master of the Rolls to the same effect. There is no doubt that such a provision as regards the life estate amounted to an obligation that was established in *Re Skingley* (4), which has been referred to. C

Then it is suggested that this general provision which would entail the obligation upon the tenant for life is removed or modified by what follows; because, after directing that the tenant for life is to keep the property in repair, the will proceeds: "and if any such person shall neglect to effect such repairs as aforesaid within six calendar months after being thereunto requested," then it authorises the trustees, out of any trust moneys that may then be in their hands, to effect the various repairs, and it says that they shall have a charge with 5 per cent. interest for the amount so expended upon the future life estate. That, no doubt, is an additional provision beyond the general provision to which I first referred; that is a provision not at all times applicable. It can only be acquired after six months' notice, and of course it would be quite inoperative before the repairs were made, or if before the six months had expired the tenant for life were to die. It was an additional provision which, under the circumstances, trustees might have to satisfy the costs if they had the property put into a proper state of repair during the lifetime of the tenant for life. But a provision is expressly made that it is not incumbent on them to do it, but they have merely this additional power. Again I adopt the argument of junior counsel for the plaintiffs on this part of the case, that this power is one which in no way derogates from the general right of enforcing the liability which the earlier part of the provision would confer upon somebody for the benefit of the estate. E

I agree with what has been said by the Master of the Rolls, that in this case, where all the legal estate is vested in the trustees, and you have merely a succession of equitable estates of less degree vested in the devisees, I think the trustees are the proper persons to raise the question and to bring in the claim, in the course of administration of Mrs. Willames' estate, to have allowed to them what would properly represent the deterioration of the property by reason of the want of repair, which I apprehend would be measured by what would be required to put the G

A property into repair. That, I think, would be a matter for inquiry in chambers in the course of the administration.

I think, speaking for myself only, I should prefer to omit from the order which has been made by KAY, J., the words following the words which declare that Mrs. Williames' executors "are liable to make good the omission," the words "pursuant to the implication or condition contained in the testator's will." I do not think those words are really necessary, and they perhaps might lead to some wrong impression, because I think it is quite clear that there is the liability, whether there is an implied contract or not. It is a liability in the nature of an obligation. In my opinion it is not a contract, and not strictly an implied contract.

FRY, L.J.—I concur in the view arrived at both by the learned judge in the court below and by my learned brethren. It appears to me that *Messenger v. Andrews* (3), *Gregg v. Coates* (1), and *Rees v. Engelback* (2) have established this, that where a testator gives successive interests, and adds to them a direction that the person who takes shall do a particular thing, such as repairing buildings, paying his debts, or paying an annuity, and the devisee accepts the estate, there is a personal liability, capable of being enforced in equity, to perform the directions imposed by the testator. That personal liability has no doubt been expressed in different phrases. In some cases it has been said to be a condition. In some cases it has been referred to as an implied contract. For myself, I prefer the language used by BACON, V.-C., in *Rees v. Engelback* (2), where he said that where it was a personal liability it could be enforced in a court of equity.

The question which has demanded our attention has been whether or not in the present case, the direction being coupled with a certain express remedy given by the testator, that express remedy repels the implication of the equitable liability and of the equitable remedy which would follow from it. But when it is borne in mind that the remedy is only permissive and discretionary, because the trustees are allowed to put it in force or not as they may think right, and when it is borne in mind further that that remedy can only apply to some cases of default, I have come to the conclusion that the effect of the added words which give the remedy do not in any way repel the implication of the equitable liability or consequently of the remedy in equity for the breach of that liability.

I agree that the form of the order does not appear to be perfectly accurate, and I think so not only with respect to the words which are inserted in regard to implied contract or condition, but also because the order does not follow the very words of the direction, which I think it ought to do; and I think, further, it ought to contain a reference to the chief clerk to ascertain the amount of the liability and liberty to prove for that amount. The order for costs will be the same as in the court below, except that this appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: *W. J. Child & Son*, for *Maurice Jones*, Welchpool; *Gregory, Rowcliffe & Co*

[*Reported by W. C. BISS, Esq., Barrister-at-Law.*]

SANDERS v. TEAPE AND ANOTHER

[QUEEN'S BENCH DIVISION (Lord Coleridge, C.J., and Williams, J.), March 29, 1884]

[Reported 51 L.T. 263; 48 J.P. 757]

Animal—Dog—Liability of owner for injury to plaintiff—Need to prove dog mischievous to owner's knowledge.

The plaintiff, a labourer, was digging a hole in the garden of a house adjoining that of the defendant T. There was a wall three feet high, belonging to T., between the gardens. Three dogs owned by T. had been taken out by the defendant S., and, as S. was returning, one of the dogs jumped over the wall and fell into the hole where the plaintiff was working. The dog struck the nape of the plaintiff's neck, causing injuries. In an action for these injuries against the defendant T. as the owner of the dog, and against the defendant S. as having the dog in charge,

Held: as the dog was not shown to be mischievous to the knowledge of the owner, the plaintiff had no cause of action against either of the defendants either for trespass or for breach of duty.

Notes. Referred to: *Hadwell v. Righton* (1907), 76 L.J.K.B. 891.

As to trespass by dogs, see 1 HALSBURY'S LAWS (3rd Edn.) 688 et seq.; and for cases see 2 DIGEST (Repl.) 376 et seq.

Cases referred to:

- (1) *Mason v. Keeling* (1699), 1 Ld. Raym. 606; 12 Mod. Rep. 382; 91 E.R. 1305; 2 Digest (Repl.) 382, 566.
- (2) *Brown v. Giles* (1823), 1 C. & P. 118; 2 Digest (Repl.) 377, 530.
- (3) *Beckwith v. Shordike* (1767), 4 Burr. 2092; 98 E.R. 91; 2 Digest (Repl.) 377, 535.

Also referred to in argument:

Lee v. Riley (1865), 18 C.B.N.S. 722; 34 L.J.C.P. 212; 12 L.T. 388; 11 Jur.N.S. 527; 13 W.R. 751; 144 E.R. 629; 2 Digest (Repl.) 312, 155.

Read v. Edwards (1864), 17 C.B.N.S. 245; 5 New Rep. 48; 34 L.J.C.P. 31; 11 L.T. 311; 144 E.R. 99; 2 Digest (Repl.) 377, 532.

Star v. Rookesby (1711), 1 Salk. 335; 91 E.R. 295; 2 Digest (Repl.) 312, 154.

Powell v. Salisbury (1828), 2 Y. & J. 391; 148 E.R. 970; 2 Digest (Repl.) 302, 101.

Appeal from a decision of Bloomsbury County Court judge, holding that no action would lie for trespass or breach of duty against the owner or person in charge of a dog which caused injury to the plaintiff by jumping on top of him.

The plaintiff, a labourer, was digging a hole in a garden of a house adjoining that of the defendant Teape. There was a wall which belonged to the defendant Teape three feet high between these two gardens. The hole was about ten feet deep, and the plaintiff was, at the time in question, engaged in doing some work at the bottom of the hole. Three dogs belonging to the defendant Teape had been taken out by the other defendant Swan, and as the defendant Swan was returning with the dogs, one of them, a large Newfoundland dog, jumped over the wall, and fell into the hole where the plaintiff was working. The dog fell on the nape of the plaintiff's neck, causing injuries for which he was confined to bed for three weeks, and he was unable to work for some time after. For these injuries the plaintiff, who had refused two sovereigns offered to him as compensation, brought an action in the Bloomsbury County Court against the defendant Teape as the owner of the dogs, and the defendant Swan as being in charge of the dogs when the injuries in question were received. The learned county court judge ruled that there was no evidence to go to the jury in support of the plaintiff's case, and that, even assuming all the facts as alleged by the plaintiff, he had no

A cause of action against either of the defendants; and he gave judgment for the defendants. The plaintiff now appealed.

Laing for the plaintiff.

Mote, for the defendant, was not called on to argue.

LORD COLERIDGE, C.J.—It seems to me to be clear that the learned county court judge was quite right, and it must be manifest upon ordinary principles of common sense that he was so. An action under the circumstances of this case is quite preposterous. It was an action against a person who kept a dog, because the dog, jumping about playfully, jumped over a low wall and into a hole where the plaintiff happened to be at work. On referring to the authorities, it is manifest that such an action could not be maintained. In *Mason v. Keeling* (1) it was held that an action would not lie against a man for mischief done by his dog, unless he knew that he had done mischief before, or was of a mischievous nature; and the same principle has also been laid down by PARKE, B., in our own time. In *Brown v. Giles* (2) it was held that a dog, jumping into a field without the consent of its master, is not a trespass for which an action will lie. In *Beckwith v. Shordike* (3) it was held that an involuntary trespass may be justified, but not a voluntary one, and though the verdict there was for the plaintiff, this arose from the jury finding that the trespass was an intentional trespass, and not a mere involuntary accident.

The result of all these cases is, that if a dog, going about, commits an injury or does any mischief, the owner of the dog will be liable only if the dog was of a mischievous nature and he was aware of that fact; but if there be no evidence of that, then no action will lie. Here there is no suggestion of any proof of the mischievous nature of the dog. The only thing suggested as a scienter is, that the owner of the dog offered the plaintiff a couple of sovereigns as a compensation, but this was entirely from his good nature, and not because he was liable in point of law. I am of opinion, therefore, that the plaintiff has shown no cause of action, and that this appeal should be dismissed.

WILLIAMS, J.—I am of the same opinion. If a man keeps horses and other animals, he is bound to keep them on his own ground; if he does not he may be liable to an action of trespass. There is an exception to this when they are on a public highway, as they have a right to be there, and then the owner is bound to use ordinary care. But in the case of dogs, pigeons, and the like, the case is different: if a dog, not being exceptionally mischievous, acting in playfulness goes over another man's land, there is no trespass, and the owner of the dog would not be liable. Here, so far as the defendants are concerned, the occurrence was purely accidental and involuntary, and no action lies against them in respect thereof, either as for a trespass or for any breach of duty.

Appeal dismissed.

Solicitors: *John Willis; Mote.*

[Reported by H. LEIGH, Esq., Barrister-at-Law.]

R. v. WELLARD

[COURT FOR THE CONSIDERATION OF CROWN CASES RESERVED (Lord Coleridge, C.J., Grove, J., Huddleston, B., Manisty and Mathew, JJ.), November 29, 1884]

[Reported 14 Q.B.D. 63; 54 L.J.M.C. 14; 51 L.T. 604;
49 J.P. 296; 33 W.R. 156; 15 Cox, C.C. 559]

Criminal Law—Indecent exposure—Public place—Private land frequented by public—Act committed in presence of several persons.

It is not necessary to support a common law indictment for indecent exposure in an open and public place to show that the place where the offence was committed was a place to which the public have a legal right of access. It is sufficient that the offence was committed in any place where an assembly of the public is collected.

The prisoner was indicted on a charge of indecently exposing his person to a group of little girls. The offence was committed on land to which the public had no legal right of access at a spot where the indecent act could not be seen from the public footpath. It was proved that the public had been in the habit of going on the land without let or hindrance.

Held: the indecent act having taken place in the presence of several persons, it was committed in a public place, and it was not necessary to prove that that place was one to which the public had a legal right of access.

Notes. Considered: *R. v. Shaw*, [1961] 1 All E.R. 330.

As to indecent exposure, see 10 HALSBURY'S LAWS (3rd Edn.) 666; and for cases see 15 DIGEST (Repl.) 892 et seq.

Cases referred to:

(1) *R. v. Crunden* (1809), 2 Camp. 89; 15 Digest (Repl.) 893, 8610.

(2) *Turnbull v. Appleton* (1881), 45 J.P. 469, D.C.; 25 Digest (Repl.) 464, 360.

Also referred to in argument:

R. v. Thallman (1863), Le. & Ca. 326; 3 New Rep. 141; 33 L.J.M.C. 58; 9 L.T. 425; 27 J.P. 790; 12 W.R. 88; 9 Cox, C.C. 388, C.C.R.; 15 Digest (Repl.) 893, 8608.

R. v. Holmes (1853), 3 Car. & Kir. 360; Dears.C.C. 207; 22 L.J.M.C. 122; 21 L.T.O.S. 160; 17 J.P. 390; 17 Jur. 562; 1 W.R. 416; 1 C.L.R. 487; 6 Cox, C.C. 216, C.C.R.; 15 Digest (Repl.) 892, 8602.

R. v. Watson (1847), 10 L.T.O.S. 204; 2 Cox, C.C. 376; 11 J.P.Jo. 868; 15 Digest (Repl.) 892, 8598.

Langrish v. Archer (1882), ante p. 913; 10 Q.B.D. 44; 52 L.J.M.C. 47; 47 L.T. 548; 47 J.P. 295; 31 W.R. 183; 15 Cox, C.C. 194, D.C.; 25 Digest (Repl.) 464, 357.

Re Freestone (1856), 1 H. & N. 93; 27 L.T.O.S. 109; 20 J.P. 376; 2 Jur.N.S. 525; 4 W.R. 567; 156 E.R. 1131; sub nom. *Ex parte Freestone*, 25 L.J.M.C. 121; 25 Digest (Repl.) 464, 356.

R. v. Harris (1871), L.R. 1 C.C.R. 282; 40 L.J.M.C. 67; 24 L.T. 74; 35 J.P. 185; 19 W.R. 360; 11 Cox, C.C. 659, C.C.R.; 15 Digest (Repl.) 892, 8604.

Case Stated by the justices of the peace for the County of Kent.

At Kent Quarter Sessions held at Maidstone, the prisoner, Frederick Wellard, was convicted of the misdemeanour of indecently exposing his person to divers liege subjects of the Queen in a certain open and public place, to wit, a marsh in the parish of Northfleet. The evidence showed that the prisoner Frederick Wellard, in the middle of the day called some seven or eight girls of the ages of eleven, eight, and thereabouts, who were at play near Northfleet Church, and told them that if they would go down into the marsh with him he would give them a halfpenny. On this the girls all went down into Northfleet Marsh with him, following him. They first went along a public footpath for some distance, and then came to a row of willow trees growing at an angle to the path; there the prisoner and the

A girls turned off the footpath on to the marsh where there was no path. There was another row of trees a little distance off, the prisoner and the girls went in on the grass land between the two rows of trees till they came to a fallen tree about one hundred and seventy paces from the footpath, and out of sight of it. At the fallen tree the prisoner lay down on the ground and there intentionally exposed his person to all the little girls, who were close to him, and he invited
B them to touch his person, and used disgusting language. No one but the girls saw this exposure, nor could anyone have seen it from the footpath. As the girls were on the footpath on their way to the fallen tree they saw some boys bathing in the water two or three hundred yards off on the other side of the marsh. These boys saw the girls while the girls were on the footpath, but lost sight of them for a short time when they turned off. The boys dressed quickly and came up
C as soon as they could after the girls to the fallen tree, there they found prisoner lying down after his exposure of his person to the girls. The girls were there also. These boys saw nothing improper, as the prisoner had turned round on their approach, and was lying on his stomach. When the prisoner and the girls turned off from the footpath towards the fallen tree they were, legally speaking, trespassing, but all persons who desired to do so were in the habit of going on to the marsh,
D and no one interfered with them or hindered them, or made objection.

The question for the court was whether on the facts the jury were justified in finding that the prisoner exposed himself indecently in a "public place."

F. J. Smith for the prisoner.

LORD COLERIDGE, C.J.—I am of opinion that in this case the conviction
E must be affirmed. This is an indictment at common law, apart from any statute, which charges the prisoner with the misdemeanour of indecently exposing his person to divers liege subjects of the Queen in a certain open and public place, to wit, a marsh in the parish of Northfleet. The offence undoubtedly was committed before seven or eight girls together, and the sole question is whether on the facts which are stated, the jury were justified in finding that the prisoner had indecently
F exposed himself in a public place.

The evidence is, that the offence was committed on a grassy spot on private land between two rows of trees, where the indecent act could not be seen from the footpath which led near to the spot; it was committed in a place to which the public had no legal right of access. Still they had always been in the habit of going upon this marsh, and no one interfered with them or hindered them, or
G made any objection. The question is whether, under these circumstances, in a place thus described, this indecent exposure was an indecent act committed in a public place.

Counsel for the prisoner has been asked by me several times during the course of the argument, whether he can define either affirmatively or negatively, in a matter of this kind, what is a public place. He has not given us any affirmative
H definition, and has been disposed to contend that, in no place where there is a collection of persons, and I suppose he must go so far as to say a collection of however many persons, if there is no legal right on the part of those persons to be in such place, can a person who is guilty of an indecent act in the presence of the people assembled be found guilty of the misdemeanour of indecently exposing himself in a public place.

I I am of opinion that such a negative argument as this will not hold good, and that it is sufficient to show that the place is such a place as this marsh, to which the public have access, though they have no legal right of access thereto. In my opinion, the offence is complete, as against public morality, if it is committed in any place where an assembly of the public is collected. There is a difficulty to my mind certainly in giving an affirmative definition as to what is a public place, but I am by no means certain that the publicity of the spot where the offence takes place has anything to do with it. This, however, is clear, that what is a public place will vary from time to time; that is to say, that a place may be a

public place at one time for the purpose of having an offence committed in it, and, A
may not be a public place at another time for that purpose. The question is,
whether at the time the offence is committed the place is a public place in the
natural and ordinary sense of the term.

In *R. v. Crunden* (1) M'DONALD, C.B., points out in a short and, if I may say so, B
good judgment, the obvious sense of what I have been endeavouring to give as
my opinion. There it appeared that on a Sunday afternoon the defendant had
bathed opposite the East Cliff at Brighton, undressing and dressing himself upon
the beach; that till within a very few years of the commission of the offence there
were no houses near this spot, and when Brighton was a fishing village whole
regiments of soldiers used to bathe there at the same time; that at the time
the offence was committed there was a row of houses erected on the cliff, from
the windows of which the defendant might be distinctly seen as he undressed; C
and when Brighton grew up, that which was before a place where bathing could
take place without any observation became a place where it could not so take place,
and the Lord Chief Baron says (2 Camp. at pp. 90, 91):

"Nor is it any justification that bathing at this spot might a few years ago
be innocent. For anything that I know a man might a few years ago have
harmlessly danced naked in the fields beyond Montague House, but it will D
scarcely be said by the learned counsel for the defendant that anyone might
now do so with impunity in Russell Square. Whatever place becomes the
habitation of civilised men, there the laws of decency must be enforced."

That appears to be exceedingly good sense, and to be a guiding statement of the
law which may fully guide us in this case. Here is a place which persons, though E
they may be legal trespassers, do go upon, and no one interferes with them.
In a place, therefore, where the public can go without interference, a man takes
seven or eight little girls and exposes himself to them. I am of opinion that the
prisoner exposed himself indecently in a public place, and that it was not necessary
in the present case to prove that the place in which he committed this offence was
a place to which the public had a legal right of access. It was clearly a place F
where an indecent act took place in the presence of several persons, and, in my
opinion, the conviction must be affirmed.

GROYE, J.—I am of the same opinion. Counsel for the prisoner has contended,
and in fact has been obliged to contend, that, in order that a place may be a public
place, it must be a place to which the public have a legal right to go. The only case G
which at all supports such a contention is *Turnbull v. Appleton* (2), but that does
not go so far as to say that, had the statute there not contained the words

"in any open place to which the public have or are permitted to have access,"
the locus in quo would not have come within the words "open and public place"
in the statute. There it was held that under the words "place to which the public
are permitted to have access" which were imported into a former statute, an H
infringement of the statute had taken place. It is said that there would have
been some difficulty had those words been omitted, and the words in the previous
statute had been relied upon, namely, "any street, road, highway, or other open
and public place"; and that "any open and public place" would then have been
ejusdem generis with "any street, road, or highway." But even then it would
not follow that the words "public place" when standing alone must necessarily I
mean a place to which the public have a right to go. Do they not mean a place
which is public, and open to the public, whether as of right or not? It is found
in the Case that persons going to this place were legally trespassing, but it is also
found that no one ever interfered with them; and does not that come within the
plain meaning of the words "open and public place?" Whether it does or does
not is, to my mind, a question of fact, and here this is found to have been an
open place, round which there was nothing in the shape of an enclosure to sever
it from the general publicity of the marsh.

A Unless, therefore, there is some decision limiting an open and public place to a place to which the public have a right to go—and none has been cited to us—I am of opinion that this case comes within the ordinary and reasonable meaning of the principle which makes it a misdemeanour to outrage public decency and morality, and that the conviction was right.

B **HUDDLESTON, B.**—I am of the same opinion. It must be remembered that this is an indictment for a nuisance, and the principle is well established which is laid down in BLACKSTONE'S COMMENTARIES and in HAWKINS' PLEAS OF THE CROWN, viz., that whatever openly outrages decency, and is injurious to public morals, is a common nuisance, and indictable as a misdemeanour at common law.

C In this case the indictment has, in accordance with this general principle, alleged that the act was done in a certain public and open place. I agree with the Chief Justice that it is not clear that an act of indecency is not an offence if it is committed before a number of persons, even if the place in which it is committed is a private place. But here the question is whether, it having been found that the place was open, and that all persons who desired to do so were in the habit of going on to the marsh, and no one interfered with their doing so, the prisoner was guilty of an act of indecency in a public place. The marsh was perhaps a place where people ought not to go, but the prisoner himself took several people there, and in my opinion he made the place public so far as the commission of the offence was concerned, and was rightly convicted.

E **MANISTY, J.**—I am of the same opinion, and I only wish to state that I entirely agree that it is not necessary, in order to support a common law indictment for indecent exposure in an open and public place, to show that the place where the offence was committed was a place to which the public have a legal right of access.

F **MATHEW, J.**—I am of the same opinion, and I concur with my learned brothers in the opinion that this offence may be committed at common law without the selection of a place over which the public have rights. To my mind there was abundant evidence to justify the jury in finding that this was such a public place as was meant by the indictment, and I am, therefore, of opinion that the conviction should be affirmed.

Conviction affirmed.

Solicitors : *Dollman & Pritchard*, for *Hayward & Smith*, Rochester.

[*Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.*]

SUNDERLAND CORPORATION *v.* ALCOCK

[CHANCERY DIVISION (Kay, J.), April 29, May 1, 1882]

[Reported 51 L.J.Ch. 546; 46 L.T. 377; 30 W.R. 655]

Street—Private street works—Expenses—Charge on all owners of land until paid—Enforcement of charge—Limitation of time—Public Health Act, 1875 (38 & 39 Vict., c. 55), s. 257.

Under s. 257 of the Public Health Act, 1875, a charge on the land for expenses incurred by a local authority for paving, etc., is given against all the owners of the land until the money shall have been recovered.

Held: the time for the enforcement of the charge was not limited to the six months prescribed by s. 257 as the time within which summary proceedings for the expenses must be taken.

Notes. Sections 4 and 257 of the Public Health Act, 1875, were repealed by the Public Health Act, 1936, except in so far as material to the construction of the unrepealed provisions of the Act: see now the Highways Act, 1959, ss. 295 (1) and 264 (1), respectively. Section 150 of the Public Health Act, 1875, was replaced by s. 189 (1), (3), (4), s. 190, and s. 213 (1), (2), of the Highways Act, 1959.

Considered: *Manchester Corpn. v. Hampson* (1886), 35 W.R. 334.

As to making up of private streets, see 19 HALSBURY'S LAWS (3rd Edn.) 424 et seq.; and for cases see 26 DIGEST (Repl.) 588 et seq. For the Highways Act, 1959, see 39 HALSBURY'S STATUTES (2nd Edn.) 402.

Cases referred to:

- (1) *Tottenham Local Board of Health v. Rowell* (1880), 15 Ch.D. 378; 50 L.J.Ch. 99; 43 L.T. 616; 29 W.R. 36, C.A.; 26 Digest (Repl.) 606, 2612.
- (2) *Birmingham Corpn. v. Baker* (1881), 17 Ch.D. 782; 46 J.P. 52; 26 Digest (Repl.) 606, 2616.

Also referred to in argument:

- Shanklin Local Board v. Millar* (1880), 5 C.P.D. 272; 49 L.J.Q.B. 512; 42 L.T. 738; 44 J.P. 635; 29 W.R. 63, D.C.; 26 Digest (Repl.) 599, 2543.
- Cook v. Ipswich Local Board* (1871), L.R. 6 Q.B. 451; 40 L.J.M.C. 169; 24 L.T. 579; 35 J.P. 565; 19 W.R. 1079; 26 Digest (Repl.) 589, 2469.
- Bermondsey Vestry v. Ramsey* (1871), L.R. 6 C.P. 247; 40 L.J.C.P. 206; 24 L.T. 429; 35 J.P. 567; 19 W.R. 774; 26 Digest (Repl.) 562, 2287.

Action for declaration.

The plaintiffs, who, under the Public Health Act, 1875, were the urban sanitary authority for the town of Sunderland, about the beginning of 1877 gave notice under s. 150 to the owners of certain houses, requiring them to execute certain works in relation thereto. Those notices not having been complied with, the plaintiffs themselves executed the works, and, in December, 1877, they served on the persons who were the owners of the premises at the time of the completion of the works notices of the apportioned expenses of the works. No payment was made by the then owners, but the plaintiffs did not put in force their summary remedy to obtain payment. In 1879, the defendant became owner of the premises, and in 1880 the plaintiffs served on him a demand for payment of the apportioned expenses of the works. This demand not having been complied with, they brought their action claiming a declaration that the apportioned sum with interest from the date of demand from the defendant were a charge on the premises. By his statement of defence, the defendant submitted that he was not the owner of the premises when the works were completed, or at any time previous to the year 1879. He also pleaded purchase for value without notice.

By s. 4 of the Public Health Act, 1875:

“ ‘Owner’ means the person for the time being receiving the rack-rent of the lands or premises in connection with which the word is used, whether

A on his own account, or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack-rent."

By s. 150 :

B "Where any street within any urban district . . . is not . . . paved . . . to the satisfaction of the urban authority, such authority may, by notice addressed to the respective owners or occupiers of the premises fronting, adjoining or abutting on such parts thereof as may require to be . . . paved . . . , require them to . . . pave . . . the same within a time to be specified in such notice."

By s. 257 :

C "Where any local authority have incurred expenses for the repayment whereof the owner of the premises for or in respect of which the same are incurred is made liable under this Act . . . such expenses may be recovered, together with interest at a rate not exceeding £5 per cent. per annum, from the date of service of a demand for the same till payment thereof, from any person who is the owner of such premises when the works are completed for which such expenses have been incurred, and until recovery of such expenses and interest the same shall be a charge on the premises in respect of which they were incurred. In all summary proceedings by a local authority for the recovery of expenses incurred by them in works of private improvement, the time within which such proceedings may be taken shall be reckoned from the date of the service of notice of demand. . . ."

E *Higgins, Q.C., and Hamilton Humphreys* for the plaintiffs.
Rigby, Q.C., and Warmington for the defendant.

F **KAY, J.**—In this case the question, which has a little novelty in it, arises under the Public Health Act, 1875. The sections which are material are, s. 4, which defines "owner," s. 150 and s. 257. The defendant has pleaded that he was the purchaser for value without notice. However, at the Bar it is stated very fairly that that cannot be relied on, and that is not a matter, therefore, which I have to consider. Time having gone by—and I will assume in favour of the defendant that there has been some negligence on the part of the plaintiffs in allowing that time to go by within which the summary remedy might have been enforced against the persons who were owners of this property at the time when the works were completed—and assuming that they have been guilty of negligence in allowing that time to go by, the question which I have to determine is whether the plaintiffs, by such negligence, have lost their right to enforce their charge on the land. It is said that it would be a great hardship on the defendant, but I cannot understand how it could be any possible hardship if the purchaser had notice of the charge, or if, which comes to the same thing, he is unable to maintain his plea of purchase without notice. That is equivalent to saying that he had notice or is not in a position to show that he had not notice; and if a man buy a house with notice of a charge of this kind on it, I cannot see how there is any possible hardship in enforcing that charge against him, so that I think the case is free from any difficulty on the ground of its being a case of hardship.

H That being so, it comes to a question of what is the meaning of the Act. The argument on that point is this: Section 257 provides that the expenses, with interest, may be recovered from any person who is the owner of such premises when the works are completed, and that

I "until recovery of such expenses and interest the same shall be a charge on the premises in respect of which they were incurred."

In the first place, I am invited to read that as though it were not "until recovery," but "during such time as by the legislature is limited for the recovery by summary proceedings." It is a sufficient answer to that to say that those are not the words. It is not "during the time limited by the law for recovery" but "until recovery," which means, according to the language of the Act, "until they shall have been

recovered." At present that time has not expired, because the moneys have not been recovered, and, therefore, I do not think that that is the true construction of the section. I take the section to mean that an additional remedy is given, a remedy against the land, which, if everything else fails, may be asserted, and may give the local authority something in the nature of a mortgage, or an equitable charge at any rate, for the expenses which they have incurred. I think that the language of JAMES, L.J., in *Tottenham Local Board of Health v. Rowell* (1) warrants me in saying that. His Lordship is there commenting on another Act (Local Government Act, 1858, s. 62), which is expressed in language not quite the same, but similar. He says (15 Ch.D. at p. 391):

"There are the words 'that such expenses shall be a charge on the premises in respect of which they were incurred,' and the premises no doubt, mean the property which has been improved, and not any particular interest in the property."

Then he says:

"But in truth there is another view which is principally pressed upon us by the counsel for the respondents in this case. That view, as I think, may be summed up in this way: 'You had an election to retain the charge on the property, or to do some other thing by which you would get different remedies against different persons; that is to say, you had an election to allow the charge to remain or to declare the costs private improvement expenses.' I think Mr. Higgins was right in saying that it was an additional remedy, or another remedy."

That is a point which does not arise here, but JAMES, L.J., treats that as being in fact an additional remedy. That case was commented on in a later case, namely, *Birmingham Corpn. v. Baker* (2), and I refer to it only for the purpose of showing that, in this later case, SIR GEORGE JESSEL, M.R., had to consider this very s. 257 which is now before me. In construing that section, he relies on the words used by JAMES, L.J., in *Tottenham Local Board of Health v. Rowell* (1), treating his language, though not applied in fact to the same Act of Parliament, but applied to a similar Act, the words of which were rather different, as being entirely applicable to s. 257.

Therefore, I come on the whole to the conclusion that the meaning of s. 257 is to give a charge on the land against all the owners of the land until the money shall have been actually recovered; and it seems to me that mere negligence, if the plaintiffs were guilty of negligence in exercising this summary remedy for recovering the expenses in that way, is not enough to deprive them of their remedy to enforce this charge, which, according to the cases I have cited, is not limited in time as the summary remedy is limited in time. Accordingly, it seems to me that the plaintiffs are entitled to recover.

Declaration accordingly.

Solicitors: *Johnson & Weatheralls*, for *Snowball*, Sunderland; *Botterell & Roche*.

[Reported by F. GOULD, Esq., Barrister-at-Law.]

A

Re LENNOX. Ex Parte LENNOX

[COURT OF APPEAL (Lord Esher, M.R., Cotton and Lindley, L.JJ.), November 6, 7, 1885]

B

[Reported 16 Q.B.D. 315; 55 L.J.Q.B. 45; 54 L.T. 452;
34 W.R. 51; 2 T.L.R. 60; 2 Morr. 271]

Bankruptcy—Receiving order—Debt—Proof—Judgment debt—Judgment by consent—Power of court to go behind the judgment.

C

Upon the hearing of the petition of a judgment creditor for a receiving order to be made against the judgment debtor, the Bankruptcy Court has power to go behind the judgment and to inquire into the consideration for the judgment debt, not only at the instance of the trustee in the bankruptcy upon the question of the proof of the debt, but also at the instance of the debtor himself at the hearing of the petition, even when the debtor has consented to the judgment. If, at the hearing of the petition, facts are alleged and evidence tendered, which, if proved, would show that, notwithstanding the judgment, there is in truth no real debt, the court ought not to make the receiving order without inquiring into the truth of the allegations.

D

A petitioning creditor applied for a receiving order on the ground that the alleged debt had been established by a judgment to which the debtor had consented. When the matter came before the registrar the debtor disputed the debt and sought to prove that, although he had consented to the judgment, yet the petitioning creditor had obtained that judgment in respect of that which was no debt at all, and that the claim was founded on a mere fraud to which the petitioning creditor was a party. The registrar refused to hear the evidence thus offered.

E

Held: the Bankruptcy Court had the power to go behind the judgment and inquire into the truth of the debtor's allegations.

F

Re Onslow, Ex parte Kibble (1) (1875), 10 Ch. App. 373, applied.

Notes. The Bankruptcy Act, 1883, s. 7 (3) has been repealed and replaced by the Bankruptcy Act, 1914, s. 5 (3).

Explained: *Re Saville, Ex parte Beyfus* (1887), 35 W.R. 791; *Re Flatau, Ex parte Scotch Whiskey Distillers* (1888), 22 Q.B.D. 83. Distinguished: *Re Russell, Ex parte Guest* (1888), 37 W.R. 21. Approved: *Re Fraser, Ex parte Central Bank of London* [1891-4] All E.R.Rep. 939. Explained: *Re Easton, Ex parte Dixon* (1893), 10 Morr. 111. Approved: *Re Hawkins, Ex parte Troup*, [1895] 1 Q.B. 404. Distinguished: *Re Debtor* (1915), 113 L.T. 704. Referred to: *Re Vitoria, Ex parte Vitoria*, [1894] 2 Q.B. 387; *Re G. E. B.*, [1903] 2 K.B. 340; *Re Van Laun, Ex parte Chatterton*, [1907] 2 K.B. 23; *Re Newey, Ex parte Whitman* (1912), 107 L.T. 832; *Re a Debtor, Ex parte Petitioning Creditor*, [1916-17] All E.R.Rep. 797; *Re Debtor* (No. 229 of 1927), [1927] All E.R.Rep. 282; *Re Debtor*, (No. 21 of 1937), *Petitioning Creditor v. Debtor*, [1938] 2 All E.R. 356; *Re a Debtor* (No. 30 of 1956), *Ex parte the Debtor v. Harman*, [1957] 2 All E.R. 216.

H

As to receiving orders in general, see 2 HALSBURY'S LAWS (3rd Edn.) 313 et seq.; and for cases see 4 DIGEST (Repl.) 169 et seq. For the Bankruptcy Act, 1914, s. 5 (3), see 2 HALSBURY'S STATUTES (2nd Edn.) 334.

I

Cases referred to:

- (1) *Re Onslow, Ex parte Kibble* (1875), 10 Ch. App. 373; 44 L.J.Bcy. 63; 32 L.T. 138; 23 W.R. 433, L.JJ.; 4 Digest (Repl.) 124, 1109.
- (2) *Re Ritso, Ex parte Ritso* (1883), 22 Ch.D. 529; 52 L.J.Ch. 535; 48 L.T. 376; 31 W.R. 373, C.A.; 4 Digest (Repl.) 163, 1474.
- (3) *Re Prescott, Ex parte Prescott* (1840), 1 Mont.D. & De G. 199; 4 Jur. 852, Ct. of R.; 4 Digest (Repl.) 353, 3212.

Also referred to in argument :

Re Ridsdale, Ex parte Marson (1838), 3 Deac. 79; 3 Mont. & A. 444, Ct. of R.; 4 Digest (Repl.) 353, 3211.

Ex parte Bryant (1813), 1 Ves. & B. 211; 2 Rose, 1; 35 E.R. 83; 4 Digest (Repl.) 17, 89.

Re Blythe, Ex parte Banner (1881), 17 Ch.D. 480; 51 L.J.Ch. 300; 44 L.T. 908; 30 W.R. 24, C.A.; 4 Digest (Repl.) 355, 3227.

Bryan v. Child (1850), 5 Exch. 368; 1 L.M. & P. 429; 19 L.J.Ex. 264; 15 L.T.O.S. 232; 14 Jur. 510; 42 Digest 654, 635.

Re James, Ex parte Mudie (1842), 3 Mont.D. & De G. 66; 12 L.J.Bcy. 25; 6 Jur. 1093, Ct. of R.; 4 Digest (Repl.) 354, 3222.

Appeal from a receiving order made by Mr. Registrar HAZLITT against the debtor, Lord Henry Gordon Lennox, upon the petition of C. F. Emmott.

In August, 1884, the petitioning creditor, C. F. Emmott, commenced an action against the debtor. The writ in the action was specially endorsed with a claim of £1,500, made against the defendant as the maker of two promissory notes for £1,000 and £500 respectively, dated April 30, 1883, and payable twelve months after date to H. Williamson or his order, and by him endorsed to the plaintiff. The defendant obtained leave to defend the action, and part of the statement of defence was as follows :

"There never was any value or consideration for the making or paying of the said notes, or either of them, by the defendant, nor were they made for the purpose hereinafter mentioned, as the plaintiff always well knew. The plaintiff requested the said H. Williamson to endorse and hand over the said notes to him, in order that he (the plaintiff) might make use of the same for his (the plaintiff's) benefit and advantage, upon the express agreement and understanding, then verbally made and entered into by the plaintiff, that such use should be only temporary, and that he (the plaintiff) should retire and take up the notes, and the defendant should not be called upon to pay the same, and the plaintiff thereby induced the said H. Williamson to endorse and hand over the said notes to him for the purpose aforesaid, on the faith of such agreement and understanding, and not otherwise. There was no value or consideration for the endorsement of the said notes, or either of them, to the plaintiff; and he has always held the same without any value or consideration, and is bringing this action in breach of his said agreement and undertaking. The plaintiff, either in partnership with the said H. Williamson or otherwise, was engaged in acquiring and running horses in races, and in betting, and other transactions and enterprises on the turf, and any moneys which the said H. Williamson may have received from the plaintiff were so received for the purpose of being expended or employed by the said H. Williamson in and about the matters aforesaid, or otherwise, for the plaintiff and on his behalf, as his partner and agent, and were so applied. If there was any consideration for the endorsement by the said H. Williamson of the said notes, or either of them, to the plaintiff (which is denied), the same did not move from the plaintiff, and he was a stranger to such consideration."

The plaintiff joined issue on the defence, and alleged that he paid Williamson £1,450 for the said notes, and that the transaction was bona fide and without any notice of the facts alleged in the defence.

The action came on for trial on June 3, 1885, when the defence was withdrawn and the following order was made :

"At a sitting held at the Royal Courts of Justice on June 3, 1885, before CAVE, J., by consent it is ordered that the statement of defence and the pleadings herein be withdrawn, and that the defendant do pay to the plaintiff the sum of £1,600 and taxed costs. The defendant to have a month in which to pay the said amount."

A The defendant failed to make the payment, and on July 25, 1885, the plaintiff served him with a bankruptcy notice founded on the order of June 3. The defendant did not comply with the notice, and on Aug. 6 the plaintiff presented a bankruptcy petition against him founded on the judgment debt and on the failure to comply with the bankruptcy notice. The defendant gave notice to dispute the debt on the grounds set out above, and in support of these allegations tendered an affidavit
B made by the said H. Williamson. At the hearing of the petition the debtor's counsel proposed to cross-examine Emmott and to ask him questions tending to establish the truth of the allegations, and to show that, in spite of the order of June 3, no debt was really due to Emmott from the debtor. The registrar refused to allow the questions, holding that, under the circumstances, he could not go behind the order of June 3, and he therefore made a receiving order. The
C debtor appealed.

Winslow, Q.C., and A. A. Terrell for the debtor.

R. V. Williams for the petitioning creditor.

LORD ESHER, M.R.—In this case the authority and power of the Court of
D Bankruptcy is invoked on behalf of a judgment creditor to order a receiving order to be made against a judgment debtor, the effect of which would be that the judgment debtor would become a bankrupt.

The proceeding was taken under s. 7 of the Bankruptcy Act, 1883. The matter being thus before the registrar, it was admitted before him that the petitioning creditor had obtained a judgment against the debtor; but it was suggested on the
E part of the debtor that the receiving order asked for ought not to be made, on the ground that the alleged debt in respect of which the judgment had been obtained never really existed at all. It was said that the alleged debt was founded in fraud, and in fraud which was brought home to the petitioning creditor, and therefore neither in law nor equity did any debt exist. Affidavits were produced to the registrar tending to prove that the facts were as thus suggested; but he
F was of opinion that he could not properly pay any attention to such affidavits, for the reason that the judgment existed, and that he could not at that stage, and in an application founded upon the judgment, go behind that judgment to inquire into the circumstances of the debt.

The question for us is whether that view is right; and whether, if we are of opinion that view is not right, the circumstances are such as to make the case
G one which ought to be inquired into. Section 7 (3) of the Bankruptcy Act, 1883, is in these terms :

"If the court is not satisfied with the proof of the petitioning creditor's debt, . . . or that for other sufficient cause no order ought to be made, the court may dismiss the petition."

H In this case the proof offered is the judgment; but if the court is not satisfied with the proof it may dismiss the petition, or it may do so for other sufficient cause. It was argued that, notwithstanding those words, the court ought and was bound to be satisfied with the proof of a debt when that proof was a judgment obtained by consent; it was not pressed that the court would be bound to be so satisfied when the judgment was obtained by default, but it was urged that when
I the judgment was obtained by consent the court had no option, but was bound to be satisfied with that proof of the debt.

It seems to me that the question is not so much what are the rights and what has been the conduct of the debtor and creditor inter partes, but that the question rather is whether the Court of Bankruptcy ought to exercise its great power and authority—a power which be it remembered deals with all sorts and classes of debtors and creditors—when there are the strongest grounds for believing that no petitioning creditor's debt exists at all as a fact. The whole foundation for the receiving order, and for the application for it, is the petitioning creditor's debt.

It is not denied that at a subsequent state of the proceedings the inquiry which is now asked for must take place, the existence of the debt may be challenged by another creditor, and the facts will then have to be inquired into. If what is now stated in these affidavits is then found to be true, the judgment debt can no longer be considered as a debt, and the Court of Bankruptcy will then find itself in this position, that a receiving order making a man a bankrupt will have been made upon an alleged debt which turns out to have no existence at all. That seems to me to be a false position for the court to find itself in. It is no doubt true to say that, as far as the debtor himself is concerned, the position in which he finds himself is entirely due to his own fault; but, as I have said, the question does not in my mind depend upon the conduct of the debtor, and I think the court ought not to be forced to act when it may be that the whole foundation of its action will be cut away.

Therefore, the question being whether this inquiry should be allowed at the outset, and not only at a subsequent stage of the proceedings, I think that the facts may be inquired into at the first stage. *Re Onslow, Ex parte Kibble* (1), is a direct authority of the Court of Appeal for the proposition that, under some circumstances, a judgment debt may be inquired into at the instance of the debtor for the purpose of preventing an adjudication of bankruptcy. I think that decision is binding on this court, and is right in principle, and I think the principle is that the Court of Bankruptcy itself has a right to see that it is not put in motion upon a debt which does not in fact exist. What was done in *Re Ritso, Ex parte Ritso* (2), shows that the judges there acted upon this view, and I think that the same remark applies to *Re Prescott, Ex parte Prescott* (3); but so far as authority is wanted, I think the authority of *Re Onslow, Ex parte Kibble* (1), is sufficient. If this is so, it is not true to say that the mere fact of a judgment existing is sufficient to prevent the court going into an inquiry into the circumstances under which that judgment was obtained, and whether there is any real debt at the foundation of the judgment. I think the court may do so at the outset of the proceedings, and may do so at the instance of the debtor, for although it may be true that by consenting to the judgment the debtor is estopped everywhere else from saying that no debt was due, yet no such estoppel is effectual as against the Court of Bankruptcy. The consent was an act of the debtor as a party, and the court is not estopped by the conduct of the parties, and is entitled if it thinks fit, to inquire into the circumstances of the debt.

If that is so, I must now consider what was the state of things when this case was brought before the court. It cannot of course be doubted that a judgment is *prima facie* evidence of a debt, and that a judgment to which the alleged debtor has consented is far stronger evidence of the existence of a debt than a judgment which has merely passed by default. A judgment consented to is more than mere *prima facie* evidence—it is very strong evidence against him. But when allegations are brought forward which would in the opinion of the court, if proved, make out a sufficient case against the judgment, then I think the court is entitled, and, indeed, bound to inquire into them. Circumstances may be proved which may show that the judgment ought to be disregarded in bankruptcy, but what those circumstances must be in each case I do not venture definitely to say; they must vary in different cases. If, when the case is first before the court, the registrar is of opinion that, even if all the facts alleged were proved, they would not be sufficient to induce him to set aside a judgment obtained by consent, he might stop there and say that it would be useless for him to hear the evidence, because even if it was all as alleged he could not act upon it. But if the circumstances alleged and offered in evidence are such as, if proved, to clearly show that no debt at all existed, and still more if they would show that the alleged debt was founded in a fraud, and in a fraud known to the petitioning creditor and acted on by him, then it seems to me that it would be monstrous to say that the Court of Bankruptcy must then stop and say that although it was alleged that these facts were capable of proof—that although the court itself entertained the strongest suspicion that

A there never was any debt, yet the court was bound, as matter of law, to say that it was satisfied with the judgment, and that the receiving order must be made.

Therefore, I am of opinion that where such allegations are made the court can inquire into them at the outset of the proceedings. If the proof of the allegations fail—if something less is proved, the debtor must of course take the consequences; the court will enter upon the inquiry with a very strong *prima facie* impression
B against the debtor in that he has consented to a judgment against him, and I should say that the court ought to lean very much in favour of such a judgment.

But that is not the whole question; the question is whether, assuming it to be proved to the satisfaction of everyone that there never was a debt, the court must enforce the judgment because the debtor has consented to it. I think the Court of Bankruptcy is not to be made an instrument to act upon an alleged debt when
C in truth and in fact no such debt ever existed. Therefore I think that the registrar in this case, upon such allegations as were here made and offered in evidence before him, ought not to have said that he was unable to enter upon such an inquiry, and was bound by the judgment because it was a judgment by consent. I think he should have heard the evidence, and have determined the case upon the result of that evidence. Therefore the case must be remitted to the registrar
D in order that such an inquiry may be made. At that inquiry I think it is plain that the debtor must come forward as a witness, if he does not I should think the court will scout the whole case. Both the debtor and Mr. Williamson must be called, and then a very sharp and decisive inquiry can be made into the truth of these allegations.

E **COTTON, L.J.**—This is a case of some importance. The petitioning creditor asks that a receiving order may be made on the ground that he has a debt of £1,600 against the debtor which had been established by a judgment to which the debtor consented. When the matter was before the registrar objections were taken to the debt, and the debtor sought to prove that, although he had not defended the action and had consented to the judgment, yet the petitioning creditor
F had in fact obtained the judgment in respect of that which was no debt at all, and that the claim was founded on a mere fraud, to which the petitioning creditor himself was a party. The registrar was of opinion that he could not hear the evidence thus offered, though the facts alleged would, if proved, show that there never was any debt in respect of which the judgment could properly have been obtained. The question for our decision is, whether the registrar ought to have
G allowed that inquiry to proceed.

It has been long established that a trustee in a bankruptcy can, as representing the creditors of the bankrupt, go behind a judgment which is put forward by a creditor as *prima facie* proof that the debt is due, and may show that in fact the judgment does not establish the debt. The trustee under the bankruptcy may do this upon the principle that, whatever may be the circumstances with reference to the judgment,
H no act of the debtor—collusion, improper compromise or what not—ought to prejudice the rights of the other creditors, the object being to distribute the assets among the honest and bona fide creditors of the bankrupt. That principle, however, does not apply here, because we are not in this case dealing with a question of proof, but we are asked at the instance of the debtor to enter into the question of whether there ought to be any bankruptcy at all.

I The principle, therefore, on which the trustee, as representing all the creditors, has been allowed to go behind a judgment has no application, and in the absence of any authority upon the point I should have felt very great difficulty about it. But *Re Onslow, Ex parte Kibble* (1), is an authority of the Court of Appeal for this proposition, that, for the purpose of deciding whether or not an adjudication of bankruptcy ought to be made, the court may entertain the question whether a judgment is sufficient evidence of a debt, and may satisfy itself that the judgment was obtained in respect of a transaction with an infant, and that the facts do not really establish any debt at all, in spite of the existence of the judgment. It is true

that in that case the judgment had been obtained by default, but there was no suggestion of any concealment, or want of notice, or anything which could raise an equity against the judgment. I think that the principle of that case must have been the principle which was referred to by the Master of the Rolls, viz., that the court is not bound to make a receiving order, but may inquire into all the facts, as the Bankruptcy Act, 1883, s. 7, shows. The court may dismiss the petition,

"if it is not satisfied with the proof of the petitioning creditor's debt, or of the act of bankruptcy, or that for other sufficient cause no order ought to be made."

Those words are wide, and it seems to me that the court has a discretion, even when the debt is established and the act of bankruptcy is established.

What then is to be the guide of the court in the exercise of its discretion in circumstances such as these? I think that, if the court is of opinion that it is asked to make a receiving order in respect of something which, when it came to be examined in the course of the bankruptcy, would be found to give the claimant no right of proof in the bankruptcy, and no right to come in as a creditor under the bankruptcy, then the court ought not to make any receiving order. In the present case the registrar has refused to inquire into facts which, if proved, would defeat the debt and destroy any right in the claimant to prove in the bankruptcy. I think that we ought not, upon the principle which I have stated, to put into operation the powers of the Bankruptcy Court without requiring that these allegations shall be inquired into. It may or may not be that they are true; we express no opinion upon what will be the result of the inquiry, but I quite agree with the Master of the Rolls that it is idle to suppose that this judgment will be set aside unless the appellant will submit himself to examination. All we say is that, in the face of these allegations, which, if proved, would clearly show that there is in fact no debt, there ought to be an opportunity of investigation, and no receiving order ought therefore to be made at present. The order must be reversed, and the matter must go back to the registrar.

LINDLEY, L.J.—I am of the same opinion. If we look at the case only as between the parties, that is as between the judgment creditor and the judgment debtor, I am not aware of any grounds upon which the judgment debtor would be entitled to have this judgment set aside or execution upon it stayed. I concede that most fully. I see no legal or equitable ground for such a course. But I think it by no means follows as a matter of course that a receiving order must be made. Bankruptcy proceedings are not mere matters of form; they are a very serious matter, not only to the debtor himself but to all his creditors, and it appears to me that, before the machinery of the Bankruptcy Court is set in motion, the court has not only the right but the duty to see at whose instance it is that it is asked to act. I think this can be gathered from the express language of s. 7 of the Bankruptcy Act, 1883, and *Re Onslow, Ex parte Kibble* (1), is conclusive on the point. In that case, **MELLISH, L.J.**, seemed to have this very point in his mind, for he said (10 Ch. App. at p. 378):

"The statute [he is speaking of the Infants' Relief Act] in effect places a debt contracted during infancy in the same position as a gambling debt; and a bill of exchange given for a gambling debt cannot form the ground of an action. Even if the debtor does not plead that it was a gambling debt and lets the judgment go against him, still the Court of Bankruptcy will go behind the judgment and declare the debt void."

What does that mean? It means, I think, that though the debtor himself could not go behind the judgment, yet that the court will not allow bankruptcy proceedings to be had recourse to for the purpose of enforcing debts which are fictitious and not real, even though they are vouched for by the judgment of a court. When the matter comes to be inquired into the judgment debtor must get out of this consent judgment as best he can, but the registrar has refused to go into the matter at all. I do not say whether the allegations are true or not—I do not know; but

A if they are true they show that in truth no debt at all exists, and if true it would be wrong, I think, to allow bankruptcy proceedings to be taken. The matters must be investigated, and meanwhile the receiving order must be set aside. The costs must abide the result of the investigation.

Appeal allowed.

B Solicitors: *H. W. Chatterton; C. F. Emmott.*

[*Reported by A. A. HOPKINS, ESQ., Barrister-at-Law.*]

HARVEY v. CROYDON UNION RURAL SANITARY AUTHORITY

D [COURT OF APPEAL (Lord Coleridge, C.J., and Cotton, L.J.), January 24, February 13, 1884]

[Reported 26 Ch.D. 249; 53 L.J.Ch. 707; 50 L.T. 291;
32 W.R. 389]

Judgment—Order—Consent order—Withdrawal of consent.

E Where consent to an order has been given by counsel duly authorised with full knowledge of all the facts and there has been no mistake, that consent is absolutely binding and cannot afterwards be withdrawn.

Notes. Considered: *Wiedegemann v. Walpole* (1889), 53 J.P. 614; *Lewis's v. Lewis* (1890), 45 Ch.D. 281. Followed: *Wedge v. Panter* (1908), 52 Sol. Jo. 241. Referred to: *Re West Devon Great Consols Mine* (1888), 38 Ch.D. 51; *Neale v. Gordon Lennox*, [1902] 1 K.B. 838; *Shepherd v. Robinson*, [1919] 1 K.B. 474.

F As to judgment by consent, see 22 HALSBURY'S LAWS (3rd Edn.) 765, 766; and for cases see 3 DIGEST (Repl.) 383.

Cases referred to:

(1) *Furnival v. Bogle* (1827), 4 Russ. 142; 6 L.J.O.S.Ch. 91; 38 E.R. 758; 3 Digest (Repl.) 383, 351.

G (2) *Holt v. Jesse* (1876), 3 Ch.D. 177; 46 L.J.Ch. 254; 24 W.R. 879; 3 Digest (Repl.) 382, 339.

Also referred to in argument:

Davis v. Davis (1880), 13 Ch.D. 861; 49 L.J.Ch. 241; 41 L.T. 790; 3 Digest (Repl.) 382, 340.

H *A.-G. v. Tomline* (1877), 7 Ch.D. 388; 47 L.J.Ch. 473; 38 L.T. 57; 26 W.R. 188. *Rogers v. Horn* (1878), 26 W.R. 432.

Cook v. Wright (1861), 1 B. & S. 559; 30 L.J.Q.B. 321; 4 L.T. 704; 7 Jur.N.S. 1121; 121 E.R. 822; 12 Digest (Repl.) 223, 1660.

Newbiggin-by-the-Sea Gas Co. v. Armstrong (1879), 13 Ch.D. 310; 49 L.J.Ch. 231; 41 L.T. 637; 28 W.R. 217, C.A.; 42 Digest 64, 566.

I *Re Hull and County Bank, Trotter's Claim* (1879), 13 Ch.D. 261; 41 L.T. 537; 28 W.R. 125, C.A.; 3 Digest (Repl.) 385, 369.

Craven v. Stanley, 20 Sol. Jo. 542.

Mullins v. Howells (1879), 11 Ch. 763; 48 L.J.Ch. 679; 16 Digest (Repl.) 57, 531.

Appeal by the plaintiff, Harvey, from a decision of PEARSON, J., that the defendants, the Croydon Union Sanitary Authority, were at liberty to withdraw their consent to an order at any time before the order was drawn up.

On Aug. 4, 1883, the writ in the action was issued, and on Aug. 8, 1883, the

plaintiff moved for an injunction to restrain the defendants, until the trial or further order, from pulling down, demolishing, or otherwise interfering with the whole or any part of two houses belonging to the plaintiff. An interim order was made by consent in the terms of the motion, which was stood over until Aug. 15, 1883. That interim order was completed, and when the motion was brought on for further hearing before the vacation judge, terms having been previously arranged between counsel for both sides, a consent order was taken by which the hearing of the motion was treated as the trial of the action. The order included a perpetual injunction against the defendants, until the terms of the Towns Improvement Act, 1847, should have been complied with, an inquiry as to damages, and a direction that the defendants should pay all costs up to and including the hearing, the costs of the inquiry being reserved, with liberty to apply. No facts were opened to the court.

An appointment was made to attend to settle the terms of the order, but before it was attended the defendants' solicitors, on Aug. 24, 1883, wrote to the plaintiff's solicitors stating that the instructions on which their counsel had consented to the order were given under a misapprehension, and that they thereby formally withdrew their consent. Correspondence ensued, in which the plaintiff's solicitors inquired what the misapprehension was under which the defendants' solicitors had consented to the order, but the latter did not give any explanation, and adhered to their letter withdrawing their consent. In these circumstances the registrar refused to proceed without the direction of the court. On Dec. 14, 1883, the plaintiff applied to PEARSON, J., for an order directing the registrar to proceed with the drawing up of the order of Aug. 15, 1883, and that the defendants be ordered to pay the costs of the motion. PEARSON, J., held that, as the case had not been opened to the judge, the defendants were at liberty to withdraw their consent at any time before the order had been drawn up, and refused the application. The plaintiff appealed.

Cozens-Hardy, Q.C., and *Swinfen Eady* for the plaintiff.

Lumley Smith, Q.C., and *Henderson* for the defendants.

COTTON, L.J.—As the question relates to the practice of the Chancery Division, LORD COLERIDGE, C.J., has requested me to deliver judgment first. PEARSON, J., has come to the conclusion that it was the settled practice in that Division that a consent given by counsel with his client's authority could afterwards be withdrawn simply at the will of the person who had given it. The judge did not go into the question whether the consent had, in this case, been given under any mistake; of course, if there had been a mistake the consent would not be binding. It is a different question, however, whether it can be withdrawn when there has been no mistake and it is a point on which counsel is entitled to give his consent.

So far as I know, this is the first time the question has been brought before the Court of Appeal. No doubt SIR GEORGE JESSEL, M.R., did consider that a consent so given could be withdrawn, even though there had been no mistake, and at first I thought, from what he had said, that such had been the settled practice. However, on looking at the cases referred to by him, I have come to a different conclusion. In my opinion, independently of the question what the settled practice was, it would be wrong if a party had once given his consent, and there had been no error, to allow him to withdraw it. Is the court, then, bound by authority to hold differently? There are, no doubt, cases before SIR GEORGE JESSEL, M.R., in which a consent was allowed to be withdrawn; but there are many other cases in which the court has refused to allow this to be done. Undoubtedly in those cases there had been something in the nature of a compromise, and that might possibly be a reason for the decisions. But what LORD LYNTHURST said in *Furnival v. Bogle* (1) was very strong; and in SETON ON DECREES (4th Edn.), p. 1536, *Holt v. Jesse* (2) is referred to as deciding that if a man knew all the material facts, and there had been no mistake, he could not change his mind and withdraw the consent which he had given.

A For the future the rule must be taken to be that if counsel, with the authority of his client, once gives a consent, and there is no mistake, the consent cannot afterwards be withdrawn. In the present case I think that PEARSON, J., was wrong, on the facts before him, in allowing the defendants to withdraw their consent, although, perhaps, in the state of the authorities, he would have had difficulty in deciding differently. The Court of Appeal, however, is not bound by the authorities

B which might be binding on PEARSON, J. I am glad to find that the practice which I have thus laid down is the same as that which has prevailed in the Queen's Bench Division.

C LORD COLERIDGE, C.J.—I am glad that COTTON, L.J., should express his opinion first on a point of practice in the Chancery Division with which I am not familiar. It may well have been that the practice of the Chancery Division has differed from that of the Queen's Bench Division. According to my experience in the Queen's Bench Division, a consent once given under the signature of counsel duly authorised, and with a full knowledge of all the facts, is absolutely binding, and cannot be afterwards withdrawn. I agree in the view that this is the right practice, and I think it is in the interest both of counsel and of their clients that this should be so. I am extremely glad to find that in the view of the lord justice

D the practice of the Chancery Division is the same.

Appeal allowed.

Solicitors: *Corsellis, Son & Mossop; Henderson & Buckle*, for *A. G. Blake*, Croydon.

E [Reported by W. C. BRIS, Esq., Barrister-at-Law.]

F FERNS v. CARR

[CHANCERY DIVISION (PEARSON, J.), January 21, 1885]

[Reported 28 Ch.D. 409; 54 L.J.Ch. 478; 52 L.T. 348; 49 J.P. 503;
33 W.R. 363; 1 T.L.R. 220]

G Solicitor—Articled clerk—Death of master during apprenticeship—Return of premium.

C., a solicitor practising by himself without any partner, took the plaintiff as an articled clerk for a term of five years at a premium of £150. During that period C. died. On a claim by the plaintiff for the return of a proportionate part of the premium from C.'s executors,

H

Held: there was no power in the court on such a contract to order any part of the premium to be returned.

Whincup v. Hughes (1) (1871), L.R. 6 C.P. 78, applied.

Hirst v. Tolson (2) (1850), 2 Mac. & G. 134, not applied.

Re Harper, Ex parte Bayley (3) (1829), 9 B. & C. 691, distinguished.

I **Notes.** Distinguished: *Covell v. Scamell* (1910), 103 L.T. 535.

As to service under articles, see 36 HALSBURY'S LAWS (3rd Edn.) 24 et seq.; and for cases, see 42 DIGEST 23 et seq.

Cases referred to:

(1) *Whincup v. Hughes* (1871), L.R. 6 C.P. 78; 40 L.J.C.P. 104; 24 L.T. 76; 19 W.R. 439; 34 Digest (Repl.) 332, 2531.

(2) *Hirst v. Tolson* (1850), 2 H. & Tw. 359; 2 Mac. & G. 134; 19 L.J.Ch. 441; 14 Jur. 559; 47 E.R. 1721, L.C.; 42 Digest 35, 162.

- (3) *Re Harper, Ex parte Bayley* (1829), 9 B. & C. 691; 4 Man. & Ry.K.B. 603; 109 A
E.R. 257; 42 Digest 35, 164.
- (4) *Ex parte Prankerd* (1819), 3 B. & Ald. 257; 10 E.R. 658; sub nom. *Ex parte Fisher*, 1 Chit. 694; 42 Digest 35, 167.

Also referred to in argument :

Atwood v. Maude (1868), 3 Ch. App. 369; sub nom. *Attwood v. Maude*, 16 W.R. 665, L.C. & L.J.; 42 Digest 383, 4297.

Webb v. England (1860), 29 Beav. 44; 30 L.J.Ch. 222; 3 L.T. 574; 25 J.P. 292; 7 Jur.N.S. 153; 9 W.R. 183; 54 E.R. 541; 42 Digest 437, 89.

Re Thompson (1848), 1 Exch. 864; 154 E.R. 369; 42 Digest 35, 160.

Adjourned Summons for judgment in the terms of the statement of claim upon the admissions in an action to enforce the return of a proportionate part of a premium paid by the plaintiff for articles to a solicitor who died before the expiration of the term fixed by the articles.

On Nov. 16, 1880, H. J. Carr, a solicitor carrying on business without a partner, took the plaintiff, H. C. Ferns, into his office as articulated clerk for a term of five years from that date, on a payment of £150 by way of premium. In the articles signed, Carr covenanted "for himself, his heirs, executors, and administrators," that he would, by the best ways and means he might or could, and to the utmost of his skill and knowledge, teach and instruct, or cause to be taught and instructed, the plaintiff in the practice and profession of a solicitor, which Carr then did, or at any time thereafter during the term use or practise. The plaintiff continued with Carr, in due performance of his duties, until December, 1883, when Carr died. The plaintiff claimed to enforce the return of a proportionate part of the premium from Carr's executors.

D. Sturges for the plaintiff.

Ingle Joyce for the solicitor's executors.

PEARSON, J.—This is an application by an articulated clerk for the return to him of part of the premium paid by him on his apprenticeship to a solicitor named Carr. There have been a good many decisions on the subject, and it seems to me that, in some of the older cases, courts of law have interfered between solicitor and clerk to determine whether or not part of the premium ought to be returned.

One of the earliest cases cited is *Ex parte Prankerd* (4), in which case the apprentice had run away and the solicitor had refused to take him back. ABBOT, C.J., there says (3 B. & Ald. at p. 258) :

"It is extremely convenient that, in cases like the present, the court should exercise a summary jurisdiction for adjusting disputes between officers of this court and their clerks. It appears to have been exercised by us and by our predecessors; and I think we ought not to disturb so useful a practice. This is very different from the case cited from the Exchequer. Our jurisdiction here depends on the authority of the court over its own officers. This rule must therefore be discharged."

BAYLEY, J., says (*ibid.*) :

"The application on the part of the parents of the apprentice was most reasonable; and I think that there is no doubt that we have jurisdiction in the matter. If so, it is not suggested that the sum ordered by the master to be returned is not a proper one."

The next case cited to me was *Re Harper, Ex parte Bayley* (3). There, the clerk had been articulated to two attorneys, partners, one of whom had died, and LORD TENTERDEN, C.J., says this (9 B. & C. at p. 691) :

"I am of opinion that this case is not to be decided by any strict rule of law. The court exercises a jurisdiction over attorneys, and that is to be exercised according to law and conscience, and not by any technical rules; and considering the circumstances of this case, and the effect of the Act of Parliament

A which prohibits attorneys from having more than a certain number of clerks, we think that the report should be confirmed. This clerk was bound to one only in name, but in reality and in conscience he was bound to the two: he was to be instructed by the two, who were in partnership together; and they caused him to be bound to one, instead of binding him to the two, in order to satisfy the Act of Parliament, and enable the partners to have that number
B of clerks which they could not otherwise have had if Bayley had been bound to the two instead of one of them. In conscience, it appears to me to be a binding to the two; the premium was paid to the two; and this one being dead, and the other having the full number of clerks which the law allows him, and not being able to retain this young man in his service, and instruct him and give him the benefit for which he paid the money, I think he who is the survivor is bound to refund whatever is to be refunded."

C There the court thought that, though the binding was expressed to be to one only, the apprentice was, nevertheless, really bound to two, and that, therefore, there was a person, a partner, surviving who was able and bound to fulfil the contract, except so far as he might be unable to do so by reason of the rule as to the number of clerks. That case, however, does not govern the present, as there is here no partner
D to fulfil the engagements entered into by the original contracting party.

I pass over the other cases which have been cited to me, and come to *Hirst v. Tolson* (2). The circumstances of that case are hardly distinguishable from those of the present, and, if the decision had not been unfavourably commented on in a later case, I should have to be bound by it. But it was most carefully considered
E in 1871 by the judges of the Court of Common Pleas in *Whincup v. Hughes* (1). They said, with all deference to LORD COTTENHAM, L.C., that he was wrong in assuming that, in a case of that kind, there was any debt at law. And if there is no debt at law I think that it would be very difficult to say that there is any in equity. If, therefore, there is no debt in equity, I am thrown back on the paternal and masterful jurisdiction which the court is said to possess and exercise over attorneys. I must say that I do not quite understand how that jurisdiction has
F anything to do with this case. No doubt the court has a summary jurisdiction over attorneys, as being its officers; and it can exercise that jurisdiction over them *brevi manu* for certain purposes, in a manner beneficial both to them and their clients. But I cannot see that the court has any jurisdiction to say that a contract between a solicitor and another person is to be construed in any other way than
G a contract between other people, or that a solicitor can be ordered to do something which he is not legally or equitably bound to do, merely because the court thinks that it would be more honourable. If I were to hold this to be so, I should be assuming for the court a code of honour which is not needed, and be making the rules of the court to vary, as LORD SELDEN once said, "according to the length of the Chancellor's foot."

H In *Whincup v. Hughes* (1), the court held that the contract came to an end on the death of the master. They said that it was only a contract for the joint-lives of those two persons, and that, unless there was a total failure of consideration, there was no ground of action; no action would lie for a partial failure. That is a recent decision. It appears to me to be a reasonable one. And, having regard to the principles which now obtain as to the fusion of law and equity, I think that
I I ought to follow it rather than the decision of *Hirst v. Tolson* (2).

Further, even if I were to assume to myself this additional jurisdiction, and disregard the strict meaning of the words of the contract, I should scarcely be prepared to say that any part of the premium ought to be returned; at any rate only a very small part. The premium paid was £150 for five years' service. For three of those five years the plaintiff has had the benefit of the solicitor's instruction, and, if he has derived as much benefit as he ought, he would by this time be of considerable value to the solicitor for the remaining two years. I doubt whether, on a fair view of the case, anything is properly returnable, except perhaps the

smallest possible sum. Under all these circumstances, though not without some doubt, on account of LORD COTTENHAM's decision, I hold that there is no power in the court on such a contract to hold that any action will lie, or that the court can order any part of the premium to be returned.

Solicitors: *Hamlin, Grammer & Hamlin*, for *B. C. Pullan*, Leeds; *Few & Co.*

[Reported by H. G. WILLINK, Esq., Barrister-at-Law.]

MAUDE AND OTHERS v. BAILDON LOCAL BOARD

[QUEEN'S BENCH DIVISION (Pollock and Huddleston, BB., and North, J.), March 6, 1883]

[Reported 10 Q.B.D. 394; 48 L.T. 874; 47 J.P. 644]

Street—Repair—Public Health Acts—Expenses—Recovery—Finding of fact by justices that way not “street”—Public Health Act, 1875 (38 & 39 Vict., c. 55), s. 4, s. 150.

By s. 4 of the Public Health Act, 1875: “In this Act, if not inconsistent with the context, the following words . . . have the meanings hereinafter respectively assigned to them . . . ‘street’ includes any highway . . . and any road lane foot-way . . . whether a thoroughfare or not.” By s. 150: “Where any street within any urban district (not being a highway repairable by the inhabitants at large) . . . is not sewered levelled paved metalled flagged channelled and made good . . . to the satisfaction of the urban authority,” they may give notice to the owners of the adjoining premises to sewer, etc., the street, and in default of compliance with such notice the urban authority may execute the works themselves and recover the expenses from the adjoining owners in a summary manner. An urban authority having taken summary proceedings to recover from the adjoining owners the expenses of sewerage, etc., a road within their district which was not repairable by the inhabitants at large, the justices found as a fact that the road was not a street, but considered themselves bound by the definition in s. 4.

Held: the justices were not bound by the definition in s. 4 to find that the road was a street, and, accordingly, the adjoining owners were not liable.

Notes. The Public Health Act, 1875, s. 4 and s. 150, have been repealed. See now the Highways Act, 1959, s. 295 (1) and ss. 189, 190 and 213 (1), (2).

Doubted: *Portsmouth Corpn. v. Smith* (1883), 13 Q.B.D. 184. Considered: *R. (on the prosecution of Cleckheaton Local Board of Health) v. Burnup* (1886), 50 J.P. 598; *Ellis v. L.C.C.* (1892), 67 L.T. 558. Referred to: *R. v. Sheil* (1884), 50 L.T. 590; *Jowett v. Idle Local Board* (1887), 57 L.T. 928; *Richards v. Kessick* (1888), 57 L.J.M.C. 48; *Fenwick v. Croydon Union R.S.A.*, [1891] 2 Q.B. 216.

As to the meaning of “street,” see 19 HALSBURY'S LAWS (3rd Edn.), 399, 400; as to making up streets, see *ibid.*, 424 et seq.; and for cases see 26 DIGEST (Repl.) 536 et seq. For the Highways Act, 1959, ss. 189, 190, 213 and 295, see 39 HALSBURY'S STATUTES (2nd Edn.), 612, 613, 638, 706.

Case referred to:

(1) *R. v. Dayman* (1857), 7 E. & B. 672; 26 L.J.M.C. 128; 29 L.T.O.S. 125; 22 J.P. 39; 3 Jur.N.S. 744; 5 W.R. 578; 119 E.R. 1395; 26 Digest (Repl.) 542, 2149.

A Also referred to in argument :

R. v. Fullford (1864), Le. & Ca. 403; 33 L.J.M.C. 122; 10 L.T. 346; 28 J.P. 357, 10 Jur.N.S. 522; 12 W.R. 715; 9 Cox, C.C. 453, C.C.R.; 26 Digest (Repl.) 541, 2145.

R. v. Kershaw (1856), 6 E. & B. 999; 26 L.J.M.C. 19; 2 Jur.N.S. 1139; 2 W.R. 53.
Coverdale v. Coventry (1878), 3 Q.B.D. 376; 47 L.J.Q.B. 446; 38 L.T. 687; affirmed, 4 Q.B.D. 104; 48 L.J.Q.B. 128; 40 L.T. 88; 43 J.P. 268; 27 W.R. 257, C.A.; 26 Digest (Repl.) 344, 621.

Robinson v. Barton Local Board (1882), 21 Ch.D. 621; 51 L.J.Ch. 467; 46 L.T. 193; on appeal, 21 Ch.D. 631; 52 L.J.Ch. 5; 47 L.T. 286, C.A.; reversed sub nom. *Robinson v. Barton-Eccles Local Board* (1883), 8 App. Cas. 798; 53 L.J.Ch. 226; 50 L.T. 57; 48 J.P. 276; 32 W.R. 249, H.L.; 26 Digest (Repl.) 547, 2187.

Case Stated by justices of the West Riding of Yorkshire.

The respondents, the Local Board for the district of Baildon, as the urban authority for the district, preferred a complaint against the appellant Maude and against the other appellants, the trustees of Richard Goldsborough, deceased, as owners respectively of premises fronting, adjoining, or abutting on a street or road called West Lane, within the district, to recover from them, under s. 150 of the Public Health Act, 1875, their respective proportions of the expense of sewerage, levelling, paving, and channelling the road. It was proved that West Lane was within the urban district of Baildon, and led from the westerly end of the village of Baildon, out of Westgate Street, and thence proceeded in a south-westerly direction for a distance of about 1,420 lineal yards, to the junction of Banktop Lane with the road, and thence in a north-westerly direction to Lacy Hall, and there joined a bridle way leading to Eldwich, and places beyond. Part of the road was laid out as a cart road, but for a period long prior to 1835 the public had enjoyed a right of way on foot and horseback along the whole of the road. Repairs had been done to the road by the owners of the land on the northerly side thereof for a period of sixty years and upwards, under a custom for the owners of land on that side of the road to repair the whole of such road in proportion to the extent of their respective frontages. No repairs had been done by the respondents, by the highway authority, or by the parish authorities. The appellants' premises were situated on the southerly side of the road. At the westerly end of the road, nearest to the village, there were numerous houses on both sides of the road, but along the whole of the remainder and by far the greater and longer portion of the said road there were only two houses, and the land on each side of the road was of a purely agricultural character.

It was contended by the appellants that there was no continuous line of houses on the longer road, and that the road by reason thereof, and by reason also of its being, for by far the greatest portion of its length, a purely agricultural lane used as an occupation road by the owners and occupiers of the adjoining lands, was not a "street" within the meaning of s. 150 of the Public Health Act, 1875.

The justices held that the road was a street within the meaning of s. 150 of the Act of 1875, as being within the definition of "street" given by s. 4 thereof, and ordered that the appellants should respectively pay the sums so claimed. The appellants appealed. On the Case coming before the Divisional Court (FIELD and STEPHEN, JJ.), the court remitted it to the justices to state whether the road was found as a matter of fact to be a street or whether they considered themselves bound by the definition in s. 4 of the Act of 1875. The justices answered that they found as a matter of fact that the road was not a street, but that they considered themselves bound by the definition in s. 4 to declare it a street.

Forbes, Q.C. (H. E. Stansfield with him), for the appellants.

Waugh (H. Wills with him) for the respondents.

POLLOCK, B.—The question for the opinion of the court as it originally stood A
in this case was as follows :

“Whether our determination upon the construction of the various points, here-
inbefore set forth, arising upon the Public Health Act, 1875, was correct in
point of law; and, if not, what should be done in the premises.”

As there was a doubt as to what the finding of the magistrates here in point of fact B
was, the case was sent down by the court for a further finding in that respect, and
on Nov. 17, 1882, the justices added the following memorandum to their previous
finding, namely :

“We held that as a matter of fact, the road in question was not a ‘street,’
but that we considered ourselves bound by the definition in s. 4 of the Public
Health Act, 1875, to declare it a street.” C

From that addendum to the Case, it is clear to my mind that the magistrates have
acted properly within what was said in *R. v. Dayman* (1) to be their duty. That
case clearly laid down that it was the duty of the magistrates in all such cases
to find in the first place, whether, in point of fact, the road in question was or
was not a street.

Counsel for the respondents says, and very properly, that, if the magistrates D
were so placed that they were bound by the definition given in s. 4 of the Public
Health Act, 1875, to find a certain thing, they could not find in fact anything con-
trary thereto; for instance, if the definition clause in the Public Health Act had
said that a “street shall mean all passages, ways, roads, etc.,” giving certain defini-
tions, they could not find contrary to that. But that is not the difficulty here.

What the justices here say is that they held as a matter of fact that the road E
in question was not a street, but that they considered themselves bound by the
definition in s. 4 to declare it a street. The question, therefore, is whether they
were or not so bound? I am clearly of opinion that they were not so. As Huddle-
ston, B., has already pointed out in the course of the argument, it is one thing
to say that “street shall mean” so-and-so, or that “roads and passages and so forth
shall be deemed to be streets,” and another and a very different thing to say that
“street shall include” so-and-so, which does not intend that the magistrates are
to have no power at all to find the fact. Section 4 merely means to say that, if a
certain place, way, or road be a street in other respects, then the word “street”
in the Act shall include that place, way, or road. That seems to me to dispose of
that branch of the argument on the part of the respondents, and to enable the court
to say that, having before them the finding of the magistrates on a point of fact, G
there is no matter for any further argument.

There is, however, one other matter to which our attention was properly called by
counsel for the respondents, who argued that, by s. 150 of the Act of 1875, it was
provided that the power declaring it to be a street is not to be ousted by reason of
there being a public footpath running parallel with the so-called street, and in the
present case there was, as a matter of fact, such a footpath. But I cannot help H
thinking that that was not the intention, nor is it the effect, of s. 150. Its effect,
in my opinion, is not to say that, wherever there is a footpath running parallel,
the rest of the ground is in such a case to be deemed a street. It merely, I think,
means to say that, in all those cases in which the magistrates could properly find
the residue to be a street, that power of so finding is not to be taken away in
consequence of the fact that there is a public footpath. That, I think, is quite I
understandable, nor is it necessary to illustrate it now, though there are many cases
which might arise in which that power would be of importance. None of those
possible cases, however, affects the present case. We have here merely to say
whether or not s. 4 compels the magistrates so to find, and my opinion is clearly
that it does not. The judgment of the court will, therefore, be for the appellants.

HUDDLESTON, B.—I am of the same opinion. The moment that the Case
went back to the justices the question was one of fact only, namely, whether this

A place is or is not a "street," and the finding of the justices on that matter is that it is not a street.

NORTH, J.—I, also, am entirely of the same opinion.

Appeal allowed.

Solicitors: *Sharpe, Parkers, Pritchard & Sharpe*, for *Weatherhead & W. & G. Burr, Bingley*; *Emmett, Son & Stubbs*, for *Peel, Stanford & Hines, Bradford, Yorkshire*.

[*Reported by HENRY LEIGH, Esq., Barrister-at-Law.*]

Re GARRUD. Ex Parte NEWITT

D [COURT OF APPEAL (James, Brett and Cotton, L.JJ.), January 27, 1881]

[Reported 16 Ch.D. 522; 51 L.J.Ch. 381; 44 L.T. 5; 29 W.R. 344]

Bankruptcy—Property available for distribution—Building contract—Lessor's power to seize materials on default of builder—Act of bankruptcy by builder—Seizure by lessor of materials—Right of trustee.

E *Bill of Sale—"Licence to take possession of personal chattels as security for debt"—Building contract—Lessor's power to seize materials on default of builder—Seizure by lessor after act of bankruptcy by builder—Bills of Sale Act, 1854 (17 & 18 Vict., c. 36), s. 7.*

F A building agreement between a lessor and a builder provided that, should the buildings "be left in an unfinished state and for the space of twenty-eight days not regularly proceeded with," the lessor might re-enter on the land, and that, on such re-entry, all materials then on and about the premises should be forfeited and become the property of the lessor "as and for liquidated and settled damages." The builder having filed a bankruptcy petition, the lessor took possession of all the materials left on the premises. The trustee in the liquidation having claimed the materials,

G **Held:** although the agreement gave a "licence to take possession of personal chattels," that possession was not to be "as security for any debt," and, therefore, the agreement was not a bill of sale within the meaning of s. 7 of the Bills of Sale Act, 1854; the right of the lessor to seize the materials was not defeated by the commission of an act of bankruptcy by the builder before such seizure; accordingly, the trustee in the liquidation took subject to the lessor's right under the agreement.

H **Notes.** The Bills of Sale Act, 1854, s. 7, has been replaced by s. 4 of the Bills of Sale Act, 1878.

Followed: *Reeves v. Barlow* (1883), 11 Q.B.D. 610. Considered: *Climpson v. Coles* (1889), 23 Q.B.D. 465. Distinguished: *Church v. Sage* (1892), 67 L.T. 800. Referred to: *Marshall v. Mackintosh* (1898), 14 T.L.R. 458; *Jennings' (a bankrupt) Trustee v. King*, [1952] 2 All E.R. 608.

I As to instruments of particular descriptions, see 3 HALSBURY'S LAWS (3rd Edn.) 261 et seq.; and for cases see 7 DIGEST (Repl.) 5 et seq. As to property available for distribution in bankruptcy, see 2 HALSBURY'S LAWS (3rd Edn.) 409 et seq.; and for cases see 5 DIGEST (Repl.) 722 et seq. For the Bills of Sale Act, 1878, s. 4, see 2 HALSBURY'S STATUTES (2nd Edn.) 558.

Cases referred to:

(1) *Brown v. Bateman* (1867), L.R. 2 C.P. 272; 36 L.J.C.P. 134; 15 L.T. 658; 15 W.R. 350; 7 Digest (Repl.) 15, 65.

- (2) *Re Harrison, Ex parte Jay* (1880), 14 Ch.D. 19; 42 L.T. 600; 44 J.P. 409; 28 W.R. 449, C.A.; 5 Digest (Repl.) 708, 6180. A

Also referred to in argument :

Blake v. Izard (1867), 16 W.R. 108; 7 Digest (Repl.) 15, 66.

Re Jeavons, Ex parte Mackay, Ex parte Brown (1873), 8 Ch. App. 648; 42 L.J.Bey. 68; 28 L.T. 828; 21 W.R. 664, L.J.J.; 5 Digest (Repl.) 708, 6187.

Re Baum, Ex parte Cooper (1878), 10 Ch.D. 313; 48 L.J.Bey. 40; 39 L.T. 521; 27 W.R. 298, C.A.; 7 Digest (Repl.) 9, 29. B

Appeal by the executors of the lessor from a decision of BACON, Chief Judge, dismissing their appeal from a judgment of Kingston County Court.

On Aug. 28, 1877, Robert Goddard, the lessor, entered into an agreement with J. D. T. Garrud, the lessee, whereby the lessee agreed to build houses numbered 15 to 32 in Alexandra Road, Wimbledon. When the various houses were completed leases were to be granted and rent paid. The houses were to be completed by Sept. 29, 1878. There was a proviso in the agreement : C

"That if the rents hereby agreed to be paid or secured, or any part thereof, shall be in arrear or unpaid for twenty-one days, whether the same shall be demanded or not, or if the said lessee shall not in all things perform and observe all things herein contained, and the covenants agreed by the said lessee to be contained in the said leases, as far as the same are applicable to the land or plots of which no lease or leases have been granted, or if the said intended erections, constructions, and buildings, drains, fences, and gardens, or any of them, shall not be commenced, or shall at any time be left in an unfinished state, and for the space of twenty-eight days not regularly proceeded with as herein provided, then, notwithstanding that no lease may have been granted in pursuance of this agreement, it shall be lawful for the said lessor to enter into and upon the said piece or plot of land and the messuages, dwelling-houses, or premises there erected or built or begun to be erected or built thereon, or any part thereof, in the name of the whole to re-enter, and the same premises thenceforth to re-possess and enjoy, and expel therefrom the said lessee, as if these presents had not been made; and that, on such re-entry, all such buildings, erections, constructions, materials, and things, then on and about the said premises, shall be forfeited and become the property of the said lessor as and for liquidated and settled damages." D E F

There was another proviso :

"That nothing in this agreement contained shall be, or be deemed to operate as an actual or present demise of the said premises, or any part thereof, it being the true intent of these presents that the said lessee shall have the right only to enter upon the said plots of land for the purpose of the due performance of this agreement, and not otherwise, and in default of such due performance then the right and interest of the said lessee shall absolutely and irrevocably cease." G H

On July 27, 1878, by another agreement made between the same parties, the lessee agreed to build a house on the South Lawrie Park Estate, at Anerley, to be completed by Jan. 27, 1879. On Dec. 24, 1878, the lessee agreed to build another house at Anerley, to be completed by June 24, 1879. The provisos in the last two agreements were similar to those in the first as to non-payment of rent and non-completion of the houses at the date specified. On Feb. 22, 1879, the lessee filed his petition in the county court at Kingston for liquidation of his affairs by arrangement. The same day the lessor took possession of the premises and materials at Wimbledon and Anerley under the provisos in the agreements, the rent not having been paid for twenty-one days and some of the houses being in an unfinished state. In May, 1879, the lessor died. The trustee in the liquidation claimed the materials which had been seized by the lessor, which claim was resisted by the lessor's executors. The county court judge held that the trustee's claim was well founded because the agreements ought to have been registered as bills of sale, being within I

A the definition in s. 7 of the Bills of Sale Act, 1854, "licences to take possession of personal chattels as security for a debt."

Millar, Q.C., and Atherley Jones for the executors of the lessor.

Winslow, Q.C., and F. Cooper Willis for the trustee.

B **JAMES, L.J.**—In this case, the point which has been mainly discussed is whether the agreement between the landowner and builder is a bill of sale. It is not substantially different from *Brown v. Bateman* (1), decided in the Court of Common Pleas. Here the goods were to become the property of the lessor on re-entry. Looking at the words of s. 7 of the Bills of Sale Act, 1854, the agreement is not a bill of sale, assignment, transfer, declaration of trust without transfer, or other assurance of personal chattels. It is "a licence to take possession of personal chattels," but not "as security for any debt." We can only apply the Bills of Sale Act, 1854, to those instruments which come within its terms. This agreement is not within the words of the Act which define a bill of sale.

C Other points were also raised. The houses were to be completed by a particular date. After that date, the lessor treated the agreement as still subsisting. I cannot assent to the view of the learned county court judge as to this operating as a waiver. Here, the point does not arise. The agreement was a continuing contract. It provided that, if the intended erections, constructions and buildings, drains, fences, and gardens, or any of them, should not be commenced, or should at any time be left in an unfinished state, and for the space of twenty-eight days not regularly proceeded with, there should be re-entry and forfeiture. We have the evidence of several persons that the houses were left in an unfinished state, and for twenty-eight days were not regularly proceeded with, there being no labour employed on the work. The answer to this was that there was a severe frost, but the frost is not an excuse for a delay of four months.

D Another point was whether the forfeiture took place before the bankruptcy. The principle is that the trustee in bankruptcy take no higher right than the assignee for value. He takes the property of the bankrupt subject to all liabilities, unless some provision of the bankruptcy laws enacts otherwise. This contract is not affected by any enactment. It provided that nothing in the agreement contained should operate as an actual or present demise of the said premises, it being the true intent that the lessee should have the right only to enter on the land for the purpose of the due performance of the agreement. That being so, the contention that the order and disposition clause (s. 31) of the Bankruptcy Act, 1869 [now s. 30 of the Bankruptcy Act, 1914], applies, is not arguable. I am of opinion that the judge miscarried. The Bills of Sale Act, 1854, does not apply to this agreement. The appeal from the order must be allowed.

E **BRETT, L.J.**—The question is as to the construction of a stipulation in the agreement, which stipulation is not void, as is shown by *Re Harrison, Ex parte Jay* (2). Being an existing legal stipulation, is it a bill of sale, and, as such, void for want of registration? In *Brown v. Bateman* (1) a building agreement was held not to be within s. 7 of the Bills of Sale Act, 1854, nor to be within the words "an assignment, transfer, or other assurance of personal chattels." Counsel for the trustee said that he would not argue this, but that the stipulation came within the words "licences to take possession of personal chattels as security for any debt." Here there was no doubt a licence to take possession of personal chattels, not "as security for any debt," but in discharge of a debt.

I Then it was argued that there was no right of re-entry because there was no forfeiture. The right certainly did arise, but was said to have been waived. It is not necessary to decide the question of waiver or not. An advance of money to the builder after the day on which the forfeiture occurred is strong evidence of waiver. But the agreement was a continuing contract. The houses were not to be left in an unfinished state, and for twenty-eight days not regularly proceeded with. On the evidence there is a prima facie case that the houses were left in an unfinished

state and for twenty-eight days not regularly proceeded with. The builder could have answered this charge if he had had an answer, but, as a matter of fact, he had not one. A

As to the Wimbledon property, the case is clear, but as to the Anerley property, the entry was made after the filing of the petition, and the trustee contends that the bankruptcy took away the rights of the lessor under his contract. Let us assume that there was a sale of the contract by the builder to a third party. The purchaser would take subject to the stipulation, the right of the lessor would not be taken away. The fact of bankruptcy having occurred cannot take away his right. B

COTTON, L.J.—The question is whether the agreement is within the ordinary meaning of the term “bill of sale” as defined by s. 7 of the Bills of Sale Act, 1854. It is a licence to take possession of personal chattels, but is it a “security for any debt?” Here, there is no security for any debt at all, but the forfeiture of materials is to be “as and for liquidated and settled damages.” It has been urged that damages were made a debt by s. 31 of the Bankruptcy Act, 1869 [now s. 30 of the Bankruptcy Act, 1914]. But that is a fallacy. Damages were made provable in bankruptcy as a debt, but that did not make them a debt for the purposes of any other Act of Parliament. There is no doubt in the present case whatever that the definition of the Bills of Sale Act does not apply. C

Then it is said that, even if the agreement is not void as a bill of sale that has not been registered, the events have not happened on which forfeiture depends. Assuming that they have happened, it is said that, after the happening of such events, the lessor recognised the contract as still subsisting, and that this is evidence of waiver. But there is a proviso in the agreement that, if the houses were left in an unfinished state and not proceeded with for twenty-eight days, there was to be a forfeiture. The evidence shows that this was the case. D

Another point was that, as to the Anerley property, possession was not taken till after the filing of the petition. If the transfer of land and goods to a third party does not take away the rights of the lessor under his contract, neither does the fact of the lessor having become a bankrupt. The order and disposition clause, with reference to the landlord not being the true owner, does not defeat his right so long as the goods remain in his possession. E

Appeal allowed.

Solicitors: *S. G. Ashwin; H. Montagu.*

[Reported by FRANK EVANS, Esq., Barrister-at-Law.] F

G

A SCOTT AND ANOTHER v. MATTHEW BROWN & CO., LTD. AND ANOTHER

[CHANCERY DIVISION (Kay, J.), November 4, 5, 11, 1884]

[Reported 51 L.T. 746; 1 T.L.R. 54]

Landlord and Tenant—Lease—Forfeiture—Relief—Re-entry without notice—Discretion of court—Conveyancing Act, 1881 (44 & 45 Vict., c. 41), s. 14 (1), (2).

Under a proviso for re-entry contained in the lease lessors re-entered and took possession of the premises for non-payment of rent and also for breach of covenant without having served on the tenant the notice required by s. 14 (1) of the Conveyancing Act, 1881, specifying the breach complained of. The lessors then determined the lease and granted a lease to another tenant. Subsequently, the former tenant, who had been absent abroad, returned, and without title regained possession of the premises and refused to give up possession to the new tenant. Thereafter the former tenant was ejected by bailiffs without using any unnecessary violence. In an action by the former tenant for wrongful entry and distress,

Held: by virtue of s. 14 (8) of the Conveyancing Act, 1881, the provisions of s. 14 (1) of that Act did not affect the law relating to re-entry for non-payment of rent; the court, in exercising its discretion under s. 14 (2) of the Act to grant relief against re-entry for breach of covenant for want of notice, would under the circumstances refuse such relief.

Held, further: where a person had gained possession of property without title to it, such a person being a trespasser, the rightful owner was entitled to use such force in ejecting him provided that it did him no personal injury.

Notes. The Conveyancing Act, 1881, s. 14, has been repealed and s. 14 (1), (2), (8) has been replaced by the Law of Property Act, 1925, s. 146 (1), (2), (11), respectively: see 20 HALSBURY'S STATUTES (2nd Edn.) 739, 742, 750. For the Forcible Entry Act, 1381, and the Landlord and Tenant Act, 1709, see 13 HALSBURY'S STATUTES (2nd Edn.) 840, 846, respectively.

Approved: *Hemmings v. Stoke Poges Golf Club*, [1918-19] All E.R.Rep. 798. Referred to: *Williams v. Taperell* (1892), 8 T.L.R. 241.

As to tenant's right to relief in case of forfeiture and as to landlord's right of re-entry, see 23 HALSBURY'S LAWS (3rd Edn.) 677, 705, 706; and for cases see 31 DIGEST (Repl.) 537 et seq. As to forcible entry on land in possession of trespasser and as to use of reasonable force in defence of property, see 10 HALSBURY'S LAWS (3rd Edn.) 592, 743. As to expulsion of trespasser, see 38 HALSBURY'S LAWS (3rd Edn.) 763; and for cases see 15 DIGEST (Repl.) 797 et seq.

Cases referred to:

- (1) *Beddall v. Maitland* (1881), 17 Ch.D. 174; 50 L.J.Ch. 401; 44 L.T. 248; 29 W.R. 484; 31 Digest (Repl.) 45, 2035.
- (2) *Browne v. Dawson* (1840), 12 Ad. & El. 624; 4 Per. & Dav. 355; Arn. & H. 114; 10 L.J.Q.B. 7; 113 E.R. 950; 43 Digest 384, 100.

Also referred to in argument:

- Edwick v. Hawkes* (1881), 18 Ch.D. 199; 45 L.T. 168; 29 W.R. 913; sub nom. *Edridge v. Hawker*, 50 L.J.Ch. 577; 15 Digest (Repl.) 796, 7498.
- Price v. Worwood* (1859), 4 H. & N. 512; 28 L.J.Ex. 329; 33 L.T.O.S. 149; 5 Jur.N.S. 472; 7 W.R. 506; 157 E.R. 941; 31 Digest (Repl.) 519, 6414.
- Taylor v. Peters* (1837), 7 Ad. & El. 110; 2 Nev. & P.K.B. 622; Will. Woll. & Dav. 644; 1 Jur. 596; 112 E.R. 412; 18 Digest (Repl.) 303, 484.
- Grimwood v. Moss* (1872), L.R. 7 C.P. 360; 41 L.J.C.P. 239; 27 L.T. 268; 36 J.P. 663; 20 W.R. 972; 18 Digest (Repl.) 303, 486.

Action by the plaintiffs, a former tenant of the defendant company and his wife, for damages for wrongful entry and distress by the defendants upon the

demised premises, and for assaults committed upon the plaintiffs while being forcibly ejected from the premises. A

The plaintiff Scott executed a counterpart lease, dated Nov. 22, 1881, whereby the defendant company demised the Cavendish Hotel, Barrow-in-Furness, to Scott as tenant. A rent of £75, payable quarterly in advance, was reserved by the lease, and Scott covenanted that he would during the continuance of the demise personally inhabit the house with his family, and make it his usual place of residence, and would not desert or shut it up and would use his best endeavours at all times to increase and extend the custom and business of such public-house; also that he would not sell upon the premises any excisable liquors other than such as should have been purchased from the defendant company; and also that he would pay the rent. There was also a power for the lessors to re-enter on non-payment of rent for seven days, or on breach of covenant. B

On Nov. 10, 1879, during the continuance of the original lease, Scott had executed a bill of sale over all the furniture and chattels then in the Cavendish Hotel, or which should during the continuance of that security be brought there, for securing the repayment to the defendant company of present and future debts owing by Scott to them. And it was provided that, if default should be made in payment, the defendant company might enter and seize the chattels, and either remove them, or remain in the hotel for the purpose of selling them. Scott remained in possession of the hotel until Sept. 5, 1882, when, during a short temporary absence of his wife, he left the hotel and went to America, without giving notice of his intention to do so. At this time £1,078 8s. 6d. was, according to the defendant company, owing from Scott to the defendant company on the bill of sale, and the rent of the hotel was five quarters in arrear. It was alleged that Scott had sold liquor bought from other persons than the company, in breach of his covenant in the lease, and had committed a further breach of covenant by leaving the hotel and going to America. Mrs. Scott, finding her husband gone, informed the defendant Ellis, who was then the company's agent. He, after leaving at the hotel a twenty-four hours' notice, on Sept. 8, 1882, took possession on behalf of the company of the chattels in the hotel. On the same day the company under the proviso for re-entry in the lease took possession of the hotel, and determined the tenancy, for non-payment of rent and breach of the covenants of the lease. On Sept. 11, 1882, they levied a distress upon the premises, seizing goods appraised at £380 11s. C

On Oct. 14, 1882, the company granted a lease of the Cavendish Hotel to the defendant Ellis, and sold to him such of the chattels comprised in Scott's bill of sale as then remained in their hands. Up to this time the company had allowed Mrs. Scott to remain in possession of the hotel as manageress, and Ellis, after the lease to him, allowed her to continue in the same capacity, receiving a weekly salary, and paying the takings of the business to him. In November, 1882, Scott returned, having been away about eight weeks shooting in America. He had never written home during that period, but he denied that he had intended to remain away permanently. He was informed of what had taken place during his absence, and a correspondence ensued between him and the company, in which he thanked the company for their kindness to his wife, and asked to be forgiven and to be allowed to return to live with his wife at the hotel, and in a letter to the chairman of the company, dated Dec. 11, 1882, he wrote: D

"I will swear to you that I will not interfere with the business in any way whatever, unless you will allow me to look after the 'cellar.' "

His application was not acceded to. On Jan. 10, 1883, Scott returned to the hotel, and began to carry on business there again, and refused to give up possession to Ellis. On Jan. 11, 1883, Ellis by a notice in writing dismissed Mrs. Scott from his service, and required her to leave the hotel, and on her refusing to do so he on Jan. 13, 1883, sent bailiffs to eject her and her husband from the premises. The bailiffs after a struggle succeeded in doing so, but without doing any material injury to either the person or the clothes of either of them. E

A On January 17, 1883, Scott and his wife brought this action against the company and Ellis. The principal claims were for damages for the wrongful entry and distress; also for the wrongful entry and seizure under the bill of sale; also for the assaults committed on the plaintiffs in ejecting them; double the value of the goods seized and sold in distress; an account of what was due to the defendant company under the bill of sale; and on payment by Scott of the amount so found due (if any) re-delivery of the goods seized. The defendants put in a counterclaim, whereby they asked for an account of what was due to them for principal, interest, and arrears of rent under the bill of sale; and for damages for the breaches of the covenants in the lease. Ellis also claimed damages for the wrongful acts of the plaintiffs.

Neville for the plaintiffs.

C *Graham Hastings, Q.C.*, and *G. B. Finch* for the defendants.

KAY, J., stated the facts and having observed that the circumstances under which the plaintiff Scott went to America were such as to justify the defendants in supposing that he would not return, and it was not clear from the evidence whether he would not in fact have remained out there had he been able to obtain some employment, and also that under the circumstances the bailiffs did not appear to have used unnecessary violence in ejecting both the plaintiffs from the hotel, continued: It is said that this forcible ejectment is a great wrong, and that this is a case where exemplary damages ought to be given, £100 and £200 being mentioned as sums which might fairly be awarded.

D In support of this contention reliance is placed on *Beddall v. Maitland* (1), a case which came before this Division of the court, where FRY, J., referring to the Forcible Entry Act, 1881, says (17 Ch.D. at p. 188):

E "The effect of the statute is this, that when a man is in possession he may use force to keep out a trespasser, but if a trespasser has gained possession the rightful owner cannot use force to put him out, but must appeal to the law for assistance."

F But how far is that to be carried? Can a man come into my house when I am out, and then say that he claims to be there, and I cannot use force to turn him out? I cannot think that the law would admit of anyone taking up such a position as that. The law on the subject was, in my opinion, accurately stated in *Browne v. Dawson* (2). In that case a schoolmaster, who had been dismissed from his office for some breach of the rules under which he was appointed, gave up possession of the schoolroom to his employers, who took possession of it and locked it up. G He, on the next day, returned and broke into the room, and remained there for some days, after which his former employers forcibly ejected him. He brought an action against them for trespass, in which a verdict was given for the defendants on a plea which denied that the room was the room of the plaintiff. On a motion for a new trial LORD DENMAN, C.J., said (12 Ad. & El. at p. 629):

H "A mere trespasser cannot, by the very act of trespass, immediately and without acquiescence give himself what the law understands by possession against the person whom he ejects, and drive him to produce his title, if he can, without delay, reinstate himself in his former possession. Here, by the acquiescence of the plaintiff, the defendants had become peaceably and lawfully possessed as against him; he had re-entered by a trespass; if they had immediately sued him for that trespass, he certainly could not have made out a plea denying their possession."

I Every word of that, it seems to me, would apply to this case. It is clear to me that the plaintiff Scott had when he was ejected no title whatever to possession, and the defendant company and Ellis, acting as their agent, who was lawfully in possession before, were entitled to use force in turning him out, so long as they did him no personal injury. There was, therefore, no wrong done to the plaintiffs by the ejectment, and I give no damages on that ground. The defendants are

willing to submit to an account of the money due under the bill of sale, and to an inquiry as to the value of the goods seized, so I need say no more as to that than to direct an account and inquiry accordingly. A

Then as to the distress. The company are, it appears to me, in this dilemma, viz.: if the re-entry which they had previously made was good, Scott was not in possession, and no distress under the Landlord and Tenant Act, 1709, could lawfully be made; if, on the other hand, the distress was good, there had been no proper re-entry, and the tenancy was not determined. However, their counsel have admitted that the distress was not good, and I think that the re-entry was proper and the distress invalid. B

The question, therefore, arises whether there ought to be an inquiry as to the damages caused by such distress. Such an inquiry would, however, be idle, as before the distress the company were lawfully in possession of the goods under their bill of sale, and all the other acts of the company were only done to fortify their title, so that no damage can I think reasonably be said to have been caused by the distress, and I decline to order any inquiry as to that. There are two more questions to be decided. It is said that the tenancy has never been properly terminated, as the notice required by the Conveyancing Act, 1881, s. 14 (1), to be served upon a lessee by a lessor before enforcing a right of re-entry or forfeiture for breaches of covenants in the lease has not in this case been served. But it would have been idle to have served any such notice in this case, as Scott had left the hotel, as it was supposed, never to return, and no one knew where he was. However, if the Act says that it must be served before re-entry can be made, any re-entry made without serving it would be wrong. C D

But sub-s. (8) of s. 14 provides that that section shall not affect the law relating to re-entry or forfeiture or relief in case of nonpayment of rent, so that the old law is still in force as to that. Then sub-s. (2) of the same section provides that the lessee may apply to the court for relief against the enforcing of a right of re-entry or forfeiture, E

"and the court may grant or refuse relief, as the court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit." F

"The foregoing provisions of this section" are the provisions as to notice contained in sub-s. (1); so that this, I think, gives the court a discretion to refuse relief on the ground of the absence of such notice where the circumstances are such that it would be right to refuse it. In this case there have clearly been breaches of covenant, partly in non-payment of the rent by Scott, and partly in his absenting himself from the hotel, and it is clear that the service of any notice would have been a mere idle form, and it seems that when Scott returned he acquiesced in what had been done, and recognised that all possible kindness had been shown to his wife by the company. He ought not, therefore, in my opinion, to be allowed to come now and say that the re-entry was wrongful, and claim damages for it, and having a discretion to refuse him any relief on that ground, I accordingly do refuse it. G H

As to the counterclaim, there must be an account of what is due under the bill of sale, but it will not be necessary to express that in taking such account an account is to be taken of the arrears of rent, as that would, I think, be done without being expressed. As to the breaches of covenant, it is said that Scott purchased liquor from persons other than the company, and he says that the company did not properly perform their duty of supplying him with good liquor, but there is no evidence of the breach to justify me in granting an inquiry as to that. I

Lastly, as to the damages which the counterclaim asks for Scott's improper entry and trespass, I am not satisfied that any pecuniary damage has resulted from it, so that I will not grant any inquiry as to that either. On the whole I think it best to give such a judgment as will, so far as possible, put an end to this wretched litigation, and I dismiss with costs the whole of the plaintiffs' action

A except so far as it asks for an account of what is due under the bill of sale, and an inquiry as to the value of the goods seized by the defendants, which account and inquiry will be taken, and the costs of which I reserve. I dismiss the counterclaim without costs, and I reserve further consideration.

Judgment for the defendants on the plaintiffs' claim.

Order for an account and inquiry against the defendants.

B *Defendants' counterclaim dismissed.*

Solicitors: D. Warde, for J. H. Pinckney, Barrow-in-Furness; Gregory, Rowcliffes & Co., for Charnley, Finch & Johnson, Preston.

[Reported by A. J. HALL, ESQ., Barrister-at-Law.]

C

D

Re WALLACE. Ex Parte WALLACE

[COURT OF APPEAL (Baggallay, Bowen and Fry, L.JJ.), October 31, 1884]

[Reported 14 Q.B.D. 22; 54 L.J.Q.B. 293; 51 L.T. 551; 33 W.R. 66;

1 T.L.R. 17; 1 Morr. 246]

Bankruptcy—Petition—Signature—Signature by attorney on behalf of petitioning creditor.

E

An attorney who was authorised by a power of attorney "to commence and carry on, at law or in equity, all actions, suits or other proceedings touching anything in which [the principal or his personal estate] may be concerned," signed a petition in bankruptcy on behalf of his principal who was the petitioning creditor.

F

Held: a petition in bankruptcy might be signed on behalf of the petitioning creditor where the terms of the power of attorney allowed, and the terms of this power of attorney were wide enough to authorise the attorney to sign a creditor's petition on behalf of his principal.

Notes. Considered: *Re Debtor* (No. 28 of 1917), [1917] 2 K.B. 808.

G

As to creditor's petition in bankruptcy, see 2 HALSBURY'S LAWS (3rd Edn.) 304, 305; and for cases see 4 DIGEST (Repl.) 149.

Case referred to:

(1) *Re Frampton, Ex parte Frampton* (1859), 1 De G.F. & J. 263; 28 L.J.Bey. 21; 33 L.T.O.S. 341; 5 Jur.N.S. 970; 7 W.R. 690; 45 E.R. 359, L.JJ.; 4 Digest (Repl.) 192, 1740.

H

Appeal by the debtor from a receiving order made against him on Oct. 17, 1884, by Mr. Registrar BROUGHAM, on a creditor's petition signed on his behalf by his attorney.

I

The bankruptcy petition was presented by W. Richards, of Prince Edward's Island, and signed "William Richards, by his attorney Thomas Picton Richards." The signature was attested by a witness, and the attestation clause was as follows: "Signed by the petitioner by his attorney, Thomas Picton Richards, in my presence." The power of attorney, dated Feb. 8, 1879, empowered T. P. Richards, on behalf of his principal,

"to commence and carry on, or to defend, at law or in equity, all actions, suits, or other proceedings touching anything in which I, or my ships, or other personal estate, may be in anywise concerned."

The debtor appealed.

F. Cooper Willis for the debtor.

R. Vaughan Williams for the petitioning creditor was not called on to argue.

BAGGALLAY, L.J.—I entertain no doubt whatever that the signature of the petition by the attorney of the petitioner was sufficient, provided that the power of attorney authorised such signature. I am satisfied that the words of this power are quite sufficient to authorise Thomas Pieton Richards to sign the petition on behalf of his principal. The power of an attorney to act on behalf of his principal in bankruptcy matters has been undisputed ever since the decision of the lords justices in *Re Frampton, Ex parte Frampton* (1). In that case, under a general authority by one man to another to arrange and settle his affairs, it was held that the agent might instruct a solicitor to dispute an adjudication in bankruptcy. The present case, no doubt, carries the principle a step further, as it will decide that a document may be signed on behalf of the principal. But the signature was here essential to the doing of the act—the commencing of a proceeding touching something in which the principal or his personal estate was concerned—which was authorised.

BOWEN, L.J.—I have no doubt that BAGGALLAY, L.J., is right in the view expressed by him. The power is wide enough in its terms to authorise the attorney to commence proceedings in bankruptcy on behalf of his principal by signing a petition.

FRY, L.J.—I am of the same opinion.

Appeal dismissed.

Solicitors: *J. T. Watson; Hollams, Son & Coward.*

[*Reported by FRANK EVANS, Esq., Barrister-at-Law.*]

Re TOLLEMACHE. Ex Parte ANDERSON

[COURT OF APPEAL (Sir Baliol Brett, M.R., Cotton and Lindley, L.JJ.), January 30, February 13, 1885]

[Reported 14 Q.B.D. 606; 54 L.J.Q.B. 383; 52 L.T. 786]

Bankruptcy—Proof—Debt—Judgment debt—Consideration for debt—Evidence of judgment.

Although a judgment is prima facie evidence in support of a debt provable in bankruptcy, where there are circumstances of suspicion the court has power to require the claimant to prove the consideration for the debt, and, if none is shown, the proof will be rejected.

A judgment may be proved by a certified copy of the entry in the entry book of the court in which it was recovered.

Notes. As to proof of debts in bankruptcy and power of court to inquire into consideration for debt, see 2 HALSBURY'S LAWS (3rd Edn.) 467, 468; and for cases see 4 DIGEST (Repl.) 344 et seq.

Cases referred to in argument:

Ex parte Bryant (1813), 1 Ves. & B. 211; 2 Rose, 1; 35 E.R. 83; 4 Digest (Repl.) 17, 89.

Re Tollemache, Ex parte Revell (1884), 13 Q.B.D. 720; 54 L.J.Q.B. 89; 51 L.T. 376; 33 W.R. 288, C.A.; 4 Digest (Repl.) 353, 3213.

Re Onslow, Ex parte Kibble (1875), 10 Ch. App. 373; 44 L.J.Bey. 63; 32 L.T. 138; 23 W.R. 433, L.JJ.; 4 Digest (Repl.) 124, 1109.

Re Ritso, Ex parte Ritso (1883), 22 Ch.D. 529; 52 L.J.Ch. 535; 48 L.T. 376; 31 W.R. 373, C.A.; 4 Digest (Repl.) 163, 1474.

A **Appeal** by Mrs. Anderson, executrix of James Hall deceased, from an order of Mr. Registrar PEPYS, rejecting a proof in the bankruptcy of the Hon. William Lionel Felix Tollemache, commonly called Lord Huntingtower, who had traded as a horse dealer and coach proprietor.

On Aug. 2, 1842, an act of bankruptcy was completed, and on Sept. 2, 1842, the fiat in bankruptcy was issued.

B On Dec. 21, 1872, Lord Huntingtower died. In 1878 the Earl of Dysart, the father of Lord Huntingtower, died, whereupon certain reversionary interests fell into possession, and became available for the benefit of the creditors under the bankruptcy. On Oct. 25, 1884, a proof was tendered by Mrs. Anderson, the executrix of James Hall, who died on Oct. 24, 1870. By her affidavit she said that the bankrupt was at and before the date of the fiat indebted to Mr. Hall, and

C his estate was, as she believed, still indebted to her, as executrix of Mr. Hall, in the sum of £561 6s. 8d. for damages recovered by Mr. Hall in the Court of Exchequer on Jan. 4, 1842, against the bankrupt in an action on the Case, and also in the further sum of £18 13s. 4d., interest on the judgment debt until the date of the fiat. An examined copy, certified by an assistant keeper of the public records, of the entry of the judgment in the entry books of judgments in the Court

D of Exchequer of Michaelmas Term 1841 was produced. The entry was as follows:

“Michaelmas Term, 1841 (5th Vict.).

Judgments, interlocutory, and final; entries of satisfaction and process, etc.,
and enrolments of deeds.

January 4.

E London promissory order B. Parke	James Hall against the Hon. William Lionel Felix Tollemache, commonly called Lord Huntingtower, damages £561 6s. 8d. costs.”	Carlton and Haynes.
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F The judgment itself could not be found, nor could the acceptance or promissory note of the bankrupt on which it was founded. No proof had been tendered by Mr. Hall during his lifetime, and his executrix had no personal knowledge of the matter. Mr. Haynes, who in 1842 had been Mr. Hall's solicitor, was examined, and stated that in 1842 Mr. Hall recovered a judgment against Lord Huntingtower, which judgment the witness believed was recovered in an action on a bill of exchange accepted by Lord Huntingtower, but although he had no doubt as to the judgment, he had no recollection of the circumstances under which the bill of exchange was given; and, having made several searches among the papers in his office, had been unable to find either the judgment or the bill of exchange. The proof was rejected by the magistrates who held that there was not sufficient proof of the debt. The executrix of James Hall appealed.

H *Cooper Willis, Q.C. (Sidney Woolf with him), for the executrix.*
Winslow, Q.C., and Yate Lee for the assignees in the bankruptcy.

Cur. adv. vult.

Feb. 13, 1885. **SIR BALIOL BRETT, M.R.**—The question raised by this appeal is, whether the registrar was right in refusing to admit a proof of a judgment debt.

I Evidence was given by means of an entry in the entry-book of judgments in the Court of Exchequer of Michaelmas Term, 1841, that a judgment had been then recovered by the claimant's testator against the bankrupt. It is a short entry, made more than forty years ago, and there is no other evidence of the judgment. The entry, however, shows that the judgment was recovered in respect of a bill of exchange or a promissory note, and it appears from the dates that it was recovered not many months after the bankrupt came of age.

We entertained some doubt at first as to whether a certified copy of this entry was proper evidence of a judgment; but upon inquiry we find that this was the

proper mode of proving a judgment. The original record would have been handed A
back to the party who obtained the judgment, and at one time he or his solicitor
must have had it in his hands. It was suggested on behalf of the assignees in the
bankruptcy that, if a person claiming to prove in bankruptcy on a judgment debt
gives no evidence of the debt except the judgments, the proof ought to be rejected.
This amounts to saying that the production of a judgment is in bankruptcy no
evidence of a judgment debt, but that the consideration for the debt must be proved. B
I cannot go that length. I cannot say that, if there are no circumstances of
suspicion, a judgment is no evidence of a judgment debt. It seems to me to be as
good evidence of a debt as possible. But it was contended by counsel for the
executrix that a judgment must stand as good evidence of a debt, unless the trustee
in the bankruptcy proves that no consideration was given for the debt. I cannot
go that length either, for it seems to me that a judgment is *prima facie* evidence C
of a provable debt, but that, if there are circumstances which cast suspicion on
the judgment, or on the debt on which it was founded, the court has a right to call
upon the claimant to prove the consideration for the debt. It would be wrong to
call upon the trustee to prove that there was no consideration; it is impossible for
him to have the means of doing so.

We must, therefore, consider whether there are any circumstances of suspicion D
in the present case, and it appears to me that there are. The fact that the judg-
ment was obtained so very soon after the bankrupt came of age upon a bill of
exchange or promissory note is, I think, a sufficient circumstance in itself to entitle
the court to call upon the claimant to prove something more than has been proved
here. The claimant says that the judgment and the bill or note are lost. If they
are lost it is her misfortune, and it is not to be wondered at after the lapse of forty E
years. On the ground that there are circumstances of suspicion in the case, and
that the claimant has totally failed to prove the consideration for the debt, I am of
opinion that the registrar's decision was right and ought to be affirmed.

COTTON, L.J.—I am of the same opinion. The judgment was recovered on
Jan. 4, 1842, and the fiat in bankruptcy was issued on Sept. 2 in the same year. F
Nothing has been done to enforce the judgment, although the bankrupt lived for
thirty years afterwards, and the judgment creditor lived till 1870. It was not until
some years after the death of the bankrupt that any proceedings were taken to prove
the debt in the bankruptcy. It is said that it was supposed that there would never
be assets to pay the creditors. But although the reversionary interests have only
recently fallen in, they were mentioned in the bankrupt's statement of affairs, and
he stated that some of his relations had proposed to give £25,000 for them. G

I agree that we cannot disregard a judgment if there are no circumstances of
suspicion. A judgment is *prima facie* evidence of a debt. But in bankruptcy the
court is always entitled to go behind a judgment if no consideration has been given
for it, for this reason, that the court is bound to consider the rights of the other
creditors of the bankrupt. A judgment may be submitted to by a defendant with-
out any ground, but this ought not to be allowed to prejudice the right of his
creditors, if he becomes bankrupt, to dispute the judgment. In the present case
there is a great deal to throw suspicion on the judgment, and no explanation has
been given. I have therefore come to the conclusion that this proof was properly
rejected. The testator did not in his lifetime think fit to come forward to prove,
and now, by reason of the death of parties, the necessary evidence cannot be H
procured. I

I would add that **LINDLEY, L.J.**, who heard the appeal argued, has asked me
to say that, although not altogether for the same reasons as we have given, he
concurs in the conclusion.

Appeal dismissed.

Solicitors: *J. R. Chidley; Still & Son.*

[*Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.*]

A

WALTON v. EDGE

[HOUSE OF LORDS (The Earl of Selborne, L.C., Lord Blackburn and Lord Watson),
November 27, 28, 1884]

[Reported 10 App. Cas. 33; 54 L.J.Ch. 362; 52 L.T. 666;
49 J.P. 468; 33 W.R. 17; 1 T.L.R. 96]

B

Building Society—Winding-up—Distribution of funds—Priority for members giving notice of withdrawal before winding-up order.

The rules of an unincorporated benefit building society provided that investing members should be allowed to withdraw their money upon giving notice "provided the funds permit," and that no further liabilities should be incurred by the society till such member had been repaid. The society was compulsorily wound-up, and the assets appeared sufficient to pay the outside creditors but insufficient to pay the investing members in full.

C

Held: notwithstanding the winding-up, the rules constituted a contract between the society and its members which applied to the relations of the members inter se, and the investing members who had given notice of withdrawal before the commencement of the winding-up but had not been repaid were entitled to be paid in priority to those who had given no notice of withdrawal.

D

Notes. For the extent of the repeal of the Building Societies Act, 1836, by s. 7 of the Building Societies Act, 1874, see 2 HALSBURY'S STATUTES (2nd Edn.) 624 and for the amendment of the Building Societies Acts, 1874 to 1940 by the Building Societies Act, 1960, see 40 HALSBURY'S STATUTES (2nd Edn.) 45.

E

Considered: *King v. Rawlings* (1890), 54 J.P. 613; *Re Sunderland 36th Universal Building Society* (1890), 24 Q.B.D. 394; *Re United Citizens' Investment Trust*, [1931] All E.R.Rep. 324. Referred to: *Re Alliance Society* (1885), 28 Ch.D. 559; *Re Mutual Aid Permanent Benefit Building Society* (1885), 29 Ch.D. 182; *Siburn v. Pearce* (1890), 44 Ch.D. 354; *Barnard v. Tomson*, [1894] 1 Ch. 374; *Botten v. City and Suburban Permanent Building Society*, [1895] 2 Ch. 441; *Sixth West Kent Mutual Building Society v. Shove*, [1899] 2 Ch. 440; *Sinclair v. Brougham*, [1914-15] All E.R.Rep. 622; *Re Moss's Trusts, Moss v. Allen* [1945] 1 All E.R. 207.

F

As to the rules of a building society forming the contract between the society and its members, see 3 HALSBURY'S LAWS (3rd Edn.) 558; and for cases see 7 DIGEST (Repl.) 541 et seq.

G

Cases referred to:

- (1) *Re Norwich and Norfolk Provident Building Society, Ex parte Rackham* (1876), 45 L.J.Ch. 785, C.A.; 7 Digest (Repl.) 542, 400.
- (2) *Re Mutual Society* (1880), 24 Ch.D. 425, n.; 32 Digest (Repl.) 647, 33.
- (3) *Blackburn Building Society v. Cunliffe, Brooks & Co.* (1882), 22 Ch.D. 61; 52 L.J.Ch. 92; 48 L.T. 33; 31 W.R. 98, C.A.; affirmed sub nom. *Brooks & Co. v. Blackburn Benefit Society* (1884), 9 App. Cas. 857; 54 L.J.Ch. 376; 52 L.T. 225; 33 W.R. 309, H.L.; 7 Digest (Repl.) 517, 245.

H

Also referred to in argument:

- Brownlie v. Russell* (1883), 8 App. Cas. 235; 48 L.T. 881; 47 J.P. 757, H.L.; 7 Digest (Repl.) 533, 345.
- Re Doncaster Permanent Building Society* (1866), L.R. 3 Eq. 158; 15 L.T. 270; 31 J.P. 310; 15 W.R. 102; 7 Digest (Repl.) 540, 388.
- Re Queen's Benefit Building Society* (1871), 6 Ch. App. 815; 40 L.J.Ch. 381; 19 W.R. 762, L.J.J.; 7 Digest (Repl.) 536, 361.

I

Appeal from a decision of the Court of Appeal (SIR BALIOL BRETT, M.R., COTTON and BOWEN, L.J.J.), reported 24 Ch.D. 421, sub nom. *Re Blackburn and District Benefit Building Society*, affirming a decision of the Vice-Chancellor of the County Palatine of Lancaster (H. F. BRISTOWE, Q.C.), that the investing members of a

building society who had given notice of withdrawal were to be treated as persons who had ceased to be members of the society, and were to be ranked as creditors of the society and paid out of the assets after payment of what might be due to outside creditors and in priority to investing members who had not given notice of withdrawal. A

The Blackburn and District Benefit Society was established in 1868 under the Building Societies Act, 1836 (6 & 7 Will. 4, c. 32), but was never incorporated under the Building Societies Act, 1874. By r. 3 of the rules of the society it was provided that: B

"Any member of this society shall be allowed to withdraw (provided the funds permit) sums not exceeding £10 by giving seven days' notice, and sums exceeding £10 by giving one month's notice, according to the printed form in the schedule annexed. No further liabilities shall be incurred by the society till such member has been repaid." C

The appellant, Mary Walton, was an investing member of the society to the amount of £792. In October, 1881, a compulsory order was made to wind-up the society, and the respondents, Henry Edge and Thomas Hayes Sheen, were appointed the official liquidators. Three classes of persons claimed a right to share in the assets of the society: First, the outside creditors, whose claims amounted to £2,212; secondly, investing members who before the winding-up gave formal or informal notice of withdrawal to the society (this class numbered about 514 persons, and their claims amounted to £45,122; and, thirdly, investing members who had not given notice of withdrawal (this class numbered about 1,926 persons, and their claims amounted to £125,077). It was anticipated that the assets would not realise a sufficient sum to pay these three classes in full. With a view to ascertaining the rights of the three respective classes in the winding-up, the respondents were nominated to represent those members who had given formal or informal notice of withdrawal, and the appellant was nominated to represent those members who had not given any notice of withdrawal, with the view of having determined the order in which the different classes of members should rank as creditors of the society. D E F

Ince, Q.C., Buckley and R. Neville for the appellant.

Macnaghten, Q.C., and Snow for the liquidators.

H. Davey, Q.C., and C. A. Russell for members who had given good notices of withdrawal.

Rigby, Q.C., and Rotch for members who had given informal notices of withdrawal. G

THE EARL OF SELBORNE, L.C.—This appeal relates to the rights of withdrawing members of the Blackburn Building Society, whose members were at liberty to make upon this subject any contract inter se which they pleased. The question is as to the construction of the contract which they have made, and that depends entirely upon the language and the effect of the third rule. It does not appear to me that any other rule has any material bearing upon the question. That rule is: H

"Any member of this society shall be allowed to withdraw (provided the funds permit) sums not exceeding £10 by giving seven days' notice, and sums exceeding £10 by giving one month's notice, according to the printed form in the schedule annexed . . ."

In reference to that, that there is nothing in the language of the form which appears to me to add in any material way to the language of the rule, or to assist materially in placing a construction upon it. "No further liabilities shall be incurred by the society till such member has been repaid." I

The question is: What right accrued to the withdrawing member who gave notice not only before there was any winding-up, but when he had no information that any winding-up was going to take place, when nothing special is alleged to affect him with notice that the society was not to continue as a going concern, and when,

A even if an objection could have been made by the directors to his notice to withdraw, none was actually made. The question is, what right accrued to such withdrawing member on the expiration of the notice required by that rule? Not a right to immediate payment, that is clear, unless the funds then available enabled the directors to make that payment. But does it follow that because the words "provided the funds permit" postponed a payment which the then state of the
B funds would not permit, therefore the expiry of the notice to withdraw was to be of no effect? It is not contended that it was to be of no effect, and it appears to me that the rule must be construed without any reference whatever to a contingency not contemplated or expressly provided for, namely, a subsequent winding-up of the society. The question what effect the occurrence of that contingency had upon the rights of the parties must depend first of all upon the contract itself,
C construed without reference to the occurrence of that contingency; and, secondly, upon the law which has been laid down as to the effect of a winding-up order.

I put aside entirely the consideration of a subsequent winding-up before actual payment, and solely inquire what right accrued to the withdrawing member on the expiry of his notice. It is said that the words "provided the funds permit" qualify the right to withdraw so that there is to be no right of withdrawal; there is
D to be in effect no withdrawal until the funds are in such a state as to enable payment to be made. But, to consider whether that can be the meaning of the word "provided," we must look at the entire context, and, first of all, inquire whether such a construction is consistent with the principle of a certain definite term of notice—in one case seven days, and in another case a month. Surely that means *prima facie* that some right accrues to the withdrawing member at the
E expiry of that notice which he had not before. In aid of that construction there are the very important words which follow: "No further liabilities shall be incurred by the society till such member has been repaid." It is admitted, I think, that that means after the expiry of the notice. If there are then any funds, he has an immediate and absolute right to receive payment; if there are not any funds, he has acquired the right, when the funds permit, to receive payment. He has
F done all which lies in him and which is in his power to withdraw, and a stop as between him and the society is put upon the power of the society to contract further liabilities until he has actually got payment; so that nothing new which the society can do in favour either of any member of the society, or of any outside creditor can, consistently with his contract and as between him and the society, intercept his right to payment out of any funds when they come in. I confess
G that it would appear to me a very strange thing if it could be made to be consistent with that contract that the non-withdrawing members could put forward any claims of their occurring after the end of the notice as an impediment to his right to be paid out of any moneys which might come in. Nobody, I think, would contend that that could be so irrespective of the winding-up.

What is there in this contract to say that, if the funds do permit the payment
H to be made, though it was not possible before the winding-up yet becomes possible after that time, it shall not be done? Certainly there is nothing on the face of the contract to that effect—there is nothing to say that in any case when there are funds, with or without winding-up, the non-withdrawing members are to come into competition with the right thus given to the withdrawing member. Is there anything to that effect in the Act which makes building societies liable to be
I wound-up? Nothing whatever. The particular terms of that Act have not been referred to, but they are familiar to your Lordships. It provides that when there is a winding-up the transactions of the society are to stop; there can be no new contracts entered into, there can be no change of the position in which the parties stand at that time; no new notice of withdrawal can be given, or anything of that character; and an official liquidator is appointed who is to collect the assets of the society and to administer them in the due course of administration, paying creditors first and the costs of the winding-up, and then, if there is a surplus, that surplus is to be applied according to the rights of the members *inter se*. If the

members had contracted with each other before the winding-up that in an event which had happened before the winding-up a particular member should have a right to be paid off his share, or a sum which he desires to withdraw, as soon as the funds permit, then, the moment the funds of the society are cleared from claims prior to his right, that right must take effect in the due course of administration under the winding-up just as it would have done before. In adjusting the rights of the members inter se, without going into any technical question as to the use of the word "creditor," those members are to be preferred who, under the contract, have a right to a preferable payment out of the free assets, the free funds, when they exist. A B

Then what is the answer which is made to that? The only answer which I have heard made, and which I have been able to follow at all, has been that the words "provided the funds permit" mean the moneys which come in and are available to meet the liabilities of the society from time to time as long as it is a going concern. If that had been expressed, of course a line would have been drawn, as to this part of the contract, at the time it ceased to be a going concern; but it is not expressed, and why in a contract inter se to give one member a preferable right to another, assuming them to be still in one sense all members, you should imply a line of that kind as regards one member when the words do not express it and there is nothing in the nature of the contract to suggest that justice requires such a construction, I cannot understand. No doubt, if there were creditors having a right in priority, what have been called outside creditors, the funds would not permit this payment to be made until they had been satisfied; but they have been satisfied, and I cannot find in the principle or in the enactments of the Winding-up Act, or in the terms of this contract, anything to suggest that the words "the funds" here mean the funds which shall be realised and become available, in the event of a winding-up before that event occurs. C D E

I think it unnecessary to say more about the matter excepting that this is perfectly consistent with the principles which would be applicable in the case of a partnership. In the case of a partnership no one partner can claim against the partnership assets and funds in competition with the creditors of them all; but the moment that all those creditors are paid one partner may have a preferable right to the others and be a quasi-creditor of the concern inter se if there is anything in the partnership contract to justify such a preference. The sole question is whether that is so or not; and why that right should be taken away by the event of the winding-up occurring is to me a thing which it is impossible to understand. F

With regard to the authorities, there are only three which seem to me to be at all in point; and of those, with regard to the one which is, as far as it goes, adverse to the case of the appellant, namely, *Re Norwich and Norfolk Provident Building Society, Ex parte Rackham* (1) I think it is quite true that some differences have been pointed out which are not immaterial to the line of argument which has been addressed to your Lordships. As I read that case there is this, which is really the principal difference in my view, that there it was not contemplated that it should be at the option of any member having a number of shares in the society, amounting in the whole to a certain sum, to withdraw a part of that sum or a part of those shares while continuing a member in respect of the rest. But here that option appears to be given; he may withdraw any sum he pleases, remaining a member in respect of other sums or other shares. I agree that that is a distinct difference, that a total withdrawal from the society was contemplated in the *Norwich Building Society Case* (1), while here it is at least not manifest that that was contemplated. I think that it was not necessary. G H I

Some cases have been pointed out where that did not happen. That is a distinction not without importance, but I think that it is not of sufficient importance to prevent the case, as far as it goes, bearing against the argument for the appellant, because that case at least shows that there is nothing inconsistent either with the nature of the contract contained in rules of this description, or with the effect in point of law, of a winding-up order, in the proposition that a withdrawing

A member, if entitled under the rule, may stand as a quasi-creditor against the funds when all other creditors have been paid off. I do not think that the distinction turning upon the grant of a certificate by the directors or upon a subsequent express allowance of 3 per cent. interest is really very material. About the interest there may be a question, but that is not necessary for the decision. Whether it would be due or not, still, if the construction of the rule is what I take it to be, the result would, I think, be the same. *Re Mutual Society* (2), in my judgment, as in the judgment of all the judges in the Court of Appeal, depended upon a particular rule which they construed, which I construe, and which I think SIR GEORGE JESSEL, M.R., construed, as providing for the constitution of a special and definite fund out of which alone withdrawing members were to be paid in a manner which was inapplicable to the state of things existing after the winding-up. Therefore, *Re Mutual Society* (2) has no application.

With regard to *Blackburn Building Society v. Cunliffe, Brooks & Co.* (3) the case stood thus: The question was between bankers who held deeds of the society against which advances had been made, and the official liquidator, the official liquidator not representing one class of members alone, nor the members alone, but representing all the contributories and also all the creditors; and unless the bankers had a right to hold as against all creditors and all contributories, they failed in their case. Payments which the bankers might have made to withdrawing members, if they were made out of money lent and advanced by the bankers and not then belonging to the society and to the credit of the society, could not possibly be payments made under this rule in due course, because they were non-existing funds, and only supplied by means of a loan, which was not itself legitimate. Therefore, in a case so arising all such payments were *prima facie* in a different category from those which might have been made in discharge of actual debts and liabilities of the society presently exigible, in respect of which the court thought that the bankers were entitled to stand in the same position as if they had been, by assignment or otherwise, subrogated to the rights of the creditors whom their money paid. That could not possibly be the situation of payments made by the bankers to withdrawing members, the time for whose payments had not yet arisen because the society had no money to pay them.

Any ulterior question whether the bankers might or might not have a right to stand in the place of those withdrawing members, if, in the course of the administration under the winding-up order, there should turn out to be a surplus to which those withdrawing members might be entitled, did not arise, and I think could not have arisen as the case then stood; and it is not necessary for me to express any opinion as to whether or no the principle on which the bankers were allowed to stand in the place of actual creditors entitled to immediate payment and who were paid with their money would have been applicable to such a claim to stand in the place of withdrawing members against an eventual surplus. It is enough to say that nothing was decided in the Court of Appeal any more than in this House which had the slightest bearing upon any such question. I move your Lordships to affirm the judgment of the court below with costs.

LORD BLACKBURN.—I also am of opinion that this order appealed against should be affirmed. I think the whole question really turns upon the true construction of the third rule, and I think that that is a question entirely of the construction of the rules. I quite agree also with what seems to have been said by SIR GEORGE JESSEL, M.R., in *Re Mutual Society* (2), though I do not think it was always properly understood, that in construing the rules and seeing what it is that they mean, we are to take into view what the parties were talking about, and see what were the whole objects of the society, and, looking at the society as a going concern as it is called, see what, if it were carried on as it would be expected to be carried on, the parties must be considered to have intended.

When one does that, I have no difficulty myself in construing this rule. The object of the society, it is to be remembered, was to raise money, partly from

investors who deposited money, receiving for it interest at 5 per cent., and having certain advantages which might come afterwards, and partly from members who, on becoming members, were to get advances made to them out of the funds of the society, which they were to secure by mortgage, and to repay, generally speaking, by instalments that were weekly, so that there would be a periodical fund constituted. The object of the society was, as I have said, to invest the money by making advances to the different members, who were to secure the amount by a mortgage security, and to repay the money by instalments, generally speaking, week by week and month by month, until the whole was paid off. There would, therefore, be funds accumulating in that way. The society may seek to make further advances, and all this money which they receive is subject to be appropriated to paying the absolute liabilities which have been already incurred by the society.

That being so, it is obvious that when an investing member—one who had put in his money to invest it—wished to call it back, nothing would be more reasonable than for the society to say, “Of course, you may have it called back upon giving proper notice; but, remember this, that, as we have during this time been incurring liabilities from time to time, you shall not call it in and call upon us to pay you off, and thereby leave those liabilities unpaid. Our funds, as they come into our hands, must be applied by us first in paying off the debts which are already existing as against you before you are repaid your money.” I think it would also be very reasonable to say, “You shall not be entitled to require us to sell any of those mortgages which are in our possession.” A mortgage given by a member whose advances were secured by his mortgage could not be enforced so long as he continued to fulfil the requirement; that is to say, such a mortgage could not be treated as a forfeited mortgage and realised in that way, but I suppose it might have been sold; and I think it is probable that they intended to say, “You shall not have the power of compelling us to sell such a mortgage—it may go on; but subject to this you shall, upon giving us a month’s notice, have the right to withdraw.”

If that was the object which the society had in their minds, have they not expressed it in r. 3? I have looked at it in a vain attempt to see that they have not so expressed it. It seems to me that, taking such a society, and such an object of the society, the words there used do really mean this, that the investing member has no right to be repaid so long as there are prior liabilities which remain unpaid, and that he has no right in order to be repaid to require the society to sell off or part with the mortgages which advance members have made to them, but that subject to those two limitations he has a right to be repaid. Why should he not? What is there against such a right? It was argued that he could not have it because there was something (I did not exactly understand what) in the nature of the transaction between the members of the society entering into a bargain of this sort which made it impossible, or illegal, or incompetent for it to be a binding bargain between them. I did not understand it, but it is really not a thing that there can be the least doubt about. If the real intention of the parties was, as it appears to me to have been, sufficiently expressed that the money was to be repaid at a particular time, then it is to be repaid. It was not to be repaid at once, as I have already pointed out; but what is there to prevent there being a contract that the society were to repay the money, although the time of payment was deferred? I will not call these withdrawing members “creditors,” for I will not beg the question. I will not speak of a “creditor” and a “debt,” because, as has been truly enough said, they are not strictly speaking creditors, and it is not strictly speaking perhaps a debt; but I do say, what is there to prevent this agreement on the part of the society to pay the money being an agreement to pay the money absolutely, although the time when the payment is to be made may be deferred and postponed, and because it may be said of it, *Debitum in presenti solvendum in futuro*? That is what one would say of a debt. Why should not this be treated in the same way? I can see no reason

A why it should not. If that be so, I do not think the winding-up makes any difference. The winding-up no doubt stops all things which are coming on from coming to maturity—it stops them in that sense, but it does not affect the rights of the parties, and when a right has been acquired in præsentī, although it is solvendum in futuro, I see no reason why it should not be enforced in a winding-up as much as in a bankruptcy or anything else.

B I think that really is the whole case. I think that SIR GEORGE JESSEL, M.R., in *Re Mutual Society* (2), did determine, upon the special rules of the society in that case, that it was not such a matter as I have described, an absolute promise to pay, but only a promise to pay out of a particular fund, which particular fund was destroyed at the time; and I think that no one who reads the rule which is quoted in that case can fail to see that it was so, and that SIR GEORGE JESSEL, M.R.,
C was perfectly right in what he decided. I do not think it necessary to make any remarks upon the other cases which have been cited, because the explanation which has been given of them by the Lord Chancellor perfectly meets my view.

LORD WATSON.—I concur.

Appeal dismissed.

D Solicitors: *Hare & Co.*, for *T. & R. C. Radcliffe*, Blackburn; *T. G. Field*, for *W. Danger*, Liverpool; *Chester & Co.*, for *H. M. Richardson*, Bolton-le-Moors; *Ridsdale & Son*, for *Robinson & Sons*, Blackburn.

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

E

COOPER v. CRABTREE

F [COURT OF APPEAL (Sir George Jessel, M.R., Cotton and Lindley, L.JJ.), March 17, 1882]

[Reported 20 Ch.D. 589; 51 L.J.Ch. 544; 47 L.T. 5; 46 J.P. 628;
30 W.R. 649]

G *Trespass—Nuisance—Damage to demised property—Action by landlord—Competency—Injunction.*

H A landlord of premises let to a weekly tenant cannot maintain an action for trespass in respect of damage to the premises, nor can he obtain an injunction to restrain a nuisance against the premises unless he can show that the nuisance has caused substantial injury to his reversion. Where a reversioner's possessory rights are being seriously infringed and an award of damages would not be an adequate remedy he may be granted an injunction.

Notes. Referred to: *Mayfair Property Co. v. Johnston*, [1894] 1 Ch. 508; *Meux's Brewery v. City of London Electric Lighting Co.*, *Shelfer v. Same* (1894), 42 W.R. 644.

I As to who may sue for trespass to land in general, see 38 HALSBURY'S LAWS (3rd Edn.) 744 et seq.; and for cases see 43 DIGEST 379 et seq. As to who may sue for private nuisance in general, see 28 HALSBURY'S LAWS (3rd Edn.) 153 et seq.; and for cases see 36 DIGEST (Repl.) 306 et seq.

Cases referred to:

- (1) *Goodson v. Richardson* (1874), 9 Ch. App. 221; 43 L.J.Ch. 790; 30 L.T. 142; 38 J.P. 436; 22 W.R. 337, L.C. & L.JJ.; 43 Digest 403, 258.
- (2) *Bowser v. Maclean* (1860), 2 De G.F. & J. 415; 30 L.J.Ch. 273; 3 L.T. 456; 6 Jur.N.S. 1220; 9 W.R. 112; 45 E.R. 682, L.C.; 13 Digest (Repl.) 16, 141.

- (3) *Rochdale Canal Co. v. King* (1851), 2 Sim.N.S. 78; 20 L.J.Ch. 675; 15 Jur. 962; 61 E.R. 270; 43 Digest 403, 257.

Also referred to in argument :

Bickett v. Morris (1866), L.R. 1 Sc. & Div. 47; 14 L.T. 835; 30 J.P. 532; 12 Jur.N.S. 802, H.L.; 44 Digest 14, 65.

Tucker v. Newman (1839), 11 Ad. & El. 40; 3 Per. & Dav. 14; 9 L.J.Q.B. 1; 3 Jur. 1145; 113 E.R. 327; 44 Digest 58, 423.

Baxter v. Taylor (1832), 4 B. & Ad. 72; 1 Nev. & M.K.B. 11; 2 L.J.K.B. 65; 110 E.R. 382; 19 Digest (Repl.) 133, 864.

Mott v. Shoolbred (1875), L.R. 20 Eq. 22; 44 L.J.Ch. 380; 23 W.R. 545; 19 Digest (Repl.) 208, 1503.

Jones v. Chappell (1875), L.R. 20 Eq. 539; 44 L.J.Ch. 658.

Jackson v. Pesked (1813), 1 M. & S. 234; 105 E.R. 88; 36 Digest (Repl.) 306, 528.

Simpson v. Savage (1856), 1 C.B.N.S. 347; 26 L.J.C.P. 50; 28 L.T.O.S. 204; 21 J.P. 279; 3 Jur.N.S. 161; 5 W.R. 147; 140 E.R. 143; 36 Digest (Repl.) 306, 531.

Appeal from an order of FRY, J., in an action brought by the plaintiff for an injunction restraining the defendant from trespassing and committing a nuisance.

The plaintiff became in 1880 the owner in fee of certain cottages at Mill Thorne, Halifax. The defendant was the owner of land adjoining on the north side the land on which the cottages stood, but the exact line where one property began and the other ended was in dispute. The cottages were completed in 1868, and the gable end of one of them contained a kitchen window facing north, and an attic window also facing in the same direction. In 1877 the defendant, in order to obstruct the light of the kitchen window, and to prevent the acquisition of a right to the access of light thereto, erected a brick wall in front of that window, and in August, 1881, he, with similar intentions with regard to the attic window, erected two poles thirty feet in height in front of that window, and placed on the top of them a hoarding opposite and only a few inches from the attic window. In consequence of complaints made by the plaintiff, the defendant fastened the poles by wire ropes or guys on his own side only of the poles.

In August, 1881, the present action was commenced, the plaintiff by his statement of claim alleging that the brick wall and poles were placed on his land by the defendant, and that a trespass was thereby committed; that the poles and hoarding were an intolerable nuisance to him and his tenants, by reason of the constant rattling and creaking noise produced thereby; that the use of wire ropes increased the nuisance; that the plaintiff would be entitled to have the poles, hoarding, and ropes removed, even if they stood on the defendant's own land; that the poles, hoarding, and ropes were a nuisance to his tenants occupying the said cottages, and that they stated that, unless the nuisance were removed, they would have to leave the cottages. Damage was alleged, and the plaintiff claimed an injunction to restrain the defendant from allowing the brick wall, poles, hoarding, and wires to remain on the plaintiff's land, and from committing other trespasses thereon, and that, in any event, the defendant might be restrained from allowing the poles, hoarding, and wires, to remain so as to create a nuisance to the plaintiff, his tenants, or his cottages. By his defence the defendant alleged that the brick wall, and the poles, hoarding, and wires were placed entirely on his own land, denied that there had been any trespass or nuisance, and stated that he had offered to receive, but the plaintiff had refused to pay, 2s. 6d. per annum for a licence to enjoy the light of the attic window.

The action was tried before FRY, J., in December, 1881, when evidence was given by a man who was in possession of the cottage of which the windows in question formed part, as a weekly tenant under the plaintiff, to the effect that the creaking of the poles, hoarding, and wires prevented his children from sleeping in the attic room, and constituted a nuisance. FRY, J., held, that, there being no actual evi-

A A defence of damage to the reversioner (the erection not being in its nature of such a description as necessarily to injure the reversioner), the plaintiff had not a cause of action, and he dismissed the action with costs and the plaintiff appealed. On the hearing of the appeal, the claims in respect of the wall and the noise caused by the structure were given up.

B *Cookson, Q.C.*, and *E. Ford* for the plaintiff.
Fischer, Q.C., and *W. Baker* for the defendant.

SIR GEORGE JESSEL, M.R.—I must say, speaking for myself, that I consider this a trumperey action; that is, when you take away all which has been abandoned by the plaintiff. The sole remaining complaint is that the defendant has put up two small poles, with a small piece of hoarding between them, in order to obstruct the window of the plaintiff's cottage. The defendant's right to do this is plain enough, and he wants to do it in order that he may prevent the plaintiff from acquiring a right to light over the defendant's land which he intends to use as building land. The defendant has not behaved unreasonably, as he has offered to give the plaintiff a licence for half-a-crown a year until the defendant wishes to build, but the plaintiff has declined to accept this offer.

D The complaint is the obstruction to the window. No doubt the plaintiff does complain that the poles were put up on his land, and he also complains of a wall and of the noise occasioned by the erection. The claims as to the wall and the noise have been abandoned. It is clear, from the statement of claim, that the only injury apprehended is the stopping up of the window. It is admitted that the poles are some distance from the cottage wall, and it is plain that merely putting the poles a few inches back would not do the plaintiff much good. The strip of land in dispute is only a few inches wide, and the poles are not touching the wall. The complaint was not of the injury to the land, but of the injury to the cottage. The plaintiff says his land is injured. There is no substantial injury. Putting sticks into land is no real injury. It is equally obvious that the structure is not permanent. It is merely put up to obstruct the light for a year, and might be pulled down in five minutes. Those being the facts, the plaintiff cannot maintain an action for trespass, because a weekly tenant is in possession of the property; and he cannot restrain the nuisance, because it is the weekly tenant who suffers, and not the reversioner. He is trying to obtain an injunction to restrain a trespass when he cannot maintain an action for the trespass. No authority has been produced in favour of the plaintiff.

G It has been suggested that you cannot consider the amount of the injury, but, in my opinion, you are entitled to look at the amount of the injury in considering whether an injunction shall be granted. There is a line of cases, such as *Goodson v. Richardson* (1) and *Bowser v. Maclean* (2), where, although the damages are nothing, the injury may be very great. In *Bowser v. Maclean* (2), an underground passage or tramway ran through the soil of the plaintiff's estate. The estate was copyhold, and the property in the minerals therefore belonged to the lord of the manor, who had let all the mines in the manor to the defendant. The defendant had the right to use the underground passage in working the mines in the manor, but he also claimed a right to make and use a tramway in the passage so as to be able to convey coals from workings outside the manor. He had no right to do that, and although the plaintiff suffered no actual damage by the defendant conveying the coals under his land, he suffered most serious injury, as he had the right to compel the defendant to pay him a wayleave rent for the use of the intervening passage. The injury arose from the loss of the wayleave rent.

H I The same thing occurred in *Rochdale Canal Co. v. King* (3). There the plaintiffs were the owners of a long canal, and claimed the right to restrain millowners from taking water for the use of their mills. The quantity of water taken by the defendant's engines was so small as not to interfere with the navigation of the canal, but inasmuch as it was the canal company's water, and they had the right to insist

on not being deprived of the gain to be got by letting the water at a water-rent for the use of the mills and engines, the action was held to be maintainable. A

Goodson v. Richardson (1) was a case of the same kind. In that case, the defendant was the owner of houses, and, in constructing works for supplying the houses with water, had to lay down pipes along the highway, the soil of which belonged to the owners of the land on each side of the highway. There was no actual damage by putting pipes in the soil of the plaintiff, who was one of the adjoining owners, but the doing so gave him the right to say, "You shall not deprive me of my property, without paying for it." All these cases show that an injunction was the only remedy. An action at law for damages would have been no remedy at all. B

In the present case the injury to the light is not caused by putting the stakes into the plaintiff's land. The same injury would be caused if the stakes were put further back on the defendant's land. There is nothing in the shape of a great injury to call for the remedy by injunction. There is no authority for the proposition that a party who is not in possession, and therefore unable to maintain trespass, and who can show no injury to the reversion, is entitled to an injunction against the continuance of a temporary obstruction. In my opinion the judgment appealed against is quite right, and the appeal ought to be dismissed. C

COTTON, L.J.—I am of the same opinion. I put out of consideration all the abandoned claims. It is said that the structure erected by the defendant prevents the tenants from sleeping and prevents the access of light to the window. Has it been shown that the trespass is of a permanent nature to so as injure the plaintiff's reversion? In my opinion it has not. The action is simply an action for trespass. It is said that the defendant, by putting up the posts, has asserted a right to the land on which they have been put up. The only interference, if any, with the right of the plaintiff is the putting up of poles on his land. The only real objection to this is that the plaintiff's window has been obstructed. No trespass or nuisance can be complained of. The poles were not put up in assertion of a claim of right, but for the purpose of erecting a structure which would block up the lights to the windows, and this the defendant might lawfully do by placing the poles a few inches back. No substantial injury having been done to the plaintiff, we ought not, in my opinion, to grant an injunction. D E F

LINDLEY, L.J.—So far as I can see, the object of the action fails. The plaintiff has tried to bolster up his case by saying that something has been done, to prevent which the action was not originally brought. The action was brought to stop the defendant from blocking up the lights for some time enjoyed by the tenants of the plaintiff's property. The case is put in an ingenious way by saying that the board which has been erected is a nuisance, and has been erected in assertion of a claim of right. That was not the plaintiff's original theory. No possessory right of the plaintiff has been interfered with, and therefore he cannot maintain trespass. His rights as a reversioner have not been infringed. He is not therefore in the position of the plaintiffs in *Rochdale Canal Co. v. King* (3) or the other cases cited, in which certain possessory rights were infringed. In my opinion, therefore, his appeal fails and must be dismissed. G H

Appeal dismissed.

Solicitors: *Layton & Jaques*, for *Holyroyd & Smith*, Halifax; *Williamson, Hill & Co.*, for *Foster, England & Foster*, Halifax. I

[Reported by FRANK EVANS, ESQ., Barrister-at-Law.]

A

HARVEY v. PRINCIPAL AND ANTIENTS OF BARNARD'S INN

[CHANCERY DIVISION (Fry, J.), August 8, 1881]

[Reported 50 L.J.Ch. 750; 45 L.T. 280; 29 W.R. 922]

B

Specific Performance—Contract—Condition—Unfulfilled condition—Agreements
 “subject to a contract to be settled between” the parties and “subject to a proper contract and the payment of a deposit to be agreed on”—Competency of action.

C

By a written agreement, dated Aug. 24, 1880, the defendants agreed to sell to the plaintiff freehold hereditaments for the sum of £50,000 “subject to a contract to be settled between [the plaintiff’s solicitors] and the defendants.” By a further written agreement, dated Sept. 1, 1880, the defendants agreed to sell to the plaintiff the same property for the sum of £50,000 “subject to a proper contract and the payment of a deposit to be agreed on.” No further contract of any kind was concluded, the defendants refused to carry out the transaction, and the plaintiff claimed specific performance of the agreements.

D

Held: the reference to a contract imposed a condition which had not been satisfied, and there was, therefore, no concluded contract in respect of which a decree of specific performance could be granted.

Notes. As to agreements contemplating execution of more formal document, see 8 HALSBURY’S LAWS (3rd Edn.) 76–77; and for cases see 12 DIGEST (Repl.) 92 et seq.

E

Cases referred to in argument:

Honeyman v. Marryatt (1855), 21 Beav. 14; 25 L.T.O.S. 242; 1 Jur.N.S. 857; affirmed (1857), 6 H.L.Cas. 112; 26 L.J.Ch. 619; 4 Jur.N.S. 17; 10 E.R. 1236, H.L.; 12 Digest (Repl.) 79, 434.

Crossley v. Maycock (1874), L.R. 18 Eq. 180; 43 L.J.Ch. 379; 22 W.R. 387; 12 Digest (Repl.) 93, 529.

F

Chinnock v. Marchioness of Ely (1865), 4 De G.J. & Sm. 638; 6 New Rep. 1; 12 L.T. 251; 29 J.P. 279; 11 Jur.N.S. 329; 13 W.R. 597; 46 E.R. 1066, L.C.; 12 Digest (Repl.) 149, 945.

Winn v. Bull (1877), 7 Ch.D. 29; 47 L.J.Ch. 139; 42 J.P. 230; 26 W.R. 230; 12 Digest (Repl.) 94, 544.

G

Rossiter v. Miller (1878), 3 App. Cas. 1124; 48 L.J.Ch. 10; 39 L.T. 173; 42 J.P. 804; 26 W.R. 865, H.L.; 12 Digest (Repl.) 95, 548.

Donnison v. People’s Café Co. (1881), 45 L.T. 187, C.A.; 12 Digest (Repl.) 162, 1040.

Hussey v. Horne-Payne (1879), 4 App. Cas. 311; 48 L.J.Ch. 846; 41 L.T. 1; 43 J.P. 814; 27 W.R. 585, H.L.; 12 Digest (Repl.) 80, 440.

H

Action by the plaintiff, Charles Henry Harvey, against the defendants, the principal and antients of Barnard’s Inn for a decree of specific performance in respect of two alleged agreements. The defendants demurred alleging that the statement of claim was bad in law as on the plaintiff’s own showing neither of the two agreements was a final agreement binding on the parties and no cause of action was therefor disclosed.

I

The statement of claim alleged that by an agreement in writing made on Aug. 24, 1880, between the defendants and the plaintiff, the defendants agreed to sell to the plaintiff, and the plaintiff to purchase from the defendants certain freehold hereditaments known as Barnard’s Inn, Holborn, for the sum of £50,000, “subject to a contract to be settled between Messrs. Carr, Fulton, and Carr, the plaintiff’s solicitors, and the defendants.” It also alleged that by another agreement in writing, made on Sept. 1, 1880, between the defendants and the plaintiff, the defendants agreed to sell to the plaintiff the aforesaid property for the sum of £50,000 “subject to a proper contract and the payment of a deposit to be agreed

on." It also alleged that the plaintiff and his solicitors had always been and were then ready and willing to settle and enter into a contract, but the defendants refused to carry out the above agreements. The plaintiff therefore on April 21, 1881, commenced this action, claimed specific performance of the several agreements. A

North, Q.C., and *C. T. Simpson* for the defendant.

Cookson, Q.C., and *Boome* for the plaintiff. B

FRY, J.—I am of opinion this demurrer must be allowed. The first agreement on which the plaintiff sues is one made on Aug. 24, 1880, by which it was agreed that the plaintiff should buy the property at the price of £50,000, "subject to a contract to be settled between Messrs. Carr, Fulton, and Carr, the plaintiff's solicitors, and the defendants." It is alleged by the plaintiff that no such contract has been settled, though he says he is and always has been ready and willing to settle one. I am of opinion that no contract exists between the plaintiff and defendants. If the matter was *res integra*, I believe I should have thought that wherever it is the common case that there is to be a future contract, both parties state that there is no existing contract. However reasonable that view may be, it is not the law. And there are cases in which, though there be a reference to a contract to be signed, the courts have nevertheless held there is a binding contract. C D

In the present case, the reference to a contract to be settled appears to me to impose a condition, and the allegation says that the so-called contract is not to be binding except on the condition of a contract being settled, and as that agreement never was carried into effect, there was no contract at all. There is another difficulty in respect of the first contract sued upon, namely, that a second and different contract is alleged, which is only consistent with the former allegation if there has been a novation, by which the first contract has been cancelled. Therefore, on that ground, I could give no relief on the contract of August. I come then to the contract of September. The allegation in respect of that is similar to the allegation in respect of the former, except that a different agent is alleged, and it is "subject to a proper contract and a payment of a deposit to be agreed upon," instead of "a contract to be settled." Those words very explicitly state that there is to be a future agreement between the parties; in other words, that they have agreed to agree, and that amounts to nothing. There is no agreement with any binding effect alleged, and it is beyond the power of the court to make an agreement for the parties or to force persons to agree. The demurrer will be allowed; or, as I understand the parties prefer it, I dismiss the action with costs. E F G

Solicitors: *Carr, Fulton & Carr*; *J. Plaskitt*.

[Reported by *W. C. Biss, Esq., Barrister-at-Law.*]

A

R. v. McDONALD

[COURT FOR THE CONSIDERATION OF CROWN CASES RESERVED (Lord Coleridge, C.J., Cave, Day, A. L. Smith and Wills, JJ.), May 9, 1885]

B

[Reported 15 Q.B.D. 323; 52 L.T. 583; 49 J.P. 695; 33 W.R. 735;
1 T.L.R. 465, 561; 15 Cox, C.C. 757]

Criminal Law—Larceny—Larceny by bailee—Goods hired under contract—Conversion of goods—Larceny Act, 1861 (24 & 25 Vict., c. 96), s. 3—Larceny Act, 1916 (6 & 7 Geo. 5, c. 50), s. 1 (1).

Infant—Capacity—Bailee of goods—Larceny—Liability of infant.

C

M., an infant, entered into a contract for the hire of goods which he agreed to purchase by quarterly instalments. Having taken delivery of the goods, he paid the first four instalments, and then sold part of the goods to a third party. On his indictment for larceny as a bailee under s. 3 of the Larceny Act, 1861, his counsel contended that there was no case to go to the jury since, M. being under age when he entered into the contract, it was void, and, therefore, did not operate to create a bailment within the meaning of the Act. The court let the case go to the jury who found M. guilty but reserved the point. On a Case Stated,

D

Held: apart from the contract, which was void by reason of M.'s minority, the bailment was completed on the delivery which created in M. the special property in the goods contemplated by s. 3 of the Larceny Act, 1861, and M. having converted the goods, he was guilty of larceny within the meaning of that section.

E

Notes. Section 3 of the Larceny Act, 1861, which dealt with larceny by a bailee, has been replaced by the proviso to s. 1 (1) of the Larceny Act, 1916: see 5 HALSBURY'S STATUTES (2nd Edn.) 1012.

As to infant's liability for tort founded on contract, see 21 HALSBURY'S LAWS (3rd Edn.) 150; as to infant's criminal capacity, see 10 HALSBURY'S LAWS (3rd Edn.) 287; as to larceny by a bailee, see *ibid.*, 768 et seq. For cases see 28 DIGEST (Repl.) 523, 524, 14 DIGEST (Repl.) 59, and 3 DIGEST (Repl.) 55 et seq.

F

Cases referred to in argument:

Mills v. Graham (1804), 1 Bos. & P.N.R. 140; 127 E.R. 413; 3 Digest (Repl.) 57, 21.

G

R. v. Robson (1861), Le. & Ca. 93; 31 L.J.M.C. 22; 5 L.T. 402; 26 J.P. 179; 8 Jur.N.S. 64; 10 W.R. 61; 9 Cox, C.C. 29, C.C.R.; 3 Digest (Repl.) 55, 5.

Wright v. Leonard (1861), 11 C.B.N.S. 258; 30 L.J.C.P. 365; 5 L.T. 110; 8 Jur.N.S. 415; 9 W.R. 944; 142 E.R. 796; 28 Digest (Repl.) 520, 375.

Bartlett v. Wells (1862), 1 B. & S. 836; 31 L.J.Q.B. 57; 5 L.T. 607; 26 J.P. 228; 8 Jur.N.S. 762; 10 W.R. 229; 121 E.R. 924; 28 Digest (Repl.) 520, 377.

H

Burnard v. Haggis (1863), 14 C.B.N.S. 45; 2 New Rep. 126; 32 L.J.C.P. 189; 8 L.T. 320; 9 Jur.N.S. 1325; 11 W.R. 644; 143 E.R. 360; 28 Digest (Repl.) 523, 402.

Jennings v. Rundall (1799), 8 Term Rep. 335; 101 E.R. 1419; 28 Digest (Repl.) 523, 401.

I

R. v. Wilson (1879), 5 Q.B.D. 28; 49 L.J.M.C. 13; 41 L.T. 480; 44 J.P. 105; 28 W.R. 307; 14 Cox, C.C. 378, C.C.R.; 5 Digest (Repl.) 1121, 9045.

R. v. Matthews (1873), 28 L.T. 645; 12 Cox, C.C. 489; sub nom. *R. v. Mathews*, 37 J.P. 596, C.C.R.; 15 Digest (Repl.) 1050, 10,339.

Case Stated for the opinion of the court with regard to the indictment of John Lawrence McDonald, an infant, for larceny as a bailee of goods.

The prisoner, John Lawrence McDonald, was indicted at Devon Quarter Sessions, for larceny as a bailee of goods, the property of James Humphrey Brown. At the trial it was proved that in March, 1884, Brown, a draper and furniture broker,

supplied furniture to McDonald under a hiring agreement, the terms of which provided that Brown thereby let on hire and McDonald agreed to hire the goods scheduled to the contract which goods had been placed in a certain dwelling-house, for a term of 42 months, at the sum of £8 per quarter, payable on specified quarter days. It was agreed that McDonald would not injure or damage the goods or give any bill of sale upon them or remove them without the consent of Brown, and that, if the instalments were not duly paid or if any execution were levied on the goods, Brown should have power to re-take possession of and remove the goods. It was further agreed that the goods should not belong to McDonald until they had been fully purchased and paid for, but that until default by him he should hold and enjoy them, paying interest on the total amount of 5 per cent. per annum monthly or quarterly. It was proved that McDonald paid the first four instalments and no more, and that afterwards, without notice to or the consent or knowledge of Brown, he removed part of the goods and sold them. It was also proved that McDonald was born on May 21, 1865, and was not of full age when he entered into the contract. An objection was thereupon raised by his counsel that there was no case to go to the jury inasmuch as the only larceny attempted to be proved against McDonald was larceny of goods of which he was at the time bailee by virtue of the contract set out, whereas, as McDonald was under age when he entered into the contract, it was void, and, therefore, did not operate to create a bailment within the meaning of the Larceny Act, 1861. Quarter Sessions let the case go to the jury, but reserved the point. The jury found McDonald guilty.

Bernard Coleridge for McDonald.

McKellar for the Crown.

LORD COLERIDGE, C.J.—I am of opinion that this conviction must be affirmed. The prisoner is stated in the Case to have been indicted for larceny “as a bailee.” It is doubtful whether the words “as bailee” are rendered necessary by s. 3 of the Larceny Act, 1861, which enacts that:

“Whosoever, being a bailee of any chattel, money, or valuable security, shall fraudulently take or convert the same to his own use or the use of any person other than the owner thereof, although he shall not break bulk or otherwise determine the bailment, shall be guilty of larceny, and may be convicted thereof upon an indictment for larceny.”

I will assume, however, that the words “as bailee” are material. That being so, it is said on behalf of the prisoner, that he cannot be convicted on such an indictment, because he obtained the goods, in respect of which he was indicted, on a contract which is void; that since, by reason of his infancy, he could not enter into a contract, he could not be guilty of larceny as a bailee.

A contract certainly does arise out of a bailment, but on the other hand there may be a complete bailment without a contract. A bailment, according to the definitions, is a delivery of goods in trust, upon a contract, express or implied, that the trust shall be duly executed, and the goods restored by the bailee as soon as the purpose of the bailment shall be answered. Bailment is then completed by delivery; it is a delivery of goods in trust. Here the goods were delivered in circumstances which created a special property in them, and, while that special property existed, the prisoner, if he abused that special property, was guilty of larceny under the statute. The Act was passed to provide against this kind of crime. In my opinion the prisoner, though a minor, has been guilty of this offence because he had a property under the bailment separate from any contract.

CAYE, J.—I agree that this conviction must be supported. Bailment is a delivery of goods upon a condition, and, though in the case of an infant a contract cannot be implied, the delivery upon condition nevertheless exists. In my opinion the delivery on condition creates a property in the goods as against the world until the condition is fulfilled, and the infant can maintain an action even if the real owner of the goods disturbs him in the possession of that property. The law recog-

A nises a special property such as that created by the delivery of the furniture in the present case, and in my opinion the prisoner is a bailee, and though he cannot be liable in an action of contract, he is within the mischief of the Act. The conviction was, therefore, in my opinion, right.

DAY, A. L. SMITH and WILLS, JJ., concurred.

B

Conviction affirmed.

Solicitors: *Ford, Lloyd, Bartlett & Michelmore; Hamlyn & Hutchins.*

A doubt having been expressed by one of the learned judges who formed the court when the above decision in *R. v. McDonald* was given, as to the correctness of the decision, the case was re-argued upon the 20th inst., before a court composed

C of the following judges, viz.: LORD COLERIDGE, C.J., GROVE and DENMAN, JJ., POLLOCK, B., FIELD, J., HUDDLESTON, B., MANISTY, HAWKINS, MATHEW, CAVE, DAY, A. L. SMITH, and WILLS, JJ. Previously to the commencement of the argument LORD COLERIDGE, C.J., said that the court did not intend to sit as a court of appeal from the Court for Crown Cases Reserved as composed on May 9, but were about to sit, because of the doubt already referred to, in order to consider, with the assistance of the learned counsel engaged in the case, the soundness of the judgment delivered by that court; and did not intend by any judgment they might give to affect the record of that judgment. After hearing an elaborate argument on the part of both the counsel for the prisoner and the counsel for the prosecution, the learned judges retired to consider their judgment; and upon returning into court LORD COLERIDGE, C.J., announced that the majority of the judges were of opinion

D that the conviction had been rightly upheld on the previous occasion.

E

[Reported by R. C. GLEN, Esq., Barrister-at-Law.]

F

BRIDGER v. SAVAGE

[COURT OF APPEAL (Sir Baliol Brett, M.R., Baggallay and Bowen, L.JJ.), July 2, 1885]

G

[Reported 15 Q.B.D. 363; 54 L.J.Q.B. 464; 53 L.T. 129;
49 J.P. 725; 33 W.R. 891]

Gaming—Betting—Wagering contract—Agent employed to bet for principal—Principal's right to recover—Gaming Act, 1845 (8 & 9 Vict., c. 109), s. 18.

H

The plaintiff employed the defendant on commission to make bets for him on races, and, when a bet was won, to pay the winnings over to him (the plaintiff). In an action by the plaintiff for the amount which the defendant had so received,

Held: the Gaming Act, 1845, s. 18, applied only to contracts by way of wagering, and so the plaintiff was entitled to recover the sum he claimed from the defendant.

I

Beyer v. Adams (1) (1857), 26 L.J.Ch. 841, overruled.

Notes. Considered: *Harvey v. Hart* (1894), 38 Sol. Jo. 418; *Cheshire v. Vaughan*, [1920] 3 K.B. 240; *Jeffrey v. Bamford*, [1921] 2 K.B. 351. Referred to: *Cohen v. Kittell* (1889), 22 Q.B.D. 680; *Hyams v. Stuart King*, [1908] 2 K.B. 696; *Edwards v. Motor Union Insurance*, [1922] 2 K.B. 249.

As to agent and principal in gaming contracts, see 18 HALSBURY'S LAWS (3rd Edn.) 176 et seq.; and for cases see 25 DIGEST (Repl.) 493 et seq. For the Gaming Act, 1845, s. 18, see 10 HALSBURY'S STATUTES (2nd Edn.) 755.

Cases referred to:

- (1) *Byer v. Adams, Re Law, Arkell's Claim* (1857), 26 L.J.Ch. 841; 30 L.T.O.S. 8; 3 Jur.N.S. 709; sub nom. *Byers v. Adams, Re Law*, 5 W.R. 795; 25 Digest (Repl.) 435, 168.
- (2) *Tenant v. Elliott* (1797), 1 Bos. & P. 3; 126 E.R. 744; 1 Digest (Repl.) 512, 1473.
- (3) *Johnson v. Lansley* (1852), 12 C.B. 468; 138 E.R. 989; 25 Digest (Repl.) 444, 260.
- (4) *Beeston v. Beeston* (1875), 1 Ex.D. 13; 45 L.J.Q.B. 230; 33 L.T. 700; 40 J.P. 152; 24 W.R. 96; 25 Digest (Repl.) 435, 169.
- (5) *Sharp v. Taylor* (1849), 2 Ph. 801; 14 L.T.O.S. 1; 41 E.R. 1153, L.C.; 36 Digest (Repl.) 580, 1388.
- (6) *Fitch v. Jones* (1855), 5 E. & B. 238; 24 L.J.Q.B. 293; 25 L.T.O.S. 160; 1 Jur.N.S. 854; 3 W.R. 507; 3 C.L.R. 1226; 119 E.R. 470; 6 Digest (Repl.) 139, 996.

Also referred to in argument:

- Read v. Anderson* (1882), 10 Q.B.D. 100; 52 L.J.Q.B. 214; 48 L.T. 74; 47 J.P. 311; 31 W.R. 453; affirmed (1884), 13 Q.B.D. 779; 53 L.J.Q.B. 532; 51 L.T. 55; 49 J.P. 4; 32 W.R. 950, C.A.; 25 Digest (Repl.) 434, 156.
- Oulds v. Harrison* (1854), 10 Exch. 572; 24 L.J.Ex. 66; 24 L.T.O.S. 220; 3 W.R. 160; 3 C.L.R. 353; 156 E.R. 566; 6 Digest (Repl.) 108, 815.

Appeal by the defendant from a decision of LORD COLERIDGE, C.J., on an action by the plaintiff for money had and received by the defendant to the use of the plaintiff.

By the Gaming Act, 1845, s. 18:

"... All contracts or agreements, whether by parole or in writing, by way of gaming or wagering, shall be null and void; and ... no suit shall be brought or maintained in any court of law and equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made."

Grantham, Q.C., and *Parsons* for the defendant.

Kemp, Q.C., and *Gore* for the plaintiff.

SIR BALIOL BRETT, M.R.—In my opinion it is impossible to disagree with LORD COLERIDGE, C.J., on his finding as to the facts. There was a direct conflict of evidence, and he did not believe the defendant. The plaintiff employed the defendant to make bets, and to receive money when he won and pay it over to the plaintiff, and the defendant agreed to do so for a consideration—that is, for the commission which the plaintiff was to pay him. The defendant then made bets and won. The persons with whom he made the bets need not have paid their losses, and could not be compelled to pay, but they did pay. The bets then were over and done with, and the defendant has received money which he has agreed to hand over to the plaintiff.

That contract is perfectly legal. It was contended for the defendant that the Gaming Act, 1845, s. 18, makes that contract illegal. The answer is that it has repeatedly been held by the courts that the statute applies only to the original contract between the two persons who make the bet, and does not apply to such a contract as the present. In *Tenant v. Elliott* (2), BULLER, J., said (1 Bos. & P. at p. 4):

"Is the man who has paid over money to another's use to dispute the legality of the original consideration? Having once waived the legality, the money never shall come back into his hands again. Can the defendant then in conscience keep the money so paid? For what purpose should he retain it? To whom is he to pay it over; who is entitled to it but the plaintiff?"

A In the same case, EYRE, C.J., said :

"The defendant is not like a stakeholder. The question is, whether he who has received money to another's use on an illegal contract can be allowed to retain it, and that not even at the desire of those who paid it to him? I think he cannot."

B It is difficult to see what could be more distinct than this language. The decision in *Johnson v. Lansley* (3) applies the same principle to horse-racing transactions. In *Beeston v. Beeston* (4), POLLOCK, B., explained the application of the statute thus (1 Ex.D. at p. 15) :

C "There was money in the hands of the defendant belonging to the plaintiff, and, therefore, good consideration for the bill. The statute is directed against suits brought for recovering on any contract by way of wagering. That applies to actions brought by one party to a wager against the other, or by either party against the stakeholder."

There are also other cases which show that the contract between the principal and the agent is not affected by the statute.

D The decision in *Beyer v. Adams* (1) is, no doubt, an authority for the argument on behalf of the defendant, but it is not binding on the Court of Appeal, and I am of opinion that the time has come to say that it was a wrong decision, and must be overruled. The view which prevailed in that case was challenged in *Beeston v. Beeston* (4) by AMPHLETT, B., whose judgment is very much more fully reported in the *LAW TIMES* than in the *LAW REPORTS*. He cited *Sharp v. Taylor* (5), and his judgment shows that the decision of LORD COTTENHAM in that case was contrary to *Beyer v. Adams* (1). For these reasons, I am of opinion that the appeal ought to be dismissed.

E **BAGGALLAY, L.J.**—I am of the same opinion. On the question of fact, I agree with the finding of LORD COLERIDGE, C.J. As to the law, the only case in the defendant's favour is *Beyer v. Adams* (1), but *Sharp v. Taylor* (5) had been decided eight years earlier, and was not cited to STUART, V.-C. If it had been brought to his attention, I think that he would have decided otherwise. It is contended for the defendant that the contract involved a betting transaction, but that contention is met by the following observations of POLLOCK, B., in *Beeston v. Beeston* (4) (1 Ex.D. at p. 16) :

G "The only thing to be said on the other side is that, this being a pre-arranged plan, such betting as was in contemplation was illegal, but it was not so at common law, nor by [Gaming Act, 1710], nor [Gaming Act, 1835], because those statutes only apply to securities between the parties wagering, and the [Gaming Act, 1845], only makes such contracts null and void, and not illegal, as is clearly expressed in *Fitch v. Jones* (6)."

H I am of opinion that the defendant fails on the question of law.

I **BOWEN, L.J.**—On the question of fact I have nothing to add. The law, I think, is clear, both on principle and on the authorities. The contract between the persons who make the bets is not illegal, but only void. A man who pays a bet when he has lost it does nothing wrong, but only waives the protection of the Gaming Act, 1845, and, moreover, he gives a good title to the person whom he pays. Then, can it be said that payment to an agent does not give a title to his principal? I am of opinion that it is impossible to hold this. The agent receives on behalf of his principal money belonging to the principal, and the consequence is that an action for money received will lie. The rights of the principal are not affected by the infirmity of the collateral transaction between the agent and the person with whom he made the bet. As to the authorities, in my opinion, *Tenant v. Elliott* (2) is directly in point, and supports the plaintiff's claim; *Johnson v. Lansley* (3) also involves the same principle. In *Beeston v. Beeston* (4), AMPHLETT, B., puts the rule of law on the true ground. As to the decision in

Beyer v. Adams (1), I agree with the other members of the court that it is not law, and ought to be considered as overruled. As to the distinction between a bill and money, which has been suggested on behalf of the defendant, it is too fine to be supported.

Appeal dismissed.

Solicitors: *Baker, Blacker & Co.*; *Palmer & Bull*, for *Lamb & Evetts*, Brighton.

[Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.]

VON BROCKDORFF v. MALCOLM

[CHANCERY DIVISION (Pearson, J.), June 29, 30, 1885]

[Reported 30 Ch.D. 172; 55 L.J.Ch. 121; 53 L.T. 263;
33 W.R. 934]

Power of Appointment—Special power—Exercise—Exercise by will—Gift by will of all property over which testator should have “any beneficial disposing power” at the time of his death.

By deeds dated respectively Mar. 28, 1845, and Aug. 8, 1851, a life interest in a fund of personalty was conferred on G.J.M. and after his death the trustees were directed to hold the fund on trust for all and every or such one or more exclusively of the other or others of the children or grandchildren or other issue of G.J.M. to be born in his lifetime, in all respects in such manner as G.J.M. should direct and appoint by deed or will, with remainders over. It was further provided that it should be lawful for G.J.M. before or after marriage to appoint not more than one half of the income thereby provided for him during his life in favour of his widow during widowhood. In contemplation of his marriage with O., in 1860 G.J.M. by deed appointed that after his death one half of the income of the fund should be paid to O. during her widowhood, and provided that, if O. should predecease him, he might revoke the appointment. The marriage took place, but in 1866 O. died. In 1876 G.J.M. re-married. By his will dated May 29, 1877, G.J.M. directed that his executors should repay to the trust fund money advanced to him out of that fund. After making various bequests, G.J.M. also gave, devised and bequeathed “all the real and personal estate and effects whatsoever and wheresoever whether in possession, reversion, remainder or expectancy over which at the time of my decease I shall have any beneficial disposing power by this my will, and which I do not otherwise dispose of by will or codicil, to my trustees upon trust” to sell and convert the same so far as not consisting of money and to invest the proceeds and money and to hold the resultant fund for his wife and issue, all of whom were objects of the powers of appointment conferred on him by the deeds of 1845 and 1851. By a codicil dated May 28, 1877, G.J.M. revoked the deed of appointment of 1860. In 1884, G.J.M. died. On a question as to the effect of the residuary devise and bequest,

Held: the powers of appointment conferred on G.J.M. by the deeds of 1845 and 1851 were effectively exercised, especially having regard to the codicil, which, although unnecessary to render the appointment of 1860 ineffective, confirmed the intention of G.J.M. to exercise his powers of appointment by his will.

Notes. Considered: *Re Cotton*, *Wood v. Cotton* (1888), 40 Ch.D. 41. Applied: *Re Milner*, *Bray v. Milner*. [1895-9] All E.R.Rep. 593; *Re Rickman*, *Stokes v.*

- A *Rickman* (1899), 80 L.T. 518. Considered: *Re Weston's Settlement*, *Neeves v. Weston*, [1904-7] All E.R.Rep. 174; *Re Welford's Will Trusts*, *Davidson v. Davidson*, [1946] 1 All E.R. 23. Referred to: *Re Paget*, *Re Mellor*, *Mellor v. Mellor* (1898), 78 L.T. 72; *Re Thompson*, *Thompson v. Thompson*, [1906] 2 Ch. 199; *Re Clarke's Settlement Trust*, *Wanklyn v. Streatfeild*, [1916] 1 Ch. 467; *Re Mackenzie*, *Bain v. Mackenzie*, [1916] 1 Ch. 125; *Re Paul*, *Public Trustee v. Pearce*, [1921] 2 Ch. 1; *Re Slack's Settlement*, *Re Slack*, *Butt v. Slack*, [1923] 2 Ch. 359; *Re Beresford's Will Trusts*, *Sturges v. Beresford*, [1938] 3 All E.R. 566; *Re Holford's Settlement*, *Lloyds Bank, Ltd. v. Holford*, [1944] 2 All E.R. 462; *Re Latta's Marriage Settlement Trusts*, [1949] 1 All E.R. 665; *Re Knight*, *Re Wynn*, *Midland Bank Executor and Trustee Co. v. Parker*, [1957] 2 All E.R. 252.

As to the exercise of powers of appointment by will, see 30 HALSBURY'S LAWS (3rd Edn.) 245 et seq.; and for cases see 37 DIGEST 412 et seq.

Case referred to:

- (1) *Ames v. Cadogan* (1879), 12 Ch.D. 868; 48 L.J.Ch. 762; 41 L.T. 211; 27 W.R. 905; 37 Digest 453, 553.

Also referred to in argument:

- D *Cowx v. Foster* (1860), 1 John. & H. 30; 29 L.J.Ch. 886; 2 L.T. 797; 6 Jur.N.S. 1051; 70 E.R. 649; 37 Digest 450, 536.
Ferrier v. Jay (1870), L.R. 10 Eq. 550; 39 L.J.Ch. 686; 23 L.T. 302; 18 W.R. 1180; 37 Digest 451, 537.
Re Teape's Trusts (1873), L.R. 16 Eq. 442; 43 L.J.Ch. 87; 28 L.T. 799; 21 W.R. 780; 37 Digest 451, 541.

E **Special Case** stated for the opinion of the court in an action brought by the widow of a testator, Admiral G. J. Malcolm deceased, against the testator's children, his executors and the trustees of the settlement of Anna Shaw deceased, to determine whether the testator had by his will exercised a power of appointment vested in him by the settlement of Anna Shaw.

F By an indenture, dated Mar. 28, 1845, and a deed-poll dated Aug. 18, 1851, under the hand and seal of Anna Shaw, leasehold premises and stocks, funds, and securities, the property of Anna Shaw, were vested in trustees, on trust, after her death, as to and concerning one moiety of one equal fourth part or share of and in the trust premises, to pay the income thereof to G. J. Malcolm during his life, and after his decease on trust for all and every or such one or more exclusively of the other or others of the children or the grandchildren or other issue to be born in his lifetime, at such age, day, or time, or respective ages, days, or times, and (if more than one) in such proportions and with such limitations over for the benefit of such children, grandchildren, or other issue, or some or one of them, and with such provisions for the maintenance and education and advancement in the world of any such child or children, grandchild, or grandchildren, or other issue, and with such restrictions and in all respects in such manner as G. J. Malcolm should direct and appoint, by deed or by his will, or any testamentary writing, and for default of such direction or appointment in trust for all and every the children and child of G. J. Malcolm, who, being a son or sons, should attain the age of twenty-one years, and who, being a daughter or daughters, should attain that age or marry under that age, equally to be divided between such children, if more than one, as tenants in common, their respective executors, administrators, and assigns; and if there should be but one such child, then the whole for that one; and if there should be no such child, then in trust for all and every, or such one or more exclusively, of the other or others of Pulteney Malcolm and Marianne Kembell, Isabella Forbes Shaw, and Alexander Nesbitt Shaw, and the children, grandchildren, and other issue. It was provided further that it should be lawful for G. J. Malcolm, either before or after marriage, by deed or will, to appoint any part not exceeding one half of the clear yearly income thereby provided for him during his life in favour of any wife or widow for the time being of G. J. Malcolm during her life, if she should so

long continue his widow, such appointment to have priority over the trusts therein- before declared in favour of his child or children. A

Anna Shaw died on June 27, 1856. By a deed-poll dated June 12, 1860, under the hand and seal of G. J. Malcolm, and executed prior to his marriage with his first wife, Ottonie Louise Charlotte Frederiche, Baroness von Dungern, G. J. Malcolm, in exercise of the power given to him by the deed-poll of Aug. 18, 1851, appointed that, in case the said then intended marriage should be solemnised, one half of the clear yearly income of the trust funds by the deed-poll provided for him during his life should from and after his death go and be paid to his first wife during her life, if she should so long continue his widow, for her own absolute use and benefit. The deed contained a proviso that, if the marriage should not take place, or if his wife should die in his lifetime, it should be lawful for him by any deed or instrument in writing to revoke, determine, and make void the appointment thereinbefore contained, so and in such manner that the said one half of the clear yearly income of the trust premises might stand and be subject to the same power of appointment as if the deed-poll of June 12, 1860, had not been executed. G. J. Malcolm's first wife died on Sept. 14, 1866, and on Dec. 5, 1876, he married the plaintiff. B C

G. J. Malcolm by his will, dated May 29, 1877, appointed Arthur Wilson and the defendant, Henry Stilwell, his executors and trustees, and, after directing his debts, funeral and testamentary expenses, to be paid, directed as follows: D

"I will that the part (if any) not repaid by me before my decease of the sum of £500 advanced to me in August, 1867, out of the trust property, by the trustees for the trust property left to me under or by virtue of a certain deed-poll dated Aug. 18, 1851, by my grandmother, Anna Shaw, be refunded into the trust, and that the said trustees may be reimbursed out of my estate any expense which they have been or may be put to on account of that advance." E

After making divers specific bequests, he provided:

"I give, devise, and bequeath all the real and personal estate and effects whatsoever and wheresoever, whether in possession, reversion, remainder, or expectancy, over which at the time of my decease I shall have any beneficial disposing power by this my will, and which I do not otherwise dispose of by will or codicil, to my trustees upon trust, at such time or times after my decease as they in their discretion and of their absolute authority may deem expedient, to sell and dispose of, collect, get in, and convert into money so much and such parts of the residuary estate as shall not consist of money, or of such securities for or investment of money yielding income as my trustees shall think fit to continue for any time, and to invest the money arising therefrom and the moneys of which I shall be possessed at the time of my decease, in or upon any of the Parliamentary stocks or public funds of Great Britain, or on the stocks of the Bank of England or Ireland, or of the public stocks, funds, or securities, or any colonial government or state, or of the German Empire, or of any of the states for the time being forming part of the German Empire, or at interest upon government securities in England, Wales, or Ireland, or in or upon the shares of the Equitable Reversionary Investment Society, or upon mortgage charge or other security of any lands or houses in the Grand Duchy of Baden, and with full power to make any such investments as aforesaid upon such title or titles as my trustees shall in each instance think proper under the circumstances to be satisfied with, which securities, and also any such of which I shall be possessed at my decease, I empower my trustees from time to time to alter, vary, and transpose for or into any other investments of the aforesaid natures as occasion shall require, or as they shall think fit, and to stand possessed of my residuary estate and its investments (hereinafter called my residuary estate) upon the trusts following (that is to say), as to one equal half part thereof (hereinafter called the first trust fund) upon trust for all and every my daughters and daughter (whether by my present or former wife) who shall F G H I

A survive me and shall either in my lifetime or after my decease attain the age of twenty-four years, and if more than one, in equal shares as tenants in common, and if I shall have no daughter who shall survive me and who shall attain the age of twenty-four years, upon trust for all and every my sons and son (by my present wife) who shall survive me, and shall either in my lifetime or after my decease attain the age of twenty-one years, and if more than one, in equal shares as tenants in common; and as to the other equal half part thereof (hereinafter called the second trust fund), upon trust to pay the annual produce thereof unto my said wife during her life or until she shall marry again, and upon the decease or marriage again (which shall first happen) of my said wife, upon trust for all and every my children and child (whether male or female and whether by my present or former wife) who shall survive me and shall attain, in my lifetime or after my decease, being sons or a son, the age of twenty-one years, or being daughters, or a daughter, attain the age of twenty-four years, and if more than one, in equal shares as tenants in common. And I direct that my trustees shall, in case all or any of my daughters shall marry before attaining the age of twenty-four years, hold as well any accruing as the original share which each daughter so marrying would have been entitled to if she had attained the age of twenty-four years on the day of such marriage, so that until she attains the age of twenty-four years, or dies, the income thereof shall be applicable for her separate benefit at the discretion of my trustees; and should such married daughter attain the age of twenty-four years, the same share or shares shall be then made over to her for her separate absolute use, but should she die before attaining the age of twenty-four years, her share or shares shall be in trust for her child or children who shall attain the age of twenty-one years, and if more than one, equally, or failing such children shall go and be in trust for such of her brothers and sisters as, being brothers, shall attain the age of twenty-one years, or, being sisters, shall attain the age of twenty-four years, with provisions similar to those before contained in the case of any of them marrying under the age of twenty-four years."

F The testator further declared that his will should not extend to any property in the German Empire which might belong to him at the time of his death or over which he might have any power of disposition, it being his intention to deal with such property according to the terms of his German will, dated May 28, 1877. The testator made a codicil, dated Sept. 27, 1877, and thereby, in consequence of the death of his former wife, and in exercise of the power reserved to him by the deed-poll of June 12, 1860, revoked the appointment made by him by such deed-poll, so and in such manner that the one-half of the clear yearly income of the trust premises thereby appointed by him might stand and be subject to the same power of appointment as if the said deed-poll had not been executed. The testator G. J. Malcolm died on Jan. 17, 1884, and his will and codicil were proved on Feb. 8, 1884, by the defendant Henry Stilwell. The total amount of the testator's personal estate in England at his death was about £780. The testator's debts amounted to £1,228 and upwards. The testator was entitled to real and personal estate in Germany. The testator had by his first marriage three children, one of whom died an infant and unmarried in 1882, the other two were defendants. By his second marriage the testator had four children, all of whom were defendants. The I testator's youngest daughter was born in 1880.

W. W. Karlake, Q.C., and Dibden for the testator's widow.

Cozens-Hardy, Q.C., and Hamilton Benn for the children.

J. C. Wright for the executor.

F. L. Wright for the trustees of the Shaw settlement.

PEARSON, J.—If there ever was a case on the line, this case is one, and I think it is just as easy for me to decide it one way as it is to decide it another way. But there is a maxim which I hold to perhaps as strongly as anybody, that if possible

one should construe a will ut res magis valeat quam pereat. At the same time, in determining this question I desire most distinctly to be understood as not going one line out of the will I have before me. A

The simple question which I have to determine is, whether or not I can find in the will itself such an indication of an intention to exercise the power as that I ought to hold that the power has been exercised. It is a question of intention, and a question of intention only. All counsel have agreed on that. There being various indications in the will, some one way and some the other, the question I have to decide is, on which side does the balance weigh most strongly. When you have put one against the other to which side ought you rather to incline to in order to determine what the real truth of the case is with regard to a man of whose intention you know nothing except what you find in the will before you. Of course there are one or two other facts that may be brought in which are necessary simply that you may have something to determine the question on. B C

Admiral Malcolm's grandmother, Mrs. Shaw, having, I presume, a considerable property which, one way or another, she had the right to dispose of, by a deed-poll dated Aug. 18, 1851, made what I may call a settlement of this property, and after giving a life interest to the admiral, she gave either the whole or a part of her property D

"in trust for all and every or such one or more exclusively of the other or others of the children or the grandchildren or other issue of the said George John Malcolm, such grandchildren or other issue to be born in his lifetime, at such age, day, or time, or respective ages, days, or times, and (if more than one) in such proportions and with such limitations over for the benefit of such children, grandchildren, or other issue, or some or one of them, and with such provisions for the maintenance and education and advancement in the world of any such child or children or grandchild or grandchildren and other issue, and with such restrictions and in all respects in such manner as the said George John Malcolm should direct or appoint by deed or by his will, or any testamentary writing for default of such direction or appointment, in trust for all and every the children or child of the said George John Malcolm who being a son or sons should attain the age of twenty-one years . . . and if there should be no such child, then in trust for all and every or such one or more exclusively of the said other or others of Pulteney Malcolm and Marianne Kemball, Isabella Forbes Shaw, and Alexander Nesbitt Shaw, and the children, grandchildren, or other issue." E F

And it was provided G

"that it should be lawful for the said George John Malcolm, either before or after marriage, by deed or will to appoint any part not exceeding one half of the clear yearly income thereby provided for him during his life in favour of any wife or widow for the time being of the said George John Malcolm during her life if she should so long continue his widow, such appointment to have priority over the trusts thereinbefore declared in favour of his child or children." H

That is a sufficient statement of the deed-poll under which the power of appointment arose, and under this power the admiral had therefore by the will the power to appoint to his children or grandchildren or other issue born in his lifetime generally in such manner as he should direct. If there was no child, then he had the right to appoint to the issue (using that word in the larger sense, but limiting it to those born within a time limited by law) of, among others, Alexander Nesbitt Shaw, and, with regard to a portion of the property over which he had a power of appointment, he had the right to give his widow a life interest in it also by will. I

The grandmother, Mrs. Shaw, died in June, 1856. Admiral Malcolm married in 1860 the Baroness von Dungen, and he was minded when he was married to her to exercise the appointment which he had in her favour, under this instrument

A made by Mrs. Shaw, and he did so by a deed-poll dated June 12, 1860. The appointment was in this form. [His LORDSHIP read the appointment, and continued:] The lady died, and before the date of his will the admiral married again. At the time, therefore, of his will he had children by his first wife, who were living; he had a second wife and had children also by that second wife. He had two families. So far it is plain; we know all that I have stated. In addition to that the facts we also know are these: He was an admiral when he died, he was a captain apparently when he made his will, in Her Majesty's navy. Both his wives had been German. He was living abroad at the time he made his will; he was living abroad at the time he made the only codicil to his will; he had property in Germany, because he refers to it in his will, and, therefore, I am entitled to say I know he had property in Germany; and, from the form in which he makes his will, I am entitled to assume that he had property, or thought he had property, in England. It is under these circumstances that he proceeds to make the will which has given rise to the contest at the present moment.

It is not necessary to read the whole of the will, but it would be necessary to indicate the different parts of it, so as to see how they bear on the question which the court has to decide. He first of all describes himself as a captain in Her Majesty's Royal Navy. He then appoints two gentlemen executors and trustees. He then directs all his just debts and funeral and testamentary expenses to be paid as soon as conveniently may be after his decease, and then follows this specially:

"I will that the part (if any) not repaid by me before my decease of the sum of £500 advanced to me in August, 1867, out of the trust property left to me under or by virtue of a certain deed-poll, dated Aug. 18, 1851, by my grandmother, Anna Shaw, be refunded into the trust, and that the said trustees may be reimbursed out of my estate any expense which they have been or may be put to on account of that advance."

It is remarkable that he does refer here to this sum, which had been lent to him apparently out of the trust-money. At all events he was anxious that the trustees should be held harmless, whatever it was. It is not the ordinary declaration that the money is simply to be repaid, but it is that the money is to be repaid, and the trustees are to be repaid all their expenses, which is, to my mind, going rather further than the payment of an ordinary simple debt. It was in consequence of the peculiar words of this that I came to the conclusion that in all probability something like a breach of trust had been committed, however safe the money was. He directs another debt to be paid. He gives jewellery and trinkets of various sorts, and then comes the disposing part of the will:

"I give, devise, and bequeath all the real and personal estate and effects whatsoever and wheresoever, whether in possession, reversion, remainder, or expectancy, over which at the time of my decease I shall have any beneficial disposing power by this my will."

No words, to my mind, can be larger than those words are, and the first observation that I make on them is that I should say that a gentleman who used those words in his will did not intend to leave undisposed of anything that by possibility he could dispose of. That is the first thing that strikes me in the matter, because, assuming for a moment that the word "beneficial" either has been put in for some reason or has been put in *per incuriam*, that does not seem to me in any way whatever to limit what on the face of it is the amplest disposition of the property that any man could possibly make. But I do not stop there in order to arrive at that conclusion, because, as I have stated, this gentleman undoubtedly had, or believed he had, property in Germany. I find here the same indication of his intention to dispose of all of his German property, because he says,

"I declare that this my will, or the appointment of executors thereof, shall not extend to my property in the German Empire which may belong to me at my

decease, or over which I may have any power of disposition, it being my intention to deal with such property according to the terms of my German will, which bears date May 28, 1877." A

I start, therefore, on the consideration of this will by saying that the testator undoubtedly meant to dispose of everything that he could dispose of. He meant to part with, as far as he could part with, according to his own mode of disposition, everything, either in England or in Germany, that he could deal with. With regard to the German property it would be impossible to raise a cavil, because the word there is not any beneficial power, but it is in its native width and extent "any power to dispose of." B

It is said that the word "beneficial" limits it, and no doubt counsel for the children is quite right in saying that in *Ames v. Cadogan* (1), Fry, J., put a construction on the word "beneficial" which points to the word "beneficial" meaning beneficial to the person exercising the power. I confess, with all respect to that very learned judge, that I am not disposed to think that one can altogether limit the word "beneficial" in any case in that way. I am far from thinking or suggesting that he was not perfectly right in limiting the word "beneficial" in that will. The only doubt I venture to hazard on the opinion of so learned a judge is that the word "beneficial" need not necessarily have that meaning. To my mind, the use of the word "beneficial" in our language is exceedingly inaccurate, and I think it is more frequently used in the passive sense, or I should rather say it is more frequently used in the reflective sense than in the active sense. We are just as much accustomed to talk of a man exercising his power or using his wealth or doing anything else in a beneficial way—meaning in a way to benefit others—as we are to talk of a man doing it in a way to benefit himself. When, therefore, I have the words here "over which at the time of my decease I shall have any beneficial disposing power by this my will," I only say I do not think it necessary when I come to that clause to confine the word "beneficial" to mean a power by which he would benefit himself. I might also make a further observation on this. I think it is less likely to be used in that sense in a will (which a man knows will not take effect until after his death) than in the sense of being able to benefit others by that which he is doing. I do not find, therefore, that I am prevented, at all events by this clause, from saying that, as I find elsewhere a strong indication of an intention to exercise the power given to him by Mrs. Shaw's settlement, he intended to exercise it because of this word "beneficial." C D E F

The testator goes on and directs the investments to be handed over to trustees for the benefit of the children and grandchildren and issue, and issue who do not come within the terms of the power of Mrs. Shaw's settlement. To my mind, not one of those circumstances is sufficient to enable me to say that he did not intend to use the power, if I find elsewhere that he did intend to use it, because, from the earliest ages, people have constantly exercised powers by appointing to trustees, and not appointing to the beneficiaries, and yet it has never been held either as an indication that they were not exercising the powers, nor has it been held a bad exercise of the power. The court has always taken care to give effect to it, and looked on the intervention of the trustees as mere machinery. As regards the investments, some of them are probably investments, and would fit in with it, and some are beyond it. When you come to the investments and securities in the German State, or the securities of governments which formed part of the German Empire, those no doubt are bad. But there is no reason why the rest should not be good. Then, when you come to the gift of issue extending beyond the limit to which the power of Mrs. Shaw's settlement extended, it is plain that all you have to do is to modify the exercise of this power, so as to bring it within the proper and legal limits. But beyond that all the gifts that are within the range of the power are perfectly good. G H I

There is one other gift here which I think is very important. After providing for some of his children by his first wife, he says, as to a part of the fund,

A "and as to the other equal half part thereof (hereinafter called the second trust fund) upon trust to pay the annual produce thereof unto my said wife during her life, or until she shall marry again."

B If the testator had stated in the beginning of his will that he intended to exercise this power, there can be no doubt whatever that this would have been a good appointment to the wife. It is entirely within the limits laid down by the settlement under which the power arose, and it is a curious thing that, if the testator was minded to benefit his wife, and was minded to do so without reference at all to the power, he should have given her this life interest in a moiety of the property only, and not in the whole. Under the settlement he is restricted to the moiety. One understands, therefore, if he was exercising the power, why the wife takes the moiety only. It is impossible to rely to any great extent on this, simply for this

C reason, that, if the man were dealing with his own property, there was nothing to prevent him from giving to his wife the same interest as he had given her here. But there is this to be said, that, at all events, when you come to the limitations in the will, you find this curious limitation, which fits in exactly with the power which he may be supposed to have exercised. To my mind, this passage has a still stronger bearing when I come to a later part of the will.

D The testator goes on to dispose of the property in various ways among his children or grandchildren. Then there comes the gift over, and, having so given it to the children and grandchildren, he says :

E "And so far as no child or grandchild of mine shall become entitled to my residuary estate under the trusts aforesaid, I direct that the same shall go (subject to the aforesaid trusts and provisions) to my cousin Marianne, the second eldest daughter now surviving of my Uncle Alexander Nesbitt Shaw, and the wife of Jno. Macintyre, an officer in the Royal Artillery."

F That is one of the children to whom he had power to appoint under Mrs. Shaw's settlement. Again, it is a curious circumstance that he should have selected one of those children if he was not intending to exercise this power. He then refers to the German power in the terms which I have already read, and then the will ends.

G If the will alone existed, I am not at all prepared to say that the evidence of exercising the power, or of not exercising the power, would not be so evenly balanced that it would be impossible for the court to decide that there was an indication which it could act on of an intention to exercise the power. But, to my mind, the codicil which the gentleman executed four months after he made his will does seem to me to carry very strong evidence indeed in favour of his having intended to exercise the power. The codicil is a very short one fortunately. He is still living abroad in Germany, and he recites that in consequence of the death of his former wife the said Ottonie Louise Charlotte (therein by mistake called Caroline) Fredericke, Baroness von Dungern, and by virtue and in exercise of the

H power reserved to him in and by the said deed-poll of June 12, 1860 (that was the appointment to her), he revoked, determined, and made void the appointment made by him by the said last-mentioned deed-poll so and in such manner that the one half of the clear yearly income of the trust premises thereby appointed by him might stand and be subject to the same power of appointment as if the said deed-poll had not been executed. We know where those words come from. The revocation is in the form of the revocation in the deed of June, 1860, exactly in the words

I given there :

"So and in such manner that the said one half of the clear yearly income of the said trust premises might stand and be subject to the same power of appointment as if the deed now in statement had not been executed."

I ask myself, however ill-advised the admiral was in supposing that any revocation was necessary, what purpose could he have had in executing this codicil? What must he have intended when he executed this codicil? To my mind, it is

plain that he thought that as long as that deed-poll existed, although the wife who took under it was dead, it would stand in the way of any appointment he made under Mrs. Shaw's will in favour of another wife. It was done, to my mind, although foolishly and unnecessarily, in order to get that appointment out of the way of some other appointment. It cannot have been done, to my mind, to get out of the way a prospective appointment. If the man had been minded to do that, whenever he wanted to make a prospective appointment he would then have revoked the other. If he had inquired of any person with half a grain of sense, that person would have told him: "Whenever you want to do it, you can do so." But it seems to me, on the face of it, that this codicil was executed in order to establish the will, in order to make good and beyond impeachment that which he had done in exercise of the power given him by Mrs. Shaw's settlement in favour of the wife under the will. If one reads it in that way the result is that the codicil, unnecessary as it was, has a meaning, and it dovetails in entirely with what has been done by the will. One can understand why it was that the testator thought the codicil necessary. It confirms the will, and, to my mind, it shows in a manner which leaves me at all events beyond doubt that he intended by that will to exercise the power given him by Mrs. Shaw's settlement. Accordingly, in spite of all the errors and blunders that there are here, and in spite of the very able argument of counsel for the children, that there are very strong indications the other way, I come to the conclusion that there are sufficient indications to satisfy the court judicially that it was intended to exercise the power, and I decide, therefore, that the power has been exercised. That, of course, leaves entirely undetermined what may be the effect of the exercise of the power, which may be determined now or at some future time.

Solicitors: *Bridges, Sawtell & Co.*; *Freeman & Bothamley.*

[Reported by H. G. WILLINK, Esq., Barrister-at-Law.]

GOODMAN AND ANOTHER v. SALTASH CORPORATION

[HOUSE OF LORDS (Lord Selborne, L.C., Earl Cairns, Lord Blackburn, Lord Watson, Lord Bramwell and Lord FitzGerald), May 15, 16, July 6, 7, August 1, 1882]

[Reported 7 App. Cas. 633; 52 L.J.Q.B. 193; 48 L.T. 239;
47 J.P. 276; 31 W.R. 293]

Profit à Prendre—Fishery—Fluctuating group of persons—Usage from time immemorial—Several fishery vested in borough corporation—Presumed condition or trust as to user by fluctuating group.

A borough corporation claimed a several oyster fishery in a tidal navigable river, and proved user from time immemorial. The free inhabitants of ancient tenements within the borough claimed, as of right, to dredge for oysters in the river during a fixed period of the year, and to catch and carry away the same without stint for sale or otherwise, and proved a usage from time immemorial. It was admitted that this usage tended to the destruction of the fishery.

Held (LORD BLACKBURN dissenting): although the free inhabitants could not be presumed to be incorporated so as to be capable of prescribing for a profit à prendre in alieno solo, the presumption which should be made was that the grant of the fishery to the corporation was subject to a trust or condition in favour of the free inhabitants, and such a trust or condition would not infringe the law against perpetuities.

- A Notes.** Considered: *Re Free Fishermen of Faversham* (1887), 36 Ch.D. 329. Followed: *Re Christchurch Inclosure Act* (1888), 38 Ch.D. 520. Considered: *Re Norwich Town Close Estate Charity* (1888), 40 Ch.D. 298; *Re St. Stephen Coleman Street, Re St. Mary the Virgin, Aldermanbury* (1888), 39 Ch.D. 492; *Tilbury v. Silva* (1890), 45 Ch.D. 98; *I.R.Comrs. v. Scott, Re Bootham, Ward Strays, York*, [1892] 2 Q.B. 152. Applied: *Haig v. West*, [1893] 2 Q.B. 19; *Eliot v. Bristol Corpn.* (1895), 72 L.T. 752. Considered: *A.-G. v. Wright*, [1897] 2 Q.B. 316. Distinguished: *A.-G. v. Simpson*, [1901] 2 Ch. 671; *Re Church Patronage Trust, Laurie v. A.-G.*, [1905] 2 Ch. 400. Considered: *Re Allen, Hargreaves v. Taylor*, [1905] 2 Ch. 400; *A.-G. v. Antrobus*, [1905] 2 Ch. 188; *Fitzhardinge v. Purcell*, [1908] 2 Ch. 139; *R. v. Income Tax Special Comrs., Ex parte University College of North Wales* (1908), 98 L.T. 446; *Harris v. Chesterfield*, [1911] A.C. 623; *Mitcham Common Conservators v. Banks* (1912), 76 J.P. 413; *A.-G. v. Horner* (No. 2), [1913] 2 Ch. 140; *Verge v. Somerville*, [1924] All E.R.Rep. 121. Distinguished: *Re Gwyon, Public Trustee v. A.-G.* (1929), 46 T.L.R. 96. Considered: *Re Smith, Public Trustee v. Smith*, [1931] All E.R.Rep. 617. Distinguished. *Wernher's Charitable Trust (Trustees) v. I.R.Comrs.*, [1937] 2 All E.R. 488. Applied: *Re Norton's Will Trusts, Lightfoot v. Goldson*, [1948] 2 All E.R. 842. Considered: *Baddeley v. I.R.Comrs.*, [1953] 2 All E.R. 233. Referred to: *Neill v. Devonshire* (1882), 8 App. Cas. 135; *Stanley v. Norwich Corpn.* (1887), 3 T.L.R. 506; *Wheaton v. Maple*, [1893] 3 Ch. 48; *Mercer v. Denne*, [1904-7] All E.R.Rep. 71; *Foley's Charity Trustees v. Dudley Corpn.*, [1910] 1 K.B. 317; *Johnston v. O'Neill*, [1911] A.C. 552; *Re Wedgwood, Allen v. Wedgwood*, [1914-15] All E.R.Rep. 322; *Keren Kayemeth Le Jisroel, Ltd. v. I.R.Comrs.*, [1931] 2 K.B. 465; *Re Spence's Estate, Barclay's Bank, Ltd. v. Stockton-on-Tees Corpn.*, [1937] 3 All E.R. 684; *Re Corelli, Watt v. Bridges*, [1943] Ch. 332; *Re Baynes, Public Trustee v. Leven Corpn.*, [1944] 2 All E.R. 597; *Chichester Diocesan Fund and Board of Finance (Inc.) v. Simpson*, [1944] 2 All E.R. 60; *Re Tree, Idle v. Hastings*, [1945] 2 All E.R. 65; *Re Compton, Powell v. Compton*, [1945] All E.R. 198; *Re Hobourn Aero Components, Ltd.'s Air Raid Distress Fund, Ryan v. Forrest*, [1946] 1 All E.R. 501; *Re Sanders' Will Trustees, Public Trustee v. McLaren*, [1954] 1 All E.R. 667.

As to presumption of grant of profit à prendre to trustees for inhabitants, see 12 HALSBURY'S LAWS (3rd Edn.) 628, para. 1370; and for cases see 19 DIGEST (Repl.) 61.

Cases referred to:

- (1) *Lord Rivers v. Adams* (1878), 3 Ex.D. 361; 48 L.J.Q.B. 47; 39 L.T. 39; 42 J.P. 728; 27 W.R. 381; 13 Digest (Repl.) 202, 217.
- (2) *Chilton v. London Corpn.* (1878), 7 Ch.D. 735; 47 L.J.Ch. 433; 38 L.T. 498; 26 W.R. 474; 13 Digest (Repl.) 202, 216.
- (3) *Cocksedge v. Fanshaw* (1779), 1 Doug.K.B. 119; 99 E.R. 80; affirmed sub nom. *Fanshaw v. Cocksedge* (1783), 3 Bro. Parl. Cas. 690; 17 Digest (Repl.) 7, 43.
- (4) *Gateward's Case* (1607), 6 Co. Rep. 59 b.; 77 E.R. 344; sub nom. *Smith v. Gatewood*, Cro. Jac. 152; 19 Digest (Repl.) 221, 1632.
- (5) *Boteler v. Bristol, City of Coventry Case* (1475), Y.B. 15 Edw. 4, fo. 29, pl. 7, fo. 32, pl. 16; 11 Digest (Repl.) 8, 51.
- (6) *White v. Coleman* (1673), 1 Freem.K.B. 134; 3 Keb. 247; 89 E.R. 98; 11 Digest (Repl.) 16, 174.
- (7) *A.-G. v. Wax Chandlers' Co. (Master, Wardens, etc.)* (1873), L.R. 6 H.L. 1; 42 L.J.Ch. 425; 28 L.T. 681; 37 J.P. 532; 21 W.R. 361, H.L.; 8 Digest (Repl.) 434, 1241.
- (8) *Jones v. Williams* (1767), Amb. 651; 27 E.R. 422, L.C.; 8 Digest (Repl.) 344, 247.
- (9) *A.-G. v. Carlisle Corpn.* (1828), 2 Sim. 437; 57 E.R. 851; affirmed (1830), 8 L.J.O.S.Ch. 146, L.C.; 8 Digest (Repl.) 344, 251.

- (10) *Howse v. Chapman* (1799), 4 Ves. 542; 31 E.R. 278, L.C.; 8 Digest (Repl.) 344, 248. A
- (11) *A.-G. v. Heelis* (1824), 2 Sim. & St. 67; 2 L.J.O.S.Ch. 189; 57 E.R. 270; 8 Digest (Repl.) 344, 250.
- (12) *A.-G. v. Dublin Corpn.* (1827), 1 Bli.N.S. 312; 4 E.R. 888, H.L.; 13 Digest (Repl.) 287, 1060.
- (13) *Wright v. Hobert* (1723), 9 Mod. Rep. 64; 88 E.R. 318; 8 Digest (Repl.) 429, 1189. B
- (14) *Dyce v. Lady Hay* (1852), 1 Macq. 305, H.L.; 19 Digest (Repl.) 15, 42.
- (15) *Sanderson v. Lees* (1859), 22 D. (Ct. of Sess.) 24.
- (16) *Beadsworth v. Torkington* (1841), 1 Q.B. 782; 1 Gal. & Dav. 482; 6 Jur. 339; 113 E.R. 1330; sub nom. *Beardsworth v. Torkington*, 10 L.J.Q.B. 254; 11 Digest (Repl.) 32, 420. C
- (17) *Hinks v. Clerk* (1679), 2 Lev. 252; 2 Show. 78; 83 E.R. 543; 11 Digest (Repl.) 36, 486.
- (18) *Workingham Corpn. v. Johnson* (1736), Lee temp. Hard. 284; 95 E.R. 183; 13 Digest (Repl.) 248, 745.
- (19) *R. v. Ashwell* (1810), 12 East, 22; 104 E.R. 9; 13 Digest (Repl.) 251, 784.
- (20) *Clayton v. Corby* (1842), 2 Q.B. 813; 2 Gal. & Dav. 174; 11 L.J.Q.B. 239; 114 E.R. 316; 19 Digest (Repl.) 220, 1621. D
- (21) *Bland v. Lipscombe* (1854), 4 E. & B. 713, n.; 3 C.L.R. 261; 24 L.J.Q.B. 155, n.; 24 L.T.O.S. 92; 19 J.P. 563; 1 Jur.N.S. 705, n.; 3 W.R. 57; 119 E.R. 263, n.; 19 Digest (Repl.) 222, 1639.
- (22) *Thomson v. Shakespear* (1860), 1 De G.F. & J. 399; 29 L.J.Ch. 276; 2 L.T. 479; 24 J.P. 309; 6 Jur.N.S. 281; 8 W.R. 265; 45 E.R. 413, L.C. & L.J.J.; 8 Digest (Repl.) 358, 364. E
- (23) *Malcolmson v. O'Dea* (1863), 10 H.L.Cas. 593; 9 L.T. 93; 27 J.P. 820; 9 Jur.N.S. 1135; 12 W.R. 178; 11 E.R. 1155, H.L.; 25 Digest (Repl.) 17, 156.
- (24) *Constable v. Nicholson* (1863), 14 C.B.N.S. 230; 2 New Rep. 76; 32 L.J.C.P. 240; 11 W.R. 698; 143 E.R. 434; 11 Digest (Repl.) 21, 249. F
- (25) *Wickham v. Hawker* (1840), 7 M. & W. 63; 10 L.J.Ex. 153; 151 E.R. 679; 19 Digest (Repl.) 214, 1574.
- (26) *Dalton v. Angus* (1881), ante p. 1; 6 App. Cas. 740; 46 J.P. 132; 30 W.R. 191, sub nom. *Public Works Comrs. v. Angus & Co.*, 50 L.J.Q.B. 689; 44 L.T. 844; H.L.; 19 Digest (Repl.) 6, 4.
- (27) *R. and Waller v. Hanger* (1615), 3 Bulst. 1; 1 Roll. Rep. 138; 81 E.R. 1; sub nom. *Walter v. Hanger*, Moore, K.B. 832; 11 Digest (Repl.) 562, 7. G
- (28) *Nicholl Corpn. v. Derby Corpn.* (1374), Y.B. 48 Ed. 3, fo. 17; cited in 1 Saund. 344.
- (29) *Mellor v. Spateman* (1669), 1 Saund. 339, 343; 85 E.R. 489, 495; sub nom. *Meller v. Staples*, 1 Mod. Rep. 6; sub nom. *Miller v. Spateman*, 2 Keb. 527, 550, 570; 11 Digest (Repl.) 30, 382. H
- (30) *Hopkins v. Swansea Corpn.* (1839), 4 M. & W. 621; 1 Horn. & H. 432; 8 L.J.Ex. 121; 3 J.P. 532; 150 E.R. 1569; affirmed, sub nom. *Swansea Corpn. v. Hopkins* (1841), 8 M. & W. 901, Ex. Ch.; 13 Digest (Repl.) 237, 610.
- (31) *Carne v. Long* (1860), 2 De G.F. & J. 75; 29 L.J.Ch. 503; 2 L.T. 552; 24 J.P. 676; 6 Jur.N.S. 639; 8 W.R. 570; 45 E.R. 550, L.C.; 8 Digest (Repl.) 437, 1278. I

Also referred to in argument :

Orford Corpn. v. Richardson (1791), 4 Term Rep. 437; reversed sub nom. *Richardson v. Orford Corpn.* (1793), 1 Anst. 231; 2 Hy. Bl. 182; 145 E.R. 857, Ex. Ch.; 25 Digest (Repl.) 21, 184.

Rogers v. Allen (1808), 1 Camp. 309; 25 Digest (Repl.) 12, 91.

Seymour v. Courtenay (1771), 5 Burr. 2814; 98 E.R. 478; 25 Digest (Repl.) 11, 81.

- A *Willingale v. Maitland* (1866), L.R. 3 Eq. 103; 36 L.J.Ch. 64; 31 J.P. 296; 12 Jur.N.S. 932; 15 W.R. 88; 11 Digest (Repl.) 23, 271.
Muldon Corpn. v. Woolvet (1840), 12 Ad. & El. 13; 4 Per. & Dav. 26; 9 L.J.Q.B. 370; 113 E.R. 714; 25 Digest (Repl.) 57, 499.
Johnson v. Barnes (1872), L.R. 7 C.P. 592; 41 L.J.C.P. 250; 27 L.T. 152; affirmed (1873), L.R. 8 C.P. 527; 42 L.J.C.P. 259; 29 L.T. 65, Ex. Ch.; 11 Digest (Repl.) 14, 148.
- B *Wake v. Hall* (1880), 7 Q.B.D. 295; 50 L.J.Q.B. 545; 44 L.T. 42, C.A.; affirmed (1883), 8 App. Cas. 195; 52 L.J.Q.B. 494; 48 L.T. 834; 47 J.P. 548; 31 W.R. 585, H.L.; 31 Digest (Repl.) 225, 3621.
Earl De La Warr v. Miles (1881), 17 Ch.D. 535; 50 L.J.Ch. 754; 44 L.T. 487; 29 W.R. 809, C.A.; 11 Digest (Repl.) 9, 78.
- C *Mannall v. Fisher* (1859), 5 C.B.N.S. 856; 23 J.P. 375; 5 Jur.N.S. 389; 141 E.R. 343; 25 Digest (Repl.) 25, 224.
A.-G. v. Mathias (1858), 4 K. & J. 579; 27 L.J.Ch. 761; 31 L.T.O.S. 367; 4 Jur.N.S. 628; 6 W.R. 780; 70 E.R. 241; 19 Digest (Repl.) 222, 1636.
Hilton v. Earl Granville (1844), 5 Q.B. 701; 1 Dav. & Mer. 614; 13 L.J.Q.B. 193; 2 L.T.O.S. 419; 8 Jur. 311; 114 E.R. 1414; 17 Digest (Repl.) 17, 190.
- D *London Corpn. v. Low* (1879), 49 L.J.Q.B. 144; 42 L.T. 16; 44 J.P. 169; 28 W.R. 250; 33 Digest (Repl.) 478, 333.

Appeal by the defendants, inhabitants of Saltash, from a decision of the Court of Appeal (BRETT and COTTON, L.JJ., BAGGALLAY, L.J., dissenting), reported 7 Q.B.D. 106, affirming a decision of the Common Pleas Division (GROVE and DENMAN, JJ.), reported 5 C.P.D. 431, on a Special Case.

- E The action was brought by the Mayor and Corporation of Saltash for a trespass in taking oysters from the Tamar, which is a tidal navigable river in which the plaintiffs claimed a several fishery. The defendants asserted that "the free inhabitants of ancient tenements" within the borough had a right from time immemorial to dredge for oysters, for sale or otherwise, without stint, from Feb. 2 to Easter eve in every year. The Special Case found (in para. 9) that the right claimed had been exercised from time immemorial, but the plaintiffs alleged (para. 16) that the usage was unreasonable, and it was found as a fact that it tended to the destruction of the fishery.

- F *Muir Mackenzie* (*Lopes* with him) for the appellants.
A. Charles, Q.C., C. Hall, Q.C., and J. V. Austin for the respondents.

- G Their Lordships took time for consideration.
 Aug. 1, 1882. The following opinions were read.

- LORD SELBORNE, L.C.**—This appeal is from an order of the Court of Appeal affirming a judgment of the Common Pleas Division on a Special Case, in an action of trespass brought by the corporation of Saltash against the appellants. The alleged trespass consisted in taking oysters from a part of the river Tamar, being a navigable tidal river, or arm of the sea, in which the corporation claims a several oyster fishery; and the questions to be determined are, first, whether on the facts appearing by the Special Case, the right of the corporation to a several fishery is established; and secondly, if this be so, whether the free inhabitants of ancient tenements in the borough of Saltash, to which class the appellants belong, are entitled to participate in the benefit of such special fishery by dredging for oysters in the locus in quo during the period from Candlemas to Easter in every year.

The respondents have been successful in both the courts below; but in the Common Pleas Division the case was treated as depending on the question whether the free inhabitants of ancient messuages in Saltash could be presumed to be separately incorporated, so as to be capable of prescribing for a profit à prendre in alieno solo, and it was held, I think rightly, on the same grounds as in *Lord Rivers v. Adams* (1) and *Chilton v. London Corpn.* (2), that such an incorporation

ought not, under the circumstances, to be presumed. In the Court of Appeal the opinions of the learned judges were divided, BAGGALLAY, L.J., thinking that the respondents had failed to establish such a right, exclusive of the appellants, as was necessary to maintain the action, while BRETT and COTTON, L.JJ., thought that the title of the respondents was sufficiently proved, and that the rights of fishing claimed by the free inhabitants of ancient messuages within the borough could not have any lawful foundation, unless at the mere will and pleasure of the respondents. A B

The "burgesses of Essa," now called Saltash, were a corporation from time immemorial, and as such enjoyed various customs, liberties, and rights. Some of these were confirmed by an ancient charter of Reginald de Vantort, in whose lordship, held under the Duchy of Cornwall, Essa was included, and by subsequent inspeximus charters of Richard II, Edward IV, Henry VIII, Queen Elizabeth, C Charles II, and George III. Queen Elizabeth's charter reconstituted the corporation under its present name, and granted to it anew its former rights and liberties. The charter of Charles II altered the constitution of the municipal body, and the manner of electing burgesses; and those alterations were confirmed by George III. No mention is made in any of these charters of any several fishery, and I think they do not advance the case of the corporation, except so far as they recognise D its title to other prescriptive rights besides those which they specify, which must of course be otherwise ascertained. The proper mode of ascertaining what these are is by evidence of user; and it does appear by a lease executed by the corporation in 1680, and by a series of later leases commencing in 1774 and continued till a quite recent date, that the right to fish for oysters in the locus in quo was exercised by the corporation and its lessees for nearly two hundred years before the commencement of this action, without any other qualification than that usage in favour E of the free inhabitants of ancient tenements within the borough on which the appellants rely. If that usage can be reconciled with the existence and the enjoyment by the corporation of a several oyster fishery, the right of the corporation to such several fishery is established.

According to the statement in para. 9 of the Special Case, that class of inhabitants F to which the appellants belong has fished in the manner of which the lawfulness is now for the first time called in question, openly, and as of right, in every year from the time of Henry II or earlier, down to the date of the alleged trespass for which this action was brought, including all those years during which the fishery was under lease from the corporation. Those leases were in every instance, as far as appears, made to inhabitants of Saltash, to whom the usage in question G could not have been unknown; and although no express exception was made in any of them in favour of the right of the free inhabitants of ancient tenements to fish from Candlemas to Easter, they did always so fish without interruption either from the corporation or from its lessees.

Such a usage, so definite and so limited in its character, both as to persons and as to time, cannot, in my opinion, be regarded as a series of trespasses acquiesced H in through mere neglect or indifference by the corporation and the lessees. The terms of the Special Case, the total absence of any ground for inferring that it was under any byelaw, or otherwise by leave or licence of the corporation, and the leases, with which any such leave or licence would have been inconsistent, satisfy me that it was not precario any more than it was clam or vi. The Special Case, I no doubt, does not find that such fishery was "of right," which would have been to prejudge the question of law left for the opinion of the court, but only that it was under a claim of right. But an open and uninterrupted enjoyment from time immemorial under a claim of right seems to me to be all that is necessary for a presumption that it had such an origin as would establish the right, if a lawful origin was reasonably possible in law. That in such a case a lawful authority ought to be presumed, if it is reasonably possible, is established by many authorities, among which I think it sufficient to mention *Cocksedge v. Fanshaw* (3), because

A it is an instance of a right being established on this principle, under and by virtue of a prescriptive title in a corporation, in favour of a particular class of members of that corporation, and against the corporation itself.

B Is it then, or is it not, reasonably possible that the right claimed by the present appellants may have had a lawful origin, assuming as true all that is stated in the Special Case, and also assuming that the mayor and free burgesses of Saltash have a prescriptive title to a several fishery in the locus in quo? An affirmative answer to that question would solve every difficulty in the case, and would reconcile all the evidence as to user on which both parties rely.

C If it were necessary that the class to which the appellants belong should make out a right to a profit à prendre in alieno solo, I should be of opinion that they could not do so. *Gateward's Case* (4) is a conclusive authority against such a claim by such a class, unless made through a corporation under its corporate title, as it was in *Boteler v. Bristow* (5) and in *White v. Coleman* (6). Here there is no corporation through which the claim could be made, except the mayor and free burgesses of Saltash themselves; and the right could not possibly be prescribed for through them, or under their title as a profit à prendre in alieno solo, because, D if a several fishery exists, they are the owners in fee simple of that fishery. But it appears to me to be consistent with all the facts and documents stated or referred to in the Special Case, that the fishery may have been originally granted to the free burgesses of Essa, subject to a condition or proviso that the free inhabitants of ancient messuages within the borough should be entitled to fish, as E they have been accustomed to do, in every year from Candlemas to Easter. I am unable to discover any reason why this should not be a good foundation in law for the right which the appellants claim. If an actual grant so qualified were produced, it would be immaterial whether the word used in it were "trust," "intent," "purpose," "proviso," or "condition," or whether the trust or duty imposed on the mayor and free burgesses were cognisable in equity only, or also at law. In such a grant there would be all the elements necessary to constitute F what in modern jurisprudence is called a charitable trust. LORD CAIRNS in *A.-G. v. Wax Chandlers Co.* (7) said (L.R. 6 H.L. at p. 21) :

"If I give an estate to A, upon condition that he shall apply the rents for the benefit of B, that is a gift in trust, to all intents and purposes."

G A gift subject to a condition or trust for the benefit of the inhabitants of a parish or town or of any particular class of such inhabitants, is, as I understand the law, a charitable trust; and no charitable trust can be void on the ground of perpetuity: *Jones v. Williams* (8); *A.-G. v. Carlisle Corpn.* (9); *Howse v. Chapman* (10); *A.-G. v. Heelis* (11); *A.-G. v. Dublin Corpn.* (12).

H In *Wright v. Hobert* (13), cited in the argument, LORD MACCLESFIELD established as a charitable trust an ancient grant of land for the pasture during three months of the year of the cows of "as many of the inhabitants" of a certain village "as were able to buy three cows," and "during seven months of the rest of the year" to be in common for all the "inhabitants," saying that

I "if this manner of grazing had been by prescription or usage, no person but the inhabitants of ancient messuages could be entitled to it, but it is otherwise appointed by the grant of the donors."

The law of Scotland on this class of subjects may not be, and probably is not, in all respects the same as that of England. But when I find judicial opinions, delivered in some Scottish cases more or less in *pari materia*, which express with accuracy the point of view from which I regard the case now before your lordships, I may without impropriety borrow the language of those opinions to illustrate my own. Those Scottish authorities were distinguished from cases of servitude by LORD ST. LEONARDS, L.C., in *Dyce v. Lady Hay* (14), and by Lord President MACNEILL and LORD CURRIEHILL and LORD DEAS in *Sanderson v. Lees* (15).

The question being, as I have said, what is reasonably possible, it appears to me to be reasonable to presume, in favour of such user as is proved in the present case, that the grant to the free burgesses of Essa of this several fishery, proved only by prescription, and also proved to have been immemorially enjoyed, at certain times and in a uniform manner, by the free inhabitants of ancient messuages within the borough, was originally made to the corporation on condition and for the purpose that it should be enjoyed so. I think that such a presumption is not only reasonable in law, but probable in fact. The Special Case is silent as to the original relation of "the free inhabitants of ancient messuages" in the borough of Saltash to the body corporate. Under the modern constitution of the borough they are not burgesses or freemen. But the constitution of the municipality was altered by King Charles II, and it is at least not improbable that these "free inhabitants" may have had before that time some greater share in the corporate privileges than afterwards. We have to deal with rights acquired not under the modern, but under the ancient, constitution, whatever it was: *Beadsworth v. Torkington* (16). The word "free" seems to me most naturally to import that in some sense and to some extent, though not defined, such "inhabitants of ancient messuages" do, or did anciently, participate in the "liberties" of the corporation; and though the light thrown on that point by the charters and other documents is obscure and imperfect, it cannot, in my opinion, be said that there is none, or that it is of no importance. The charter of Reginald de Vantort appears to me to point to the holders of buruage tenements, which may be presumed to be identical with, or to include, the "ancient messuages" within the borough, as the original burgesses of "Essa." Their tenure was that described by LITTLETON, ss. 162-164. There was a hundred court belonging to the borough in which they doubtless did suit. Queen Elizabeth's charter shows that "the town and borough, with all and singular its suburbs, members, and appurtenances," was vested in the body corporate; and the same charter granted to the corporation powers, doubtless the same with those previously exercised by "the burgesses of Essa," to take tolls, duties, and customs, and to make ordinances for the good government of the inhabitants, and for the public good, common advantage, and good rule of the borough. In ancient boroughs there were often various degrees of participation in the borough franchise: see *Hinks v. Clerk* (17), and *Workingham Corpn. v. Johnson* (18), also MADOX's "Firma Burgi," p. 269.

It is now proper to consider the objections stated in para. 16 of the Special Case,

"That an usage to dredge oysters without stint, for the purposes of sale or otherwise, in a several fishery is unreasonable and destructive of the fishery, and does not raise any presumption of any royal grant or charter";

and the finding in the same paragraph that the

"said usage does in fact tend to the destruction of the said oyster fishery, and if continued will destroy the same."

This last paragraph must of course be taken in conjunction with para. 9, which finds that the privilege claimed by the appellants had been annually exercised from time immemorial down to 1876; and what LORD ELLENBOROUGH, C.J., said as to byelaws in *R. v. Ashwell* (19) seems to apply here in principle, viz., that

"the long continuance of a byelaw, though it would not legalise it if it were in itself illegal, is fair evidence to show that there is no intrinsic inconvenience in it; at least the acquiescence of the corporation in it for above two centuries is a fair answer to any theoretical argument of inconvenience."

Authorities were cited at the Bar—*Clayton v. Corby* (20) and *Bland v. Lipscombe* (21)—for the purpose of showing that, if the claim were to a common of piscary, it ought to be made with some limitation or restriction, and that an in-

A definite claim to destroy the subject-matter cannot be supported at law as a profit à prendre in alieno solo. But, in the view which I have taken of this case, it is not one of common of piscary, or of any other kind of profit à prendre in alieno solo; so that the objection, if it is of any force at all, can only be to the reasonableness of the presumption of fact which your Lordships are asked to make.

B Considered in that light, the objection does not appear to me to be of any serious weight. The tendency to the destruction of the oyster fishery, spoken of in the Special Case, can mean no more than what must always be in the power of the public where there is a general public right of fishing, or of any owner, whether absolute or limited, where there is a several fishery, viz., the exhaustion of the fishery by taking excessive numbers of fish. If the corporation had taken the fishery on the condition or trust that the free inhabitants of ancient messuages C should be at liberty to fish without stint, for sale or otherwise, at all seasonable times throughout the year, the possibility of the exhaustion of the oyster beds by an improvident use of that privilege would not have been a valid objection to such a condition or trust; and if not, it cannot be so when the right is more limited. The usage in this case, although it is to take oysters "without stint for the purposes of sale or otherwise," is not unlimited, being confined to a particular D class of persons, viz., the "inhabitants of ancient messuages within the borough," whose number would not be capable of indefinite increase, and to a particular time of year, varying from seven to twelve weeks. It must also necessarily be subject to any general restrictions by statute law as to taking the spat, spawn, and young brood of oysters, and to any reasonable regulations consistent with the substance of the right itself which the corporation may think fit to make, by byelaw or E otherwise, as to the manner of exercising it, such as those restrictions relating to the size of oysters proper to be taken, which are found in the leases of 1774 and 1867.

My opinion is that the question in this case being altogether one as to the true nature, character, and conditions of a prescriptive title, established by evidence of user and enjoyment only, the whole user which has prevailed from time immemorial until now, and not only that part of it which is in favour of the respondents, F may be, and ought to be, taken into account. That user, taken as a whole, appears to me to establish a title in the respondents to a several fishery; not, however, an absolute and unqualified title for their own sole benefit, but one qualified by a trust or condition in favour of the free inhabitants of ancient tenements within the borough, in accordance with the usage stated in para. 9 of the Special Case. G I, therefore, think that the order appealed from ought to be reversed.

The principle on which I have arrived at this conclusion would not, in my opinion, be applicable to such a case as *Lord Rivers v. Adams* (1), in which, if the defendants had alleged the plaintiff to be their trustee, that allegation would have been met by the production of his title deeds, showing that he held under conveyances made to him and his ancestors without any trust. Against such a H title a trust could not, in my opinion, be presumed from any evidence of mere fishing in a stream which passed, and of which the plaintiff had possession, under those conveyances.

I must move your Lordships that the order under appeal be reversed, and that judgment in the action be entered for the appellants, with costs in both the courts below and the costs of this appeal.

I

EARL CAIRNS.—I have arrived at the same conclusion. There were several questions argued both here and in the court below, and I think it desirable to mention them for the purpose of explaining that I am very far from questioning the law as applicable to those questions.

In the first place, I agree with the view of the Common Pleas Division that the free inhabitants of ancient messuages in Saltash cannot be presumed to be incorporated so as to be capable of prescribing for a profit à prendre in alieno solo. In the next place, I think it clear law that, while you may by custom claim an

easement to be enjoyed over the land of another, you cannot by custom claim a profit à prendre in alieno solo. I think it is also clear that you cannot claim by prescription anything which could not have a lawful beginning; and I think it also clear that a fluctuating and uncertain body cannot claim a profit à prendre in alieno solo, and, indeed, cannot be the grantee of a several fishery or of any other kind of real property. On all those questions, therefore, nothing that I am going to say will raise or suggest any kind of doubt. But, in the first place, on the evidence it appears to me clear that the corporation have established a right to a several fishery in the river, subject to whatever may be the just inference to be derived from the statements in para. 9 of the Case. Therefore, your Lordships have on the one hand the conclusion from the evidence of a title to a several fishery on the part of the respondents, and you have an unqualified statement of the exercise from time immemorial of the defined right as stated on the part of the appellants. The question seems to me to be, How are these two titles to be reconciled?

I wish to put aside a suggestion which was made that these facts are easily explained by supposing that the corporation had the right which I have stated, and that the exercise of this particular privilege on the part of the appellants was by permission or licence on the part of the corporation, and that it was a revocable licence, which could be put an end to at any time. The Special Case is one from which your Lordships are entitled to draw any conclusion as to matters of fact which you think proper. It appears to me impossible to draw any conclusion such as the argument I have referred to would suggest, but that, on the contrary, we are bound to draw a conclusion of the opposite kind, because I find, with regard to the character of the acts of the appellants, the statement in para. 16 that the respondents

"contend that an usage to dredge oysters without stint, for the purposes of sale or otherwise, in a several fishery is unreasonable, and destructive of the fishery, and does not raise any presumption of any royal grant or charter, and cannot be the subject of any prescription or right under the statute mentioned in the previous paragraph. The said usage does in fact tend to the destruction of the said oyster fishery, and, if continued, will destroy the same."

If that is the opinion of the respondents at the present time, it must have been the opinion of the corporation at all times, and appears to me to be utterly incredible, and a thing the idea of which cannot for a moment be entertained, that with that impression on their minds the corporation allowed as a matter of licence and permission these practices, or the exercise of this right, described in para. 9 of the case. But in addition to that it appears to me that the statement in para. 9 itself is inconsistent with the idea that the exercise of the right was by permission or licence on the part of the corporation, because the statement is that

"the free inhabitants of ancient tenements in the borough have from time immemorial, without interruption, and claiming as of right, exercised the privilege"

in question. Those two circumstances, viz., the character of the acts, taken in connection with the opinion entertained by the corporation of the character of those acts, and the statement in para. 9, appear to me to dispose of the idea that this right on the part of the appellants was exercised by the licence of the corporation.

Then, coming to the titles of the two contending parties, and treating them as independent and separate titles, and repudiating the suggestion that the acts of the appellants are to be explained by a licence or permission on the part of the respondents, we have cast on us the duty of reconciling in some way these two titles and these two parallel practices. I agree that we have not all the information which would be desirable as to the origin of the term, "the free inhabitants of ancient tenements in the borough of Saltash"; but, looking to what has been referred to, the changes which this corporation has undergone from time to time, and the absence of documents which might inform us precisely as to the nature of

A those changes, it appears to me that we must conclude that these "free inhabitants of ancient tenements within the borough of Saltash" were persons who originally had some share in the corporation, and were in some way connected with it, and that very probably these ancient tenements in the borough were those burgage tenements which are spoken of in the passage in *LITTLETON* to which the Lord Chancellor has referred.

B Then I come to the question, is there any difficulty, in that state of things, in supposing, what we are bound to suppose if it is possible, an ancient grant to the corporation of Saltash, which would explain and reconcile the whole of the practice which we have thus laid before us? It appears to me that there is no difficulty at all in supposing such a grant—a grant to the corporation before the time of legal memory of a several fishery—a grant by the Crown, with a condition
C in that grant in some terms, which are not before us, but which we can easily imagine, a condition that the free inhabitants of ancient tenements in the borough should enjoy this right, which as a matter of fact the case tells us they have enjoyed from time immemorial. A grant of that kind, it appears to me, would be perfectly legal and perfectly intelligible, and there would be nothing in it which would infringe any principle of law. Such a condition would create that which in
D the very wide language of our courts is called a charitable, i.e., a public, trust or interest, for the benefit of the free inhabitants of ancient tenements. A trust of that kind would not in any way infringe the law or rule against perpetuities, because we know very well that where you have a trust which, if it were for private individuals, or a fluctuating body of private individuals, would be void on the ground of perpetuity, yet if it creates a charitable, i.e., a public interest, it will be
E free from any obnoxiousness to the rule with regard to perpetuities. That is a principle of the courts which was very well explained in *Thomson v. Shakespear* (22), and has been established in many cases.

I, therefore, agree that we are bound here to suppose a grant of the kind which I have mentioned; that that grant would not be in any way contrary to any rule of law, and that the privilege which the appellants have enjoyed from time
F immemorial should be held to be founded on a title of this kind. I agree that the decision of the court below should be reversed.

LORD BLACKBURN.—The law is, I think, now perfectly settled on many of the points raised in this case, and I think that the learned counsel agreed that it was so. The right of fishing in arms and creeks of the sea and in tidal rivers is originally lodged in the king; yet, as **LORD HALE** says (*DE JURE MARIS*, part 1,
G c. 4):

"the common people of England have regularly a liberty of fishing in the sea, or creeks or arms thereof, as a public common of piscary, and may not without injury to their right be restrained of it, unless in such places, creeks, or navigable rivers, where either the king or some subject hath gained a propriety exclusive of that liberty."

One of the modes in which such a property can be gained is by prescription; and when it can be shown that a corporation which existed before the time of legal memory, and was, therefore, capable of taking by prescription, has as far back as living memory goes, enjoyed this exclusive right of fishery, excluding the common liberty, and dealing with it as of right as a distinct and separate property,
I and there is nothing to show that its origin is modern, the proper presumption is, as was said in *Malcolmson v. O'Dea* (23), that the fishery, being reasonably shown to have been dealt with as property, must have become such in due course of law, and, therefore, must have come into existence before the time of legal memory.

The charter of Reginald de Vantort confirmed to

"my free burgesses of Essa all their liberties and free customs hereunder written, which they had in the time of my ancestors."

This charter was inspected, ratified, and approved in the time of Richard II. It is not dated, but as Reginald de Vantort was one of the great barons entrusted with the enforcement of Magna Carta in the reign of Henry III, this charter is sufficient proof that the free burgesses of Essa were a corporation existing before the time of legal memory, capable of having at that time, and not improbably actually having, a property in the fishery in that part of the sea, exclusive of the common liberty of the common people of England to fish there. There is nothing that I can see in the various subsequent charters indicating that the corporation ever had an exclusive fishery, but there is nothing inconsistent with it, and it was not disputed at the bar that if there was a prescriptive right of fishery in the old corporation of Essa, it was properly and validly continued down to the present corporation of Saltash, neither the change of name nor the surrenders and regrants in any way affecting their property.

The proof of enjoyment and acts of ownership by the corporation, from 1680 downwards, is such as would, beyond all reasonable doubt, raise the presumption that the corporation had enjoyed this exclusive right of fishery from time immemorial, were it not for para. 9 of the Case. I have felt some difficulty from not being able to understand who "the free inhabitants of ancient tenements in the borough of Saltash" are. I think, however, that it is quite clear that they are not the public at large, and that their acts in taking oysters from Feb. 2 to Easter eve are not acts of the public as such, exercising, though only during a limited portion of the year, the general liberty from which the corporation claim to have by prescription the right to exclude them during the whole year; but only acts of a limited portion of the public claiming, in conjunction with the plaintiffs, to exclude the general public from this liberty. What the acts of ownership and the fact found in para. 9 together prove is that during the greater part of the year the plaintiffs, and during the period from Feb. 2 to Easter eve the plaintiffs, and this limited portion of the public as tenants in common with the plaintiffs, have excluded the general public.

I cannot, therefore, agree with BAGGALLAY, L.J., that the effect of this paragraph is to disprove the exclusive right of fishing, and show that all the public, and the defendants as part of them, have a liberty of fishing, either during the whole year or this limited portion of it. I think, however, that if "the free inhabitants of ancient tenements in the borough of Saltash" are capable of in any way acquiring a right of property in the fishery during this limited time, the presumption should be made that they have acquired it. If they cannot acquire such a property, the privilege, however long tolerated, may be withdrawn. I do not attach any weight to the statement in para. 16; I do not doubt its truth, but the unlimited right given at common law, in the absence of prescription, to all the public to fish, would be even more likely to destroy the oysters. It affords an excellent reason why the mayor and aldermen, if they have the power, as I thought they had, should put an end to the practice, or put it under such restriction as will prevent the oysters from being extirpated; just as it affords a reason why the legislature should put restrictions on the common law right, but does not prevent this mode of enjoyment from being legal, though wasteful.

I do not think it is disputed that the law was accurately stated by WILLES, J., in *Constable v. Nicholson* (24), where he says:

"The distinction is well established that by custom you may claim an easement to be enjoyed over the land of another, but you cannot claim a profit out of the land. The only difficulty in these cases is to ascertain what is a profit à prendre and what an easement."

And I think it was not disputed that a licence to take and carry away fish for sale or otherwise is a licence of a profit à prendre, which may at this day be created by a grant to a grantee capable of taking an interest in the land (*Wickham v. Hawker* (25)), nor that there was not any difference in this respect between a licensee by the owner of a prescriptive fishery in the sea, and the owner of a

A fishery in an inland river; and as such a right would now be created by grant to anybody capable of holding such a profit in land, it can be prescribed for by any one who is capable of prescribing. I think the law is that, though a custom may, if in other respects reasonable, establish a local law in a particular place differing from the common law, yet prescription can only be of something which could have a lawful origin at common law. This has often been laid down. I will only refer to what LORD SELBORNE, L.C., says, in *Dalton v. Angus* (26).

I have come to the conclusion that no form of grant, either ancient or modern, will be found effectually giving to a fluctuating body a right in fee to a profit à prendre in land, either by a grant to that body direct, or by casting on the grantee in fee of a several fishery, or of any other real property, an obligation to permit a fluctuating or uncertain body to take such a profit à prendre out of the subject of the grant. I say nothing at present as to whether such an obligation might not be enforceable as a trust: I confine myself to the question at law. But, as I fear that in saying this I differ from the Lord Chancellor, and from others of your Lordships, I must give my reasons more at length, especially as this question was not raised below, or at least not so as to lead the judges to discuss it.

Gateward's Case (4) is reported in 6 Co. Rep. 59 b, and also in Cro. Jac. 152. The two reports quite agree, and, as I think, from them both it is to be collected that the reason, or at least a principal reason, why the custom was held bad, was that it is repugnant to the nature of an inheritance in a profit à prendre in real property that it should be vested in a body not capable of releasing or dealing with it, or at least that it is against the policy of the law of England to allow it to be so vested. This, if it is the reason of the rule, is equally strong against the validity of a grant direct to such a fluctuating body of an inheritance in a profit in land. In *Constable v. Nicholson* (24), WILLES, J., said such a grant was not good. In *Chilton v. London Corpn.* (2) SIR GEORGE JESSEL, M.R., said, "Such right cannot exist by grant"; and I have not been able to find any case in which it has been said that such a grant would be good, unless where, being from the Crown, and out of Crown property, it might be implied that the Crown created the grantees a corporation for this special purpose. But it was argued that even if there could be no such grant direct to the fluctuating body, there might be an exception or condition in the original grant to the owners of the fee, requiring them to allow such a fluctuating body to take a profit à prendre out of the land so granted, and that such an exception or condition would be good—at least where there was such a relation between the grantees and the body as exists between a corporation of a town and the whole, or a class, of the inhabitants of that town. Cases were cited in support of this position, which, as they seemed to the Lord Chancellor to support it, I have carefully examined, but I do not understand them as he does. I think such an exception or condition, operating so as to give to that fluctuating body an inheritance in a profit in land, would be just as open to the objection that it was repugnant to the rules of law to allow an inheritance in a profit in land to vest so as not to be capable of being discharged as a direct grant. It seems to me a strong authority against the validity of such an exception or condition, that in every case where it was proved or admitted that there was a custom for a fluctuating body from time immemorial to take a profit à prendre in the soil of another, the presumption that the fee was originally conveyed subject to such an obligation would be quite as strong as in the present case; and the right of the fluctuating body, if properly pleaded, would be good, if good here; and in the recent case of *Lord Rivers v. Adams* (1) where no point turned on the pleadings, it ought to have been held that the fee was, before the time of legal memory, conveyed to the person whose estate Lord Rivers now has, subject to such an obligation. Yet there is no case of which I am aware in which such a claim has ever been made; certainly none in which it has been supported.

Cocksedge v. Fanshaw (8) was not, as I read it, such a case. The claim there was not one to real estate at all, and *Gateward's Case* (4) could have no bearing on it. The original grant of the Crown to the corporation of London was to take

a tax on all corn imported into the city; and the question was, whether there could be a lawful origin for an exception of corn consigned to the freemen of the city. LORD HALE, in his treatise concerning the customs, in part 3 of his treatise *DE JURE MARIS*, chapter 3 (I quote from HARGRAVES LAW TRACTS, Dublin edition, 1787, p. 125), says:

"A man, or town, or corporation may have a discharge of prisage by charter, and this is without all question, as shall be shown. If the king grant to the mayor and commonalty of the city of London quod omnes cives civitatis predictæ shall be free of prisage, though the charter be granted to the corporation, yet the exemption is well transferred to particular persons; and so in case of a discharge of toll, of putting into juries, and like privileges of discharge."

This was solemnly decided in the great case of *Walter v. Hanger* (27). It is only material to say that the charter there relied on was after the time of legal memory. The same is the law as to a discharge by a subject to whom the right to take tolls had been transferred, as appears by *Nicholl Corpn. v. Derby Corpn.* (28) (YEAR BOOK, 48 Edw. 3, fo. 17), cited in *Mellor v. Spateman* (29).

These cases are, not in the slightest degree inconsistent with the reason which I think was the ground of *Gateward's Case* (4), for in the first place there was no profit taken in the soil, or in any way connected with the soil, and secondly they were cases of discharge, not of grant. But they are very strong to show that LORD MANSFIELD was quite right when he said that a grant to take tolls, subject to an exemption that they should not be taken from a certain class of freemen, would not have been void. Neither can I put the same construction on the effect of the cases as to the form of pleading in prescription which was put in the argument. I have no doubt that a right to take a profit in alieno solo may at this day be granted in gross to a common person in fee, as indeed was done in *Wickham v. Hawker* (25), or in gross to a corporation in fee; and it may also be made appendant to other lands, and so be conveyed along with them. As such an interest would be created now, it is clear that it might be prescribed for. That is no way inconsistent with what I take to be the reason of *Gateward's Case* (4), for such a person can always release, or otherwise part with, the right. The owner of the profit à prendre may take it in person or by his servants. But he may also, whether the profit is in gross or appendant to land, get the benefit of his profit à prendre by selling or letting an interest in it, for a longer or shorter term, to any person capable of taking such an interest, and so long as that interest endures the donee has an irrevocable licence to take so much of the profit. It is clear justice that the tenant or other person taking an interest ought, by good pleading, to be able to protect himself if an action be brought against him by the owner of the servient tenement for using the right while his interest endures, whether that interest was long or short.

The mode in which this should be done was the question in *Boteler v. Bristow, City of Coventry Case* (5). It seems plain that this was a case of common appendant to property in the city, and it certainly seems to me far from being an authority for saying that the inhabitants had a right, as against the city, to have this common. All that was decided was, that a tenant at will of part of the dominant tenement might justify putting on the servient tenement beasts which were levant and couchant on the dominant tenement; and this, I think, is the rule of pleading which is stated in the sixth resolution of *Gateward's Case* (4). On reference to the original French it will be found that there is a mistranslation, or misprint, in the first edition of COKE's REPORTS in English, which renders this resolution, as printed, unintelligible; and it has not been corrected in any of the subsequent editions. So in *White v. Coleman* (6) the mayor and burgesses prescribed properly enough for common of estovers for them and every inhabitant to have in their houses. Common of estovers, from its nature, must be appurtenant to the land on which stand the houses in which they are to be burned.

A Bodies corporate may, as such, hold property in their corporate capacity, and it is, I think, incident to the nature of a corporation that there should be a power in the governing body from time to time to make ordinances for the management of that property. In the charter of Queen Elizabeth such a power is expressly given to the mayor and aldermen, or the major part of them, in convocation, to make from time to time such ordinances as to them in their discretion may seem meet, inter alia,

B “for the letting and demising of the lands, tenements, possessions, revenues, and hereditaments given, granted, or assigned, or hereafter to be given, granted, or assigned to the mayor and free burgesses or their successors.”

C I suppose that an ordinance directing that any property belonging to the corporation should be enjoyed till further order by the individual burgesses would be good enough; and in all corporations, while such an ordinance allowing the individual burgesses to enjoy a right of common existed, the burgesses could plead the prescription for their benefit to protect themselves, just as the tenants at will could, and I think the various cases referred to go no further than this. If the ordinance thus made was revocable, it would in no way be inconsistent with *Gateward's Case* (4), and I am not aware of any authority for saying that such a byelaw or ordinance, however ancient, was irrevocable till some rights given to freemen and others were made so by the Municipal Corporation Act, 1835 (5 & 6 Will. 4, c. 76), s. 2: see *Hopkins v. Swansea Corpn.* (30). But in no way can the ninth paragraph of the case be understood as stating a right which comes within that enactment.

E I think the corporation, just like any other owner in fee, can deal with their property, and release or discharge it, unless they have conveyed it with the property in a part of the dominant tenement to someone else, and in that case the owner of the property to which it was appendant will release it. But whatever may be the meaning of the “free inhabitants of ancient tenements,” it cannot be construed as meaning the owners of property to which the right of fishing was appendant. It is not impossible that there was once a byelaw or ordinance allowing the inhabitants of the town freely to take oysters from Feb. 2 to Easter eve; at least, its existence would be a lawful origin for the practice stated in para. 9. But, if there was one, it was revoked when the mayor and aldermen made the leases in 1680, and whatever reason the inhabitants then living might have had to complain, I cannot see why that revocation should not be effectual against those who have two hundred years after become inhabitants.

G It was argued that at all events such a grant in favour of a fluctuating body might be worked out by treating the corporation as a trustee, and by the intervention of the Court of Chancery. I speak with diffidence on a subject with which I am not very conversant, but I believe the rule against perpetuities, which is founded on nearly the same reason as that of *Gateward's Case* (4), applies to all trusts except those in which the sovereign has the power, as being the ultimate trustee for charitable uses, of altering them. Though there are many cases to the effect that a trust for public purposes, not confined to the poor, may be considered charitable for many purposes, I do not know of any which say that such a trust as is now supposed would be taken out of the rule against perpetuities; and I *Carme v. Long* (31) seems rather against it. As, however, EARL CAIRNS agrees with the Lord Chancellor that such a trust would not be held void in equity, as being against the rule against perpetuities, I do not venture to differ from them. But I do feel strongly that, after the numerous cases, from *Gateward's Case* (4) down to *Lord Rivers v. Adams* (1), in no one of which was it ever suggested that such a trust should be presumed, your Lordships should not presume it here, unless some distinction can be shown why the corporation of Saltash should be presumed to be a trustee, and a private person, owner of an estate in fee, like Lord Rivers, should not, which is hardly done to my satisfaction.

If, therefore, it depended on my opinion, the judgment of the Court of Appeal should be affirmed, and this appeal dismissed with costs.

LORD WATSON, LORD BRAMWELL, and LORD FITZGERALD concurred in the opinion of the Lord Chancellor.

Appeal allowed.

Solicitors: *Wedlake & Letts; William Bohm.*

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

MANCHESTER CORPORATION v. LYONS BROTHERS

[COURT OF APPEAL (Sir George Jessel, M.R., Cotton and Bowen, L.JJ.), November 25, 27, 1882]

[Reported 22 Ch.D. 287; 47 L.T. 677]

Market—Grant by Crown—Subsequent grant by statute—Effect of Parliamentary grant—Disturbance of market—Sale in shop of marketable commodities.

If, after a grant of a market by the Crown, the three estates of the realm constituting Parliament, whether on the solicitation of the grantee or otherwise, by their joint act create the same rights, or larger or different rights of the same nature and character in favour of the grantee, the Parliamentary right supersedes those previously held from the Crown alone, and thereafter there is no continuing tenure by the grantee under his original title or continuance of his prior accountability to the Crown.

As an ordinary rule, the sale of a man's own goods, in the ordinary and regular course of business, in his own shop, is not a disturbance of a market.

Manchester Corporation had held a manorial right of market for, among other things, cured fish. This right had, as the court held, been superseded by a larger grant of market rights by Act of Parliament. The defendants were wholesale dealers in cured fish and eggs, in respect of which commodities, when sold in their market, the corporation had a statutory right of levying tolls. The defendants sold their goods, in the ordinary course of business, in their shop which opened on the street and was not situate in or opposite the market, but was some yards away.

Held: the defendants' business activities were not a disturbance of the market of the corporation.

Notes. Considered: *Bishopsgate Motor Finance Corpn. v. Transport Brakes, Ltd.*, [1949] 1 All E.R. 37. Referred to: *Abergavenny Improvement Comrs. v. Straker* (1889), 42 Ch.D. 83; *Birmingham Corpn. v. Foster* (1894), 70 L.T. 371; *New Windsor Corpn. v. Taylor*, [1899] A.C. 41; *A.-G. v. Horner* (No. 2), [1913] 2 Ch. 140; *Hailsham Cattle Market Co. v. Tolman*, [1915] 1 Ch. 360.

As to creation of right to hold market, see 35 HALSBURY'S LAWS (3rd Edn.) 382 et seq; as to disturbance of right, see *ibid.*, 403 et seq; and for cases see 33 DIGEST (Repl.) 450 et seq., 475 et seq.

Cases referred to:

- (1) *Warrington v. Mosely* (1694), Holt, K.B. 673; 4 Mod. Rep. 319; 90 E.R. 1272; sub nom. *Warrington v. Mosely*, Comb. 295; 26 Digest (Repl.) 355, 696.
- (2) *Moseley v. Pierson* (1790), 4 Term Rep. 104; 100 E.R. 918; 33 Digest (Repl.) 470, 212.

- A (3) *Moseley v. Chadwick* (1782), 3 Doug.K.B. 117; 99 E.R. 568; sub nom. *Mosley v. Chadwick*, 7 B. & C. 47, n.; 33 Digest (Repl.) 478, 328.
- (4) *Mosley v. Walker* (1827), 7 B. & C. 40; 9 Dow. & Ry.K.B. 863; 5 L.J.O.S.K.B. 358; 108 E.R. 640; 33 Digest (Repl.) 458, 93.
- (5) *Manchester Corpn. v. Peverley* (1876), 22 Ch.D. 294, n.; 33 Digest (Repl.) 488, 431.
- B (6) *Dorchester Corpn. v. Ensor* (1869), L.R. 4 Exch. 335; 39 L.J.Ex. 11; 21 L.T. 145; 34 J.P. 167; 33 Digest (Repl.) 358, 96.
- (7) *Macclesfield Corpn. v. Pedley* (1833), 4 B. & Ad. 397; 1 Nev. & M.K.B. 708; 110 E.R. 504; 33 Digest (Repl.) 479, 340.
- (8) *Macclesfield Corpn. v. Chapman* (1843), 12 M. & W. 18; 13 L.J.Ex. 32; 2 L.T.O.S. 103; 7 J.P. 707; 7 Jur. 1041; 152 E.R. 1093; 33 Digest (Repl.) 479, 342.
- C (9) *Prior of Dunstable v. B.* (1433), Y.B. 11 Hen. 6, fo. 19, pl. 13; 33 Digest (Repl.) 480, 344.

Also referred to in argument :

- Yard v. Ford* (1670), 2 Saund. 172; 1 Mod. Rep. 69; 1 Lev. 296; 2 Keb. 689, 706; 1 Vent. 98; T.Raym. 195; 85 E.R. 922; 33 Digest (Repl.) 479, 334.
- D *Elwes v. Payne* (1879), 12 Ch.D. 468; 27 W.R. 704; on appeal, 12 Ch.D. 475, C.A.; 33 Digest (Repl.) 479, 336.
- Bridgland v. Shapter* (1839), 5 M. & W. 375; 8 L.J.Ex. 246; 151 E.R. 159; 33 Digest (Repl.) 456, 75.
- Fearon v. Mitchell* (1872), L.R. 7 Q.B. 690; 41 L.J.M.C. 170; 27 L.T. 33; 36 J.P. 804; 33 Digest (Repl.) 452, 39.
- E *Pope v. Whalley* (1865), 6 B. & S. 303; 5 New Rep. 323; 34 L.J.M.C. 76; 11 L.T. 769; 20 J.P. 134; 11 Jur.N.S. 444; 13 W.R. 402; 122 E.R. 1208; 33 Digest 484, 382.
- Ashworth v. Heyworth* (1869), L.R. 4 Q.B. 316; 10 B. & S. 309; 38 L.J.M.C. 91; 20 L.T. 439; 33 J.P. 565; 17 W.R. 668; 33 Digest (Repl.) 484, 390.
- F *Re Islington Market Bill* (1835), 3 Cl. & Fin. 513; 12 M. & W. 20, n.; 6 E.R. 1530; 33 Digest (Repl.) 481, 357.
- Penryn Corpn. v. Best* (1878), 3 Ex.D. 292; 48 L.J.Q.B. 103; 38 L.T. 805; 42 J.P. 629; 27 W.R. 126, C.A.; 33 Digest (Repl.) 479, 343.
- London Corpn. v. Low* (1879), 49 L.J.Q.B. 144; 42 L.T. 16; 44 J.P. 169; 28 W.R. 250; 33 Digest (Repl.) 478, 333.
- G *Brecon Corpn. v. Edwards* (1862), 1 H. & C. 51; 31 L.J.Ex. 368; 6 L.T. 293; 26 J.P. 614; 8 Jur.N.S. 461; 158 E.R. 797; 33 Digest (Repl.) 475, 308.

Appeal by the plaintiffs, Manchester Corporation, from an order dated Feb. 22, 1882, of BRISTOWE, V.-C.

The present action was brought in the Court of Chancery of the County Palatine of Lancaster, by the plaintiffs, Manchester Corporation, against the defendants, Messrs. Alfred and James Lyons, who carried on the business of Irish and foreign produce merchants, importers of butter and eggs, cheese and bacon factors, and fish curers, at No. 18, Oak Street, in the city of Manchester, for a declaration that the business carried on by the defendants at Oak Street aforesaid, as wholesale dealers in eggs and cured fish, was a nuisance to and a disturbance of the plaintiffs' markets, and an infringement of and fraud on the exclusive rights claimed by them as owners of markets within the city of Manchester; also for an injunction to restrain the defendants from carrying on such business, and for an account.

The manor of Manchester was co-terminous with the township of Manchester, which was one of six townships constituting the borough, and afterwards the city of Manchester. The borough was incorporated under charter dated Oct. 28, 1838. There was evidence that the lords of the manor had a grant (which was lost) from the Crown of a right of markets, but to what extent was not clear. In 1693 a claim by prescription by the then lord of the manor of Manchester for "a toll of 2d. for every pack bought in Manchester called Manchester wares, except of the

burgesses there," was not proved to the satisfaction of the court: *Warrington v. Mosely* (1). In 1794 a claim by the then lord to a prescriptive right to hold a weekly market on Saturday for the sale of flour and oatmeal, and for a toll in kind in respect of sales, was unsuccessful: *Moseley v. Pierson* (2). A

In June, 1782, the then lord brought an action on the case for depriving and defrauding the plaintiff of the profits and emoluments of his market by erecting another market in a certain place near the plaintiff's market for selling and exposing for sale flesh meat, for hire and reward, without the licence and against the will of the plaintiff. The result of the special verdict therein was that the plaintiff was seised of a franchise for holding a market, and that the defendants erected about 140 stalls very near his market, taking no tolls, but taking rent for the stalls, so as to diminish the profits arising from the plaintiff's market to the amount of £90. The Court of King's Bench gave judgment for the plaintiff: *Mosley v. Chadwick* (3). B C

The evidence pointed to a general market only being claimed for Saturday in the above causes.

In June, 1827, the then lord claimed a market on every Tuesday, Thursday, and Saturday (except when they fell on Christmas Day or New Year's Day) for all manner of fish usually sold in markets, and for tolls and stallages, and the lord recovered judgment against the owner of a house adjoining the market-place, for opening a shop there, and selling marketable fish there: *Mosley v. Walker* (4). An inquisition in the ninth year of John of Gaunt, first Duke of Lancaster, referred to "the market day." D

By s. 31 of the Manchester Police Act, 1844 (7 & 8 Vict., c. xl.), s. 31, power was given to the borough council to purchase the rights of the lord of the manor, and this purchase was effected on May 5, 1846. After completing this purchase the corporation of Manchester obtained certain statutory rights of market under Acts of Parliament, the effect of which is set out in the judgments. E

BRISTOWE, V.-C., gave judgment for the defendants. The plaintiffs appealed.

Benjamin, Q.C., and *Gully, Q.C.* (*Maberly* with them), for the plaintiffs.

Ambrose, Q.C., *O. L. Clare* and *Edwin Jones* for the defendants, were not called on to argue. F

SIR GEORGE JESSEL, M.R.—There are two points arising on this appeal which are totally distinct. The first question is whether an ancient franchise to hold a market by the lords of the manor of Manchester is still an existing franchise belonging to Manchester Corporation, the present appellants, or whether it has not been extinguished by virtue of a Markets Act obtained by that corporation. The second question is whether, assuming this court to be of opinion that the franchise has been extinguished, and that the only markets belonging to the corporation are the markets which they are empowered to hold by their Market Act, the defendants Lyons Brothers, have committed any disturbance of those markets and are liable to be sued in an action for that disturbance. As regards the first point it was originally decided by *LITTLE, V.-C.*, in *Manchester Corpn. v. Peverley* (5), and that judgment was against the corporation. In the present action his successor, *BRISTOWE, V.-C.*, properly held that he was bound by that judgment, in which he also expressed his concurrence. Therefore, we have both Vice-Chancellors of opinion that the franchise has been extinguished or ceased to exist. G H

With regard to the law on the subject, I think I may quote with safety what was said by *LITTLE, V.-C.*, in his judgment in *Manchester Corporation v. Peverley* (5). After speaking of a grant by the Crown he says (22 Ch.D. at p. 294, n.): I

"If, after such a grant has been made by the Crown, the three estates which jointly constitute Parliament step in, whether on the solicitation of the grantee or otherwise, and by their joint act, create the same rights, or larger or different rights of the same nature and character, in favour of the grantee, it seems to me that, of necessity, these parliamentary rights, emanating as they

A do from a paramount authority, must supersede those which the grantee was previously holding from the Crown alone, and that, after the passing of such an Act, there can be no continuing tenure by the grantee under his original title, nor a continuance of his prior accountability on foot thereof to the Crown."

B That being, as I think, correct, it only remains to consider whether, by the Manchester Markets Act, 1846 (9 & 10 Vict., c. ccxix), there was created such a grant of market or markets to the corporation as showed that the old markets no longer existed, and that the corporation must rely on the Manchester Markets Act, 1846, for its new market.

C The history of the matter is very simple. It seems that the manor of Manchester was co-terminous with the township of Manchester, which appears to be one and the largest and most important of six townships which constituted the borough, now the city, of Manchester. That manor had, no doubt, a grant from the Crown of a right of markets. What it was exactly it is rather difficult to say, because the grant is lost, but there was evidence, and very good evidence to my mind, that the original grant was of a Saturday market. In the first place, we have an inquisition in the time of John of Gaunt, the first Duke of Lancaster, in the ninth year of his dukedom, which speaks of "the market day." It says that tolls may be taken on other days than the market day, which is evidence that there was something to answer to "the market day." It does not show what day it was, but it shows that it was the market day. Then, in the next place, we have three records towards the end of the last century. They are all actions brought by the then lord of the manor, and in every one of those actions he states the market day to be the Saturday. Of course, he must have known—and the evidence is very strong indeed to show—that there was a Saturday market day. Then, there is no other evidence except this, that, in the beginning of this century about the year 1827, a successor in title to the lordship brought an action, alleging, not that the general market was held on any other day than the Saturday, but that the fish market was held on Tuesdays, Thursdays, and Saturdays. Taking it in the most advantageous light for the lord of the manor, it only amounts to this, that there was the general Saturday market, and that there was a fish market on Tuesday, Thursday, and Saturday. I should not be prepared to say, at the present moment, that that single record, having regard to the three prior records, would sufficiently prove even the existence of the fish market on those three days, but we assume that in favour of the present appellants.

G Then it comes to this. There is a Saturday market, a general market (in two of the records it is not alleged to be general, in the third it is), and a fish market on Tuesdays, Thursdays, and Saturdays, by prescription. Then the Manchester Police Act, 1844 (7 & 8 Vict., c. xl) was passed, which enabled the corporation to buy up the market from the lord of the manor, and in pursuance of the terms of that Act of Parliament the corporation did buy up the market. At the time of the passing of the Manchester Markets Act, 1846, the corporation were the owners of the market, that is, of the manorial market. There is some question as to what the extent of the franchise was, but the lord of the manor established this, that by prescription he had a right to prevent fishmongers and butchers from selling in their shops on market days. Therefore, there was a grant, or prescription which implies a grant, to that effect. Beyond that it does not appear that he had established by prescription any right to compel anybody who had a shop within the township of Manchester to refrain from selling his own goods in his own shop on market days.

I That being the position of matters, we have in 1846 an Act passed, the title of which is not without some significance. The title is:

"An Act for providing market places, and for regulating the markets and fairs in the borough of Manchester in the county palatine of Lancaster"

—not in the township, but in the borough. Then it recites some prior Acts of Parliament, and then it recites,

"And whereas the council have in pursuance of the power contained in the said first recited Act completed the purchase of the said manorial rights, lands and properties, and have thereby become entitled to the tolls and stallages payable in respect of the markets and fairs held within the said manor, and whereas it would be a great convenience and advantage to the inhabitants of the said borough and the neighbourhood thereof, and to the public at large, if some of the existing market places were discontinued and others enlarged, and also if new market places were established for the sale of fish, poultry, vegetables, meat, butter and other provisions, as well as of live cattle, corn, grain, hay, straw, lime, coal, and other marketable commodities usually sold in open market, and it is expedient that provision should be made for the better regulation of the said markets and fairs, and for the improvement of the approaches thereto, and for appointing the days on which the same shall be held, and for altering and varying the tolls and stallages now payable in the said markets and fairs, or in respect of produce brought within the said borough, and for granting other tolls and stallage in lieu thereof, but the same cannot be effected without the aid and authority of Parliament."

I will go through the sections which appear to me material. Section 4 gives a certain power to the council of the borough, and I read "council" throughout as being used merely for the executive of the corporation. Though the power is given to the council, the power is given to the corporation by the powers being given to the executive, and I do not rely on the use of the word "council" in the section as making any distinction in effect, from what the Act would have done if the word "corporation" had been used throughout. First of all the council are entitled to buy any lands, houses or buildings within the borough for the purposes of the Act. Then they are empowered, by s. 24, to erect a new market hall, which is evidently to be something very grand, and very large, for the sale of fish, meat, provisions, agricultural produce, etc. Section 25 provides:

"That after the said new market hall and other buildings connected therewith shall have been completed and opened for public use, it shall be lawful for the council to hold and keep a market therein thenceforth for ever, on such days in every week as they shall from time to time appoint,"

and there to allow anything to be exposed for sale. There is a provision in s. 26 to enable them to use other places until their market hall is completed. Section 27 provides that the council may enlarge all or any of the present market places, "or, in lieu thereof, or in addition thereto," make new ones for all these purposes. Then s. 28 has a similar provision with regard to cattle markets, and s. 29 contains a provision as to the days for holding the cattle markets. Section 30 enables the council to discontinue old markets when they have made new ones. Section 32 enables them to provide markets for the sale of hay and straw.

Section 33 enables them to provide eligible sites for the market places. Section 33 and s. 34 enable these sites to be provided either from any land then belonging to the corporation, or from any land they may acquire. As I understand, they had land without the township of Manchester and within the borough, but they had no land except within the borough at the passing of the Act. So it comes to this, that the effect of those two sections is, that the corporation may establish their markets in any part of the borough they may think fit, whether they are within the township of Manchester or not.

Section 36 contains a provision establishing modes of weighing and measuring things used in the market. Section 38 contains a provision as to weighing carts and carriages. Section 39 gives the council power to take new tolls, which are not to exceed those mentioned in schedule B. As I understand they are larger tolls than they could take before. Section 40 gives similar tolls for the cattle market. Section 42 gives new tolls altogether for machines for weighing goods sold, and s. 43 does the same thing for machines for weighing carts. I think there

A is nothing else which is material to this case. Some reference was made to a saving clause, but I object to look to a saving clause for the purpose of extending an enactment. It does not really affect the question, when it is examined with s. 126, because that really says that the Act shall not extend the manorial rights beyond Manchester. Then there are some very curious provisions as regards butchers and fishmongers. As I said, the lord of the manor had established a right

B to prevent them from keeping their shops open, and the new legislation, instead of that, provides that they may do it on obtaining a licence, for which they have to pay a certain sum of money. Then it goes on to provide that, when the money that Manchester Corporation has spent in the purchase of the manorial rights has been repaid, the licence shall cease and the butchers and fishmongers shall have the same rights of selling in their own shops.

C Look at the sections I have referred to, and see what the effect is. First of all the day of the market is changed. Whether it was one day or three days a week for fish is immaterial. It was one day a week for everything else. If there be a market on any day or days, it is a very strong circumstance to show that it is a new market, and not a mere extension of the old one. The next matter of observation is, that not only is the day changed but the place may be changed. The old

D manorial market is a market which must of necessity have been situated within the township of Manchester, one of the six townships now constituting the city of Manchester. You could not take it outside the limits; but under the new statute all the new markets may be outside the township, or all on the borders, or all in other townships. Considering the importance of the provisioning of the township of Manchester, I do not suppose they would be outside that township, but they

E might be. Consequently you have a market changed in time, or which may be changed in time, and changed in place, or which may be changed in place. But that is not all. In addition to changes in time and place, you have a change of charge. Of course, in an old market everybody is entitled to use the market on payment of the accustomed toll, but here you have a power to charge more, and therefore the right of charge is changed. In addition to that, charges are imposed

F to which people were not formerly liable at all—the charge in relation to the weighing machines. Therefore, there is not only the power to change the old toll for which people were liable, but you have an imposition on them of an entirely new set of tolls, to which they were not liable. Then, to crown the whole thing, the new market, instead of being a market for the inhabitants of a particular township, is to be a market for the whole borough. Of course, you have let in now a new

G class, who are entitled to use the market. The old customers of the market, the inhabitants of the township, had a right to use the market instead of everybody else, but now you have a market place, erected within a township, which all the inhabitants of the borough, including the inhabitants of the six townships, have a right to use. So that you have changed almost everything that it is possible to change.

H One can hardly imagine a plainer case of a new market, as distinguished from a mere alteration or enlargement of an old one. It appears to me perfectly plain that, applying the law as laid down—and as it seems to me correctly laid down—by LITTLE, V.-C., in *Manchester Corpn. v. Peverley* (5), there is a market which is intended to be a new market, or rather, a series of new markets, and that the whole franchise was intended to be extinguished. It was bought by the corporation, and was intended to be put an end to in consideration of totally different privileges granted to Manchester Corporation by the Act of Parliament in question. That concludes all I have to say on the first question.

The second question we have to consider is whether, in this case, the defendants are liable for disturbance of market. The facts which it appears to me necessary to state are very few indeed. The defendants are the owners of a shop in Oak Street, Manchester. This shop is used by them for the sale, among other things, of dried fish and eggs. It is material to consider where the shop is. It is not opposite the market. That is higher up the street, several yards from the shop.

The shop is opposite some private houses belonging to the corporation, and opens on the street, and not on the market. If we had given to the word "market" the signification attempted to be put upon it by the counsel for the plaintiffs, it would have included the whole of the street leading up to the market. In my opinion, that is not a fair definition of "the market." The market is the proper market, and the fact that some persons do improperly sell provisions in the street outside does not, in my opinion, extend it so far as the plaintiffs claim. What is the position of the defendants? They sell, both wholesale and retail, eggs and dried fish, which belong to themselves, in the ordinary course of business. They sell them on market days as well as on other days, and that is alleged to be a disturbance of the market. It may be an infringement of the market in this sense, that if they were to shut up their shop more people would go to the market on those days, and more business might be done in the market. But I suppose the same observation might be made if every other shop in Manchester were shut up on market days—that more people would go to the market, and more business would be done there. It does not appear to me that that has much bearing on the question.

What amounts to a disturbance of the market, must, of course, depend on the facts of the case. And I am not going to lay down that, because a man sells goods in a shop, it may not be a disturbance of the market. I do not think it is necessary to consider that point on the present occasion, and I do not wish to lay down anything which may be called a definition of disturbance of a market because the evil of laying down such a definition is, that the judge probably forgets some case or other which the ingenuity of man may devise which really would be a disturbance of the market, and then what he says may be cited as an authority for not allowing an action to lie in respect of such a disturbance. It has been held more than once in modern times, whatever may have been the case in former days—and there are some ancient decisions—that, as an ordinary rule, the sale of a man's own goods, in the regular and ordinary course of business, in his own shop, is not a disturbance of the market, and you must show something more. How much more will be sufficient it is not now for me to say. I can find no evidence whatever beyond the mere fact that I have stated, that they sell their own goods in the ordinary course of business, to accuse these defendants of disturbing the market. In my opinion, that does not amount to a disturbance of the market. Therefore, the defendants are not liable in this action, and in my opinion the appeal must be dismissed.

COTTON, L.J.—The first question is whether the plaintiffs are entitled to rely on the ancient franchise, and the rights they claim to have by prescription. I would not add a word to what the Master of the Rolls has said, but that it is an important question, what is the effect of the Act of Parliament in this case?

In my opinion, it must in every case be a question, having regard to the words used in and the effect of the new rights given by the Act, whether the right given by the Act is or is not a supersession, is or is not intended to supersede, and in fact does supersede, the rights which previously existed. What I principally rely on here is, that the right given by the Act to the corporation is a right to hold markets, not only in the comparatively small area over which their ancient franchise extended, but in any part of the borough of Manchester. The former right, which the corporation contend is still subsisting, was a right belonging to the lord of the manor as regards the township, and not extending beyond that; but I cannot doubt, looking at the Manchester Market Act, 1846, that the rights intended to be given to the corporation by that statute were rights not only for the benefit of the borough, but which they might exercise throughout the borough. The power to buy the manorial rights, including the market, had been given to the corporation by a previous Act of Parliament (the Manchester Police Act, 1844).

In the Act of 1846, after the recital referred to by the Master of the Rolls, we find, not only that there is no limit as to the place where the new markets are to be erected (except that it is to be on land of the plaintiffs, or land to be acquired by them; which land to be acquired is, I think, limited to the borough), but, that

A what is to be done must necessarily be co-terminous with the borough. Section 55 provides :

“That it shall be lawful for the council, when, and as often as they shall think fit, to alter and change the days, times and places for holding all or any of the present or future markets or fairs within the borough, as they shall deem necessary or expedient.”

B That, therefore, is a power given to them, in express terms, throughout the borough, and not in any way confined to the township to which the previous franchise only extends. That and other things lead my mind to the conclusion which I can have no doubt about, that the intention of this Act of Parliament was, to grant powers, as regards holding markets and regulating them, not only in the township, but throughout the whole of the borough. Section 126, the saving clause, might at first seem to afford an argument in favour of the corporation, but I agree with the Master of the Rolls that a mere saving clause is not to give a new effect, or a different effect, from what is the true construction of the provisions of the previous sections of the Act; and it must be remembered that the manorial rights which were purchased were not only this franchise, but other rights, and although the first part of that section speaks of manorial rights still existing, it may be *ex abundanti cautela*; it could have no effect in extending those rights or conferring the old franchise. One only of the manorial rights is still existing, but the latter part of the saving clause, if any effect is given to it, is against the corporation, because it says that they are not in any way to interfere with the rights of the Duke of Bridgewater, as regards one of the townships in the borough

E (the township of Hulme), of holding a market there. If the market rights were not intended to extend throughout all the borough, I hardly think that saving clause would have been introduced. That being so, I have come to this conclusion, that these large powers as regards markets were intended to be co-terminous with the borough. That is not immaterial as regards the rights which are given to the corporation with reference to the market. I cannot but come to the conclusion

F that here Parliament has given to the corporation, on their application, rights extending over a much larger area than, and in some respects possibly of a different kind from, that of the old franchise, and that that was a superseding of the old right which the corporation (having bought it for the benefit of the borough) had before the Act over only the smaller area of the township of Manchester.

G The present case is entirely different and distinct from those that have been referred to by counsel for the plaintiffs. *Dorchester Corpn. v. Ensor* (6) was simply this: There being a grant to the corporation of a right to hold a market in the borough, when the limits of that borough were extended, it was held that the right was extended also, not by an addition to the right, but by an extension of area subject to the right, when the Act of Parliament (and that was the only contention, although the extension was for the purposes of the Municipal Corporations Act) had said: “for all purposes, what is hereby added to the limits of the borough shall be part of the borough.” The other cases referred to are, in my opinion, in no way inconsistent with our decision. As I say, it is a matter of the construction of each statute on which the question arises, and if you find the statute referring to an old franchise as subsisting, and merely varying the powers

H which the grantee is to have as regards that franchise, then that is not superseding, but enabling those who hold the old franchise to exercise rights of a larger character than they could have exercised under the mere franchise. It is confirming it, and continuing its existence, but with some larger powers. That being so, the question is a question of construction, and on this statute I feel no doubt that the old franchise is superseded by the powers granted by the new statute.

I As regards the second question, that of disturbance, that is a question of evidence. What was relied on was the dictum that a man cannot take the benefit of a market and evade paying toll. The difficulty of that is this, what is taking the

benefit of the market? It may be, in a sense, that everyone gets the benefit of a market who sells his goods on a market-day to the increased number of people who come in from the country around, but that is inconsistent with what is established at law, viz., that, except in an old franchise which may confer the right, shopkeepers are not prevented from selling their goods in their shops on a market day unless such selling amounts to a disturbance of the market. Here the defendants are selling their goods in their own shop in the ordinary way of their business. There is no evidence to show that on those days they are taking the goods of others, and, under the pretence of carrying on their own business, enabling other people's goods to be sold there, or that they are going into the market to solicit people to come out to them. They are merely selling in the ordinary way, and the only point which raises the argument of the corporation is, that the shop of the defendants is within a certain distance of the market. I cannot come to the conclusion that, simply because this shop is within fifty yards of the market, not opposite the market or in the market, the mere selling of these goods in the shop in the ordinary way of business is a disturbance of the market, although, no doubt, this shop and other similar shops outside the market may attract customers who would otherwise go to the market.

In my opinion, the evidence here does not establish that what the defendants are doing is a disturbance of the market.

BOWEN, L.J.—I agree with all that has been said, and I will only add a very few words.

The first point is, whether the corporation are, in their present proceedings, enforcing an old manorial franchise, derived in the first instance from the king, and bought up by the corporation in 1846, or whether they are enforcing something totally distinct from the royal franchise, viz., a right created by statute. Where you have a franchise created by charter, and the legislature operates on it afterwards, the legislature can do exactly what it pleases. It has only to express its intention in clear words. It can leave the old franchise standing, and place a new parliamentary right beside it; or it may, for anything I know, leave the old franchise standing, and add certain statutory incidents to the old franchise, provided it makes itself clear as to its intention; or it may extinguish the old franchise either expressly or by implication, and substitute in its place not a franchise properly so called, but parliamentary rights and obligations under no franchise. The legislature can do exactly as it pleases. Therefore, one must look in each case at the statute itself to see what the legislature has chosen to do; and for that reason I think that so few cases could be found exactly in point; but when we come to this statute, I entirely agree with what has been said, that we find a new day, a new place, and new tolls. Instead of a manorial franchise we find a borough market substituted for the old one. There is, therefore, nothing left at all that has any identity with the old franchise. It is no longer the old franchise from the king. That has disappeared under the Manchester Markets Act, 1846.

With regard to the second question, we have to decide the bare point, whether the fact of a man being an ordinary dealer in a shop close to the limits of the market is, as it stands alone, evidence of a disturbance of the market. There is no such case. I use for the purpose of clearness the language of *LITTLEDALE, J.*, in *Macclesfield Corpn. v. Pedley* (7), which has also received sanction from the language of *PARKE, B.*, and *LORD ABINGER*, in *Macclesfield Corpn. v. Chapman* (8). *LITTLEDALE, J.*, says:

"There is no case which has decided that the mere selling, in a private shop, not within the limits of the market-place, marketable articles, on market days, is an injury to the market in point of law."

There is, no doubt, an older case still, *Prior of Dunstable v. B.* (9), which is supposed to have decided that, but on examination of *Prior of Dunstable v. B.* (9)

A many years ago, it was pointed out that it established nothing of the kind. As to that, without defining what is the evidence which would establish disturbance of the market, it is sufficient to say that there is not enough here to raise any presumption of the kind.

Solicitors: *R. F. Austin*, for *W. H. Talbot*, Manchester; *Pritchard, Englefield & Co.*, for *J. J. Lambert*, Manchester.

[Reported by FRANK EVANS, Esq., Barrister-at-Law.]

LEIGH AND ANOTHER v. DICKESON

[COURT OF APPEAL (Sir Baliol Brett, M.R., Cotton and Lindley, L.J.J.), November 8, 22, 1884]

[Reported 15 Q.B.D. 60; 54 L.J.Q.B. 18; 52 L.T. 790;
33 W.R. 538]

Landlord and Tenant—Tenancy—Tenancy in common—Repairs—Contribution—Rent—Liability of tenant in common to pay rent to co-tenant.

E If property is held by tenants in common and they are not under a common liability by tenure or otherwise to do repairs, and one co-tenant, without being requested by the other or others, executes repairs, he cannot claim contribution for the cost, but in a partition action such expenditure is taken into account and ordered to be shared proportionately between the tenants according to their interests in the property.

In special circumstances, one tenant in common may be liable to pay rent to his co-tenant.

F **Notes.** Since 1925, partition actions have become obsolete: see 14 HALSBURY'S LAWS (3rd Edn.) 502. After 1925, the statutory trust for sale applies to tenancies in common where there is no express trust for sale, and liability for repairs depends on the law of trusts. For the trustees' powers, see 38 HALSBURY'S LAWS (3rd Edn.) 1015–1016.

G Followed: *Re Jones, Farrington v. Forrester*, [1893] 2 Ch. 461; *Kenrick v. Mountsteeven* (1899), 48 W.R. 141. Explained: *Bonner v. Tottenham and Edmon-ton Permanent Building Society*, [1895–9] All E.R.Rep. 549. Distinguished: *Re Coulson's Trusts, Prichard v. Coulson* (1907), 97 L.T. 754. Considered: *Re Cleadon Trust, Ltd.*, [1938] 4 All E.R. 518. Referred to: *Re Cook's Mortgage, Lawledge v. Tyndall* (1896), 65 L.J.Ch. 654; *Hill v. Hickin*, [1897] 2 Ch. 579; *Atk. Dampskibsskibsselskab v. Pearson* (1927), 137 L.T. 533; *Wheeler v. Mercer*, [1955] 3 All E.R. 455.

H As to contribution between joint tenants, and partition, see 32 HALSBURY'S LAWS (3rd Edn.) 334, 344–350; and for cases see 36 DIGEST (Repl.) 404 et seq.; 38 DIGEST (Repl.) 828–829.

Case referred to:

I (1) *Bayley v. Bradley* (1848), 5 C.B. 396; 16 L.J.C.P. 206; 136 E.R. 932; 31 Digest (Repl.) 305, 4433.

Also referred to in argument:

M'Mahon v. Burchell (1846), 2 Ph. 127; 5 Hare, 322; 1 Coop. temp. Cott. 457; 8 L.T.O.S. 289; 41 E.R. 889; 30 Digest (Repl.) 361, 12.

Henderson v. Eason (1851), 17 Q.B.D. 701; 21 L.J.Q.B. 82; 18 L.T.O.S. 143; 16 Jur. 518; 117 E.R. 1451, Ex. Ch.; 38 Digest (Repl.) 828, 405.

Pascoe v. Swan (1859), 27 Beav. 508; 29 L.J.Ch. 159; 1 L.T. 17; 5 Jur.N.S. 1235; 8 W.R. 180; 54 E.R. 201; 28 Digest (Repl.) 537, 509.

Teasdale v. Sanderson (1864), 33 Beav. 534; 55 E.R. 476; 38 Digest (Repl.) 829, A 408.

Agar v. Fairfax, 2 White & Tudor L.C. 419.

Swan v. Swan (1820), 8 Price, 516; 146 E.R. 1281; 32 Digest (Repl.) 302, 446.

Appeal by the defendant, Dickeson, from a decision of POLLOCK, B., reported 12 Q.B.D. 194, holding that the plaintiff was entitled to recover £24 9s. 6d. for the defendant's use and occupation of premises in Market Lane, Dover, and dismissing a counterclaim by the defendant for contribution towards the cost of repairs carried out to those premises by him. B

The defendant had become tenant to the plaintiff under a lease of an undivided three-fourths of certain premises to which the plaintiff was entitled as tenant in common with another. During the lease the defendant purchased the interest of the plaintiff's co-tenant in common. On the expiration of the lease the defendant continued in occupation of the above three-fourths as tenant on sufferance to the plaintiff. The plaintiff brought an action to recover from the defendant rent for the use and occupation of the above three-fourths since the expiration of the lease. The defendant counterclaimed that he had expended money on the repairs of the house, and claimed from the plaintiff, by way of counterclaim, contribution in respect of the moneys so expended, in the proportion of three-fourths to one-fourth. The action was tried before POLLOCK, B., who gave judgment for the plaintiff, both upon the claim and the counterclaim. The defendant appealed. C D

Finlay, Q.C., and *C. A. Russell* for the defendant.

E. Pollock for the plaintiff.

Cur. adv. vult. E

Nov. 22, 1884. **SIR BALIOL BRETT, M.R.**—In this case the plaintiff and the defendant are tenants in common of property, in this instance the property is a house. The defendant has done repairs to the house which we may take to be reasonable repairs, and necessary for the proper maintenance of the property. For those repairs he has paid, or at all events has become liable to pay, and in an action brought by his co-tenant against him for rent, he counterclaims to recover from her her share of the money thus expended on repairs. Dealing only with the counterclaim, this, then, is one of those cases where one person having expended money, if not exactly on behalf of another, yet to another's advantage, sues to recover that money or part of it back. The question, therefore, is whether the circumstances of this case bring it within any of those legal principles which entitle persons who have expended money to another's advantage to recover it again. It is not pretended in this case that there ever was any express request by the plaintiff that the defendant should do these repairs. F G

What then are the conditions which entitle a person who has expended money to another's advantage to recover it again? If the plaintiff in the action has done so at the express request of the defendant, then, of course, the matter is open to no doubt. If the plaintiff in the action has made himself liable as the agent of the defendant, then the matter is equally clear. The law has gone further than this, and even although there be no request by the defendant in fact to expend money, yet if there be a request by him that the plaintiff shall do something which at law imposes a liability to pay money, then the law implies a promise on the part of the defendant to repay it. Recently the law has gone even further than this, and it has been decided that if the defendant requests the plaintiff, not to pay money on his behalf, but to do something which will place him in such a position that if he does not pay money harm will come to him in his social position, although there be no legal liability upon him to pay, then if he does pay money under these circumstances the law will imply a promise on the part of the defendant to repay it. On the other hand, it is perfectly clear that the law is, and always has been, that if the plaintiff in the action has expended money in a merely voluntary payment, he cannot make the defendant repay it even H I

A by alleging and proving that it was done for his benefit. If, however, the defendant is at full liberty, either to accept or reject the benefit of the money so expended by the plaintiff, and he elects to accept it, then he adopts and ratifies the acts of the plaintiff and becomes liable. But if the defendant is of necessity obliged to accept it, and has no choice in the matter, then the plaintiff must suffer for his own generosity.

B Now comes the question under which of these heads the present case is brought? Here is a house in which the plaintiff and the defendant have separate and independent interests, though their interests are in one sense combined. Upon that house the defendant expends money in repairs without any authority to do so on the part of the plaintiff; he was not the agent of the plaintiff for this purpose; he and the plaintiff are not partners; there is nothing in the relations C to repay money expended by the other. What then is this payment so made by the defendant? It is a mere voluntary payment, and although it is made partly for his advantage, and partly for the advantage of his co-tenant, yet it is an advantage which his co-tenant cannot possibly reject, but must of necessity accept. The case, therefore, seems to me to come within the last head to which I have D referred, and the defendant must suffer for his generosity, for he cannot recover in this form of action as for money paid, nor, indeed, in any form of action at common law.

Is there, then, no remedy for such a state of circumstances as this? There is a remedy in chancery. If co-owners disagree and apply in their differences to a court of equity, then the court of equity divorces them in a suit for partition, and E in this suit, having all the parties before it, the court of equity does, what it always does under such circumstances, that which it conceives to be justice between them, and in that suit, any such expenditure as this on the part of one co-tenant, is taken into the account and shared proportionately between them. An old common law writ (*de reparatione facienda*: FITZHERBERT'S *NATURA BREVIVM*, 9th Edn., pp. 127, 162) was cited in support of the proposition that there was a F remedy at law. That writ was apparently mandatory in its nature, but I do not think that I need say anything further about it than that it seems to me wholly and entirely obsolete, and for a very good reason, namely, that it would be utterly unworkable. There is, then, no remedy at law, and the only remedy is in Chancery, and there only in a suit for partition. The strongest evidence of this is, that, though we have had the able assistance of counsel in this case, and G although my learned brothers and I have examined the authorities on this point; nobody can find any case where a co-owner has been made to contribute to expenses incurred by his co-owner, except in the case of a suit in equity for partition, and yet the question must have arisen in numerous ways over and over again. If any further reason were required, it is this: that if we were to give the defendant the remedy which he asks here, we should be enabling one co-owner to put his H other co-owner to expenses which the latter may choose to think unnecessary. A house in the hands of co-owners may be on the outskirts of a decaying town, the owner in possession may think well to repair it, his co-owner may differ on this point, and be willing to allow the tenement to go to ruin; the result of allowing this appeal would be that we should force the co-owner against his will to repair. Even supposing the latter to be wholly unreasonable in his refusal, still there I is no power in the law to compel him to be wise. For these reasons I am of opinion that the judgment below was right and that this appeal must be dismissed.

COTTON, L.J.—I am of the same opinion. The plaintiff and the defendant are tenants in common of a house, the plaintiff sues the defendant, who is in possession, for rent, and the defendant counterclaims in respect of money that he has expended on repairs. As to the claim for rent, I think the plaintiff is right. The defendant argued that the law did not require rent from one tenant in common in possession to his co-tenant. But here there are special circumstances. In this case there

was a lease to the defendant from his co-tenant of her share of the property, and after the expiration of that lease the defendant continued in possession, and claimed and held exclusive possession; I think the defendant was properly held liable to pay the rent. A

Then comes the question of repairs. The question is raised upon demurrer, and consequently we have not before us the exact facts of the case; but, for the purposes of this judgment, I assume that the repairs, which have been substantial repairs, have been such proper repairs as under all the circumstances are reasonable and necessary. It is plain, I think, that the defendant could not claim from his co-tenant for anything in the nature of an improvement to the property, but a more difficult question arises upon repairs pure and simple. It is no doubt true that where persons are under a common obligation to do repairs, and one of them discharges that obligation, the others are liable for their share of the expense incurred on their behalf; but tenants in common do not stand in that position to one another, even as regards repairs that are reasonable and necessary. There is no more obligation on tenants in common to repair than there is upon any sole owner; and, in the absence of any suggestion of any expressed or implied request, I can see no ground for saying that a common law action by one tenant in common would lie to recover money expended in repairs by his co-tenant, or that equity would allow any such claim. B C D

Some difficulty has been caused by the fact that a writ has been found in FITZHERBERT'S *NATURA BREVIIUM*, which, it was argued, was a common law writ of contribution between tenants in common, but when we examine that writ we find that it assumes that some obligation is imposed upon the tenants in common to do repairs, for the writ is as follows (9th Edn., p. 162): E

"The king to the sheriff, etc.: If A shall make you secure, etc., then summon, etc., B and C that they be, etc., at W, etc., to show wherefore whereas they, the said A B and C jointly, hold a certain mill undivided in N, and the issues thence coming by equal portions partake, and are bound to the reparation and support of the same mill, and the said B and C (although they receive the proportion of those issues happening to them) refuse to contribute to the reparation and support of the said mill, to the great damage of the said A as he saith." F

Such a writ as that might apply to a case where there is some obligation, by reason of tenure or otherwise, upon the tenants to repair, and where one of the persons under such obligation refused to fulfil it; but it has no application to such a case as the present. It is curious that in COKE UPON LITTLETON, 200 b., a reference to this writ is to be found as follows: G

"(f) If two tenants in common, or joint tenants, be of an house or mill, and it fall in decay, and the one is willing to repair the same, and the other will not, he that is willing shall have a writ de reparatione facienda; and the writ saith, ad reparationem et sustentationem ejusdem domus teneantur; whereby it appeareth that owners are in that case bound pro bono publico to maintain house and mills which are for the habitation and use of men." H

I cannot but think that he has mistaken the writ mentioned by FITZHERBERT, for this suggests an obligation to repair upon all owners, but if sole owners are under no such obligation, I cannot see how joint owners can be. I

Is there then no remedy in such a case as the present? I think there is none as long as the co-tenants are willing to enjoy the property together, for so long as they do so, one of them cannot, in the absence of any express or implied request, do repairs so as to charge the other; but there is a remedy in a suit for partition. In partition suits it is quite common to have an inquiry whether either of the co-tenants has expended money in repairs or in improvements of the property, and although, as long as the parties enjoy together, there can be no common law or equity action of contribution, yet, when they are desirous of severing their tenancy,

A it is possible and usual to take an account of all the dealings of the parties with the property, and of any increased value of the property occasioned by money expended upon it by either of the tenants. Then the one who has not contributed to this increased value cannot take the benefit of it when the time for partition comes without making due allowance to his co-tenant. But I think this cannot be done in any other way or at any other time than when the whole matter is before the court in a partition action. There is, therefore, a remedy available, if the parties will accept it, and it is a sufficient and the only remedy.

C **LINDLEY, L.J.**—Two questions arise in this case. The first is as to the right of the plaintiff to recover rent from the defendant in respect of her portion of a property which was held by the plaintiff and defendant in common, and which was exclusively occupied by the defendant. The second question is as to the right of the defendant to call upon the plaintiff to contribute towards the expense of repairs which he has done upon the property.

D As to the rent, the defendant held under a lease from the plaintiff, and continued in possession after the expiration of that lease; and I think he cannot truly say that the relation of landlord and tenant was ever determined. He never gave up possession; he never made it clear that he was doing anything more than any person does who holds over after the expiration of a lease. It seems to me that this is another instance in which the inference, which the Court of Common Pleas drew in *Bayley v. Bradley* (1), should be drawn, namely, that he is liable to pay rent at the old rate. This is what **POLLOCK, B.**, held, and I quite agree with him.

E Then comes the question whether the defendant's co-tenant is liable to contribute towards the sum expended by the defendant upon repairs to the property, assuming those repairs necessary, and to have been reasonably executed at no extravagant outlay. I have looked everywhere for information for the purpose of discovering whether there is any trace of an obligation upon one co-tenant in common to contribute to the cost of repairs of the common property. I can find none, and I think no action for contribution lies in the absence of any express or implied request, or in the absence of some duty on the part of one tenant towards the other to do repairs or to contribute towards the expenses of repairs. The passages in **COKE** and **FITZHERBERT**, which were referred to in argument, do not seem to go the length contended for. The language of **FITZHERBERT** most in favour of the defendant is to be found at p. 162. He says:

G "The writ of contribution lieth where there are tenants in common, or who jointly hold a mill pro indiviso, and take the profits equally, and the mill falleth into decay, and one of them will not repair the mill; now the other shall have a writ to compel him to be contributory to the reparations."

H Two things strike me upon this, first, a case is contemplated in which all the tenants in common are, so to say, partners, and have a share in the profits of the mill; secondly, the writ says that all the tenants are bound. What is that obligation? Why should we assume that it is an obligation as between the co-tenants themselves, and that they are bound one to the other? It seems to me that a case is contemplated in which there is some obligation upon all the co-tenants to do repairs, either by reason of tenure, or because the state of the mill is a public nuisance. But in this case now before us it cannot be gathered from the pleadings, nor is there any suggestion that there is any common obligation to do any repairs. Then this difficulty arises: suppose a difference of opinion arises between two tenants in common of a property whether it is proper to expend money on the property in repairs or not; can one do so and make the other pay his share? I can find no trace of any such action at law or in equity, and that is, I think, a significant fact when one considers that such disputes must be of almost daily occurrence. The only remedy is that which is, in truth, the only workable remedy, a partition suit. Tenancy in common is a tenure which is

useful when the tenants are all of one mind, but it is utterly unfit for people who cannot agree. All questions between them can be considered and set right in a suit for partition, in which suit every tenant gets his share, all inequalities of expenditure upon the property being taken into consideration. This appeal must, therefore, be dismissed.

Appeal dismissed.

Solicitors: *Palmer & Bull*, for *Lamb & Evett*, Brighton; *Bower, Cotton & Bower*, for *J. Stillwell*, Dover.

[Reported by A. A. HOPKINS, ESQ., Barrister-at-Law.]

READ v. ANDERSON

[COURT OF APPEAL (Sir Baliol Brett, M.R., Bowen and Fry, L.JJ.), May 8, 30, 1884]

[Reported 13 Q.B.D. 779; 53 L.J.Q.B. 532; 51 L.T. 55;
49 J.P. 4; 32 W.R. 950]

Agent—Authority—Termination of authority—Right of principal to determine authority—Agent having incurred personal liability not amounting to a legal obligation.

A commission agent was employed by the defendant to place bets in his (the agent's) name, and the agent had authority to pay the amount of any bets lost. In accordance with his instructions, the agent placed bets which were lost, and before he had paid the amounts involved the defendant purported to revoke his authority. If the agent did not pay such bets, he would be excluded from the betting-ring and to avoid that result he paid the bets. In an action by the agent to recover from the defendant the amounts he had paid,

Held (per BOWEN and FRY, L.JJ., SIR BALIOL BRETT, M.R., dissenting): a principal could not revoke an agent's authority once the agent, in carrying out the agency, had placed himself in a position of difficulty, even though he might not have incurred any legal obligation; and, accordingly, the agent was entitled to succeed.

Notes. By the Gaming Act, 1892, s. 1: "Any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by the Gaming Act, 1845, or to pay any sum of money by way of commission, fee, reward or otherwise in respect of any such contract, or of any services in relation thereto or in connection therewith, is null and void, and no action shall be brought to recover any such sum of money."

This section renders obsolete the decision in this case in so far as it relates to the recovery of payments by the agent for bets irrecoverable from the principal; however, the principle established by this case—that a principal cannot revoke an agent's authority once the agent has placed himself in a position of difficulty, even though the agent may have incurred no legal liability—remains good law outside the field of gaming or wagering.

Distinguished: *Perry v. Barnett* (1885), 14 Q.B.D. 467. Explained and Followed: *Seymour v. Bridge* (1885), 14 Q.B.D. 460. Explained: *Bridger v. Savage*, ante, p. 1065; *Thomas v. Hawkins* (1889), 5 T.L.R. 551; *The Vindobala* (1889), 37 W.R. 409. Considered and Doubted: *Cohen v. Kittell* (1889), 22 Q.B.D. 680. Distinguished: *Coates, Son & Co. v. Pacey* (1892), 8 T.L.R. 474. Explained: *Knight v. Lee* (1892), 5 R. 54. Considered and Doubted: *Tatem v. Reeve*,

- A [1891-4] All E.R.Rep. 391. Considered and Explained: *Harvey v. Hart* (1894), 38 Sol. Jo. 418; *Burge v. Ashley and Smith*, [1900] 1 Q.B. 744. Explained: *Davies v. Stoddart* (1902), 18 T.L.R. 260. Considered and Explained: *Lennox v. Stoddart*, *Davis v. Stoddart*, [1902] 2 K.B. 21. Distinguished: *Frith v. Frith*, [1906] A.C. 254. Considered: *Cheshire v. Vaughan*, [1920] 3 K.B. 240; *Maskell v. Hill*, [1921] 3 K.B. 157. Referred to: *Leigh v. Dickeson* (1884), 15 Q.B.D. 60;
- B *Lilley v. Rankin* (1886), 2 T.L.R. 785; *Moore v. Peachey* (1891), 7 T.L.R. 748; *North v. Walthamstow U.D.C.* (1898), 62 J.P. 886; *Saffery v. Mayer* (1900), 16 T.L.R. 169; *Renton v. King* (1905), 49 Sol. Jo. 552; *Jeffrey v. Bamford*, [1921] 2 K.B. 351; *Cohen v. Hall*, [1922] 2 K.B. 37.

As to termination of agency, see 1 HALSBURY'S LAWS (3rd Edn.) 238 et seq.; as to agency in connection with gaming and wagering, see 18 HALSBURY'S LAWS (3rd Edn.) 176-177; and for cases see 1 DIGEST (Repl.) 427-429, 801-802. For the Gaming Act, 1845, s. 18, see 10 HALSBURY'S STATUTES (2nd Edn.) 755; and for the Gaming Act, 1892, s. 1, see *ibid.*, 777.

Cases referred to in argument:

- Hampden v. Walsh* (1876), 1 Q.B.D. 189; 45 L.J.Q.B. 238; 33 L.T. 852; 24 W.R. 607; 25 Digest (Repl.) 427, 91.
- D *Diggle v. Higgs* (1877), 2 Ex.D. 422; 46 L.J.Q.B. 721; 37 L.T. 27; 42 J.P. 245; 25 W.R. 777, C.A.; 25 Digest (Repl.) 422, 61.
- Thacker v. Hardy* (1878), 4 Q.B.D. 685; 48 L.J.Q.B. 289; 39 L.T. 595; 43 J.P. 221; 25 W.R. 158, C.A.; 1 Digest (Repl.) 619, 2037.
- Rosewarne v. Billing* (1863), 15 C.B.N.S. 316; 3 New Rep. 207; 33 L.J.C.P. 55; 9 L.T. 441; 10 Jur.N.S. 496; 12 W.R. 104; 143 E.R. 806; 25 Digest (Repl.) 433, 153.

E **Appeal** by the defendant, Anderson, from a decision of HAWKINS, J., reported 10 Q.B.D. 100, holding that the plaintiff, a commission agent, was entitled to recover the sum of £175, the amount of three bets made by the plaintiff in his own name at the request of and for the defendant, and paid by the plaintiff to the winners.

F The plaintiff was a turf commission agent and a member of Tattersall's Subscription Room. The defendant was a licensed victualler at South Shields. According to well-established usage, known to the defendant, a turf commission agent instructed by an employer to back a horse backs it in his own name, and becomes himself alone responsible to the layer of the odds, or the person with whom the bet is made; and, on the settling day after the event, he receives or pays, as the case may be, rendering his own account to his employer, paying to or receiving from him the balance of moneys won or lost. For some time before the Ascot Meeting, 1881, the plaintiff had, according to such usage, been in the habit of backing horses for the defendant, of receiving bets won, paying bets lost, sending accounts to the defendant, and paying to or receiving from him the balances thereof.

H On Friday, June 17, 1881, the defendant telegraphed from South Shields to the plaintiff at Ascot, instructing him to make certain bets for him, including three of £100, £50, and £25 on the Wokingham Stakes. The plaintiff made these three bets as instructed, and none of the horses backed won the Wokingham Stakes. In consequence of not having received a telegram from the plaintiff with reference to these bets until after he had ascertained the result of the race from another source, the defendant, on the evening of the same day, wrote to the plaintiff repudiating the three bets, and all liability in respect of them, and two days later he again wrote enclosing a cheque for the amount of certain other bets, but refusing to pay the £175. Afterwards, on the settling day, the plaintiff paid the three bets in question to the winners of them. Had he not done so he would have been a "defaulter" within the meaning of r. 3 of Tattersall's new subscription room; and if upon complaint made to the committee of the room the committee adjudged him to be so, his membership of the room would thereupon have ceased, and he would have been thenceforward excluded from it, and by r. 50 of the Rules of

Racing made by the Jockey Club, if he had been reported by such committee as being a defaulter in bets, he would, until his default had been cleared, have been subject to certain disqualifications mentioned in r. 49 of the Rules of Racing as to entering and running horses. The consequences of becoming a defaulter would therefore have been very serious to the plaintiff. A

The case was tried before HAWKINS, J., without a jury, and was reserved for further consideration. On Nov. 16, 1882, judgment was given for the plaintiff. B
The defendant appealed.

By the Gaming Act, 1845, s. 18:

"All contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void; and no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made." C

Petheram, Q.C., and *C. M. Dale* for the defendant.

Finlay, Q.C., and *R. A. McCall* for the plaintiff.

Cur. adv. vult. D

May 30, 1884. **SIR BALIOL BRETT, M.R.**—In this case, which was tried before HAWKINS, J., without a jury, the plaintiff is a turf commission agent, and he sues the defendant to recover £175, the amount of three bets made by the plaintiff in his own name at the request of and for the defendant, and paid by the plaintiff to the winners. The learned judge has found as to certain questions of fact, and if it is alleged that we are bound by these findings, I must say that I object to being considered bound, for when an appeal is brought from the judgment of a judge who has tried a case without a jury, the Court of Appeal has a right to disagree with the findings as to matters of fact. I think, therefore, we need not act on these findings unless we agree with them. It seems to me, however, that in the present case the transaction is clear on the evidence. E

The defendant speculates on races, and he hires the plaintiff as a commission agent to bet in his (the plaintiff's) own name, and gives him authority to pay and receive the amount of bets won and lost. That is the contract; it is a contract of principal and agent, not of purchase and sale, and the relation of principal and agent is constituted by the terms on which the parties deal. Those terms are, that the agent is to make bets, and the principal is to pay him commission; that commission is paid for making, not for paying, the bets. F G

One ordinary power of a principal (unless he takes away the power from himself) is, that he can always revoke the authority he has given at any time before that authority has been fulfilled. Therefore, unless something can be shown to the contrary, there was power on the part of the defendant to revoke the authority which he had given to the plaintiff to make and pay bets. Here the defendant revoked the authority before the bets were paid, and the plaintiff sues to recover the amount of the bets which he has paid, notwithstanding such revocation. The question is whether the plaintiff could revoke this authority. There is nothing express in the contract to take away his power to do so. Then is there anything to be implied which has that effect? HAWKINS, J., found, and the evidence proves, that where an agent bets in his own name on behalf of a principal, and does not pay the bets which he loses, he is turned out of the ring, and cannot carry on his business as he has been in the habit of carrying it on before, and suffers loss and inconvenience. The question is whether in such a case the law will imply an undertaking on the part of the principal that he will not revoke the agent's authority to pay the bets. Where authority is given to an agent to do a thing in his own name on behalf of his principal, under such circumstances that if the authority were withdrawn the agent would be bound in law, there it has been held that the principal is not entitled to revoke the authority which he has given to the agent. H I

- A But in the present case, suppose the agent had declined to pay the bets which he had made and lost, the winners of those bets could not have enforced payment against him, nor could they have enforced it against the principal. If the bets had been decided the other way, the agent could not have enforced payment against the losers, nor could the principal, for the law will not assist any person to recover money won by betting.
- B If the contention on behalf of the plaintiff is well founded, the law gives him power to enforce payment, for his contention is, that he is entitled to enforce payment of the amount of these bets from the defendant—that is, to do what the law says shall not be done. That is a strong proposition. It is said on behalf of the plaintiff that otherwise he would suffer personal inconvenience and loss in business. But what is his business? It is true it is not illegal, but it is a business to which
- C the law has an objection, and the law will not allow contracts made in such a business to be enforced. It seems to me that it is a business of which the law should not take notice, and, therefore, that the law should disregard the inconvenience to which the plaintiff would be put if he did not pay and were turned out of the betting-ring. For these reasons I am strongly of opinion that the exception to the rule that the principal has the power of revocation must be confined
- D to cases where if the principal were to revoke his authority the agent would be left in such a position that the party with whom he had contracted could enforce the contract against him. I, therefore, entertain a clear opinion that the judgment appealed from is wrong.

- BOWEN, L.J.**—I am unable to agree with the judgment of the Master of the
- E Rolls. The plaintiff here is a turf commission agent, and has made certain bets on behalf of the defendant, which were lost, and the plaintiff has paid them; he now seeks to recover the amount so paid from the defendant. The bets were made, not in the name of the defendant, but, according to custom, in the plaintiff's own name. The defendant purported to revoke the plaintiff's authority to pay the bets, and denied that he was liable to repay to the plaintiff the amount which
- F the plaintiff had paid to the winners.

- The question is whether the defendant had a right, after the plaintiff had incurred liability, to retract the commission. What is the nature of the transaction? It is a contract between principal and agent, and may be looked at from two points of view: First, as to the delegation of authority, the general rule is that, unless he is precluded by his conduct or by the terms of the contract, the principal may
- G revoke the authority which he has given; secondly, what is the bargain? If by the terms of the bargain the plaintiff precludes himself, he cannot revoke the authority, but is bound to indemnify the agent. What was the contract here? That is a pure question of fact. Was it to the effect that the plaintiff was to be at liberty to bet in his own name, but that the defendant was entitled to deny him liberty to pay the bets after they had been lost; or was it that the defendant authorised the
- H plaintiff to make the bets and would indemnify him against losses incurred thereby? Which is the true view? It is an inference of fact. In general, if a principal employs an agent, and involves him in liability, the principal cannot cry off; but this case is somewhat different, for here there is no legal liability on the part of the agent, because payment of a bet cannot be enforced by law. But there was a usage, known to both parties, that a turf commission agent, instructed by an
- I employer to back a horse, backs it in his own name, and becomes himself alone responsible to the layer of the odds or the person with whom the bet is made. I agree that we could re-open the finding; but I am of opinion that the learned judge, in finding that this custom existed, has found according to the evidence.

Therefore, the matter stands thus: "The defendant in effect says to the plaintiff, "On my behalf, and on the faith of being recouped in the event of loss, assume the position of being liable to pay bets if lost, or of being turned out of the ring." What is the true inference? Did the plaintiff undertake such a liability, and was he not to be remunerated in the event of loss? Who that was not a lunatic would

enter into such an agreement? The only inference which I can draw is, that it was a well-understood part of the bargain that if the agent became involved in the difficulty which would result from his losing bets, and paid, the principal would recoup him. I feel the force of the point that the obligation on the part of the agent to pay the amount of the bet is not an obligation recognised by law. But the root of the principal's liability is not the obligation on the part of the agent, but the fact that the agent has placed himself in a difficulty. I, therefore, draw the inference that it was understood that the defendant was to indemnify the plaintiff. A B

Take the case where a merchant in this country employs an agent abroad to insure for him by foreign honour policies, which could not be sued on in our courts; could the English principal repudiate his liability on such a contract? I can hardly believe that the contract would not be that the principal should guarantee the agent against what the agent was bound to pay in honour and did pay. A difficulty is put, which is, that according to this view it would be in the power of the agent to enforce a payment as against the principal, which the other party, the winner of the bet, could not have enforced as against the agent. But suppose the agent was directed to pay, and has paid; in that case he would recover, not because payment could be compelled, but because he would have altered his condition. It seems to me that, if my view as to the inference of fact to be drawn is right, that is the same as the present case. It is true that there is a difficulty arising from the fact that the plaintiff's business is wagering, and the law does not sanction such a business. But the law does not make the business illegal; the law only says that a contract made in the course of such a business shall not be enforced. The contract in the present case is not a wager; it is not because the horses which he backed for the defendant lost that the plaintiff sues, but because he was put in the position of having to pay the bets or being liable to be turned out of the ring and to suffer loss and inconvenience. I have had some hesitation in arriving at this conclusion, because the view of the Master of the Rolls is the other way; but I feel that the judgment of HAWKINS, J., is right, and am of opinion that the plaintiff is entitled to recover, and this appeal ought to be dismissed. C D E

FRY, L.J.—Although I have felt some doubt in consequence of the opposite view taken by the Master of the Rolls, I agree with BOWEN, L.J., and he has so fully and exactly expressed my view, that I confine myself to expressing my concurrence. F

Appeal dismissed.

Solicitors: *T. R. Apps; J. & C. Scott*, for *T. T. Dale*, South Shields. G

[*Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.*]

A

CRABTREE v. ROBINSON

[QUEEN'S BENCH DIVISION (Manisty and Field, JJ.), June 22, 30, 1885]

[Reported 15 Q.B.D. 312; 54 L.J.Q.B. 544; 50 J.P. 70;
33 W.R. 936]B *Distress—For rent—Entry—Entry by window—Need for window to be partly open.*

In order to make an entry to levy distress, the latch of a door may be lifted though the door be closed, but, in the case of a window, entry can only be made if the window is to some extent open. For the purpose of entry in such a case the window may be further opened.

C **Notes.** As to entry for distress, see 12 HALSBURY'S LAWS (3rd Edn.) 129–130; as to entry under a writ of fieri facias, see 16 HALSBURY'S LAWS (3rd Edn.) 41–42; as to entry by sheriffs and bailiffs, see 34 HALSBURY'S LAWS (3rd Edn.) 685–686; and for cases see 18 DIGEST (Repl.) 323–325.

Cases referred to :

D (1) *R. v. Smith* (1827), 1 Mood.C.C. 178, C.C.R.; 15 Digest (Repl.) 1129, 11,276.
(2) *Nash v. Lucas* (1867), L.R. 2 Q.B. 590; 8 B. & S. 531; 32 J.P. 23; 18 Digest (Repl.) 324, 698.

Also referred to in argument :

Tutton v. Darke, Nixon v. Freeman (1860), 5 H. & N. 647; 29 L.J.Ex. 271; 2 L.T. 361; 6 Jur.N.S. 983; 157 E.R. 1338; 18 Digest (Repl.) 300, 462.
E *Ryan v. Shilcock* (1851), 7 Exch. 72; 21 L.J.Ex. 55; 18 L.T.O.S. 157; 16 J.P. 213; 15 Jur. 1200; 155 E.R. 861; 18 Digest (Repl.) 324, 693.
Semayne's Case (1604), 5 Co. Rep. 91a.; 77 E.R. 194; sub nom. *Seyman v. Gresham*, Cro. Eliz. 908; sub nom. *Semayne v. Gresham*, Moore, K.B. 668; Yelv. 29; 21 Digest (Repl.) 566, 614.
Gould v. Bradstock (1812), 4 Taunt. 562; 128 E.R. 450; 18 Digest (Repl.) 323, 686.
F *Sandon v. Jervis* (1859), E.B. & E. 942; 28 L.J.Ex. 156; 32 L.T.O.S. 375; 5 Jur.N.S. 860; 7 W.R. 290; 120 E.R. 760, Ex. Ch.; 43 Digest 445, 738.

Appeal by the plaintiff, a tenant, from a decision of the county court judge at Otley, dismissing his action against the defendants, the landlord and a broker employed by the landlord, for an allegedly unlawful distress.

G The plaintiff was tenant in possession of certain premises which he held of the defendant Robinson, and the latter distrained for rent. The bailiff employed to make the distress found a window partly open but not sufficiently so to admit of his thereby entering the house. By direction of the defendants the bailiff raised this window and so obtained access to the house and opened the front door. The distress was then made. The county court judge held that the entry so made was not illegal, and entered a verdict for the defendants. A rule nisi was now obtained
H to enter a verdict for the plaintiff or for a new trial.

J. Robins for the defendants.*Morton Smith* for the plaintiff.*Cur. adv. vult.*

I June 30, 1885. **MANISTY, J.**—This is an appeal from a judgment of the county court judge at Otley, for the county of Yorkshire, in an action for an illegal distress. The only question for us was whether the distress was illegal, seeing that the bailiff entered the house through the window, which was partly open, by raising it sufficiently to enable him to get in. The question is whether this is a breaking into the house which rendered the distress illegal. There is no doubt that a bailiff cannot legally enter a house by breaking into it, and it is settled law that if a window is closed and the bailiff opens it and so enters, the entry is a breaking into the house and illegal. It may seem somewhat strange that if the window is open a small

distance, perhaps two or three inches, the bailiff may raise it and get in, but on that point also, the decisions are, in my opinion, conclusive. A

The only two cases I intend to notice of the many that were cited are, first, *R. v. Smith* (1), on which the county court judge acted. I think he acted rightly on that case. There the prisoner was indicted for breaking and entering a dwelling-house, the window of which was partly open, but not sufficiently to admit a person without raising it. All the judges met to consider the case, and came to the conclusion that an entry made by raising the sash could not be held to be a breaking into the house, not being within the principle of any of the preceding cases, which the court were unwilling to extend. That was a criminal case, but the county court judge rightly argued that if that case correctly laid down the law as to entry for a criminal purpose it was impossible to contend that an entry in a similar manner for a lawful purpose constitutes an illegal entry. There are other cases to the same effect, but the only other case which I shall notice is *Nash v. Lucas* (2). B
There it was held that an entry by opening a window which was shut but not fastened was unlawful. That seems to me to be in accordance with the authorities, but the case was mainly relied on for the dictum of LUSH, J., in the course of the argument, in which he drew the distinction between entry by a closed but unfastened door and entry by a window, on the ground that the door is the usual mode of access, and that a licence from the occupier to any one to enter who has lawful business may be implied from its being unfastened, while no such licence can be implied from a window being left unfastened. This does not touch the point before us, where the window is not closed. C D

The cases seem to result in this, that to make an entry the latch of a door may be lifted though the door be closed, but that in the case of a window entry can be made only if the window is to some extent open, and that for the purpose of entry in such cases the window may be further opened. The authorities seem to me to support the judgment of the county court judge, and my brother FIELD concurs in this view. This appeal must, therefore, be dismissed with costs. E

Appeal dismissed.

Solicitors: *Le Riche & Son*, for *Robinson & Robinson*, Keighley; *Henry Ikin*, for *Child & Groom*, Otley. F

A LONDON SCOTTISH BENEFIT SOCIETY v. CHORLEY AND OTHERS

[COURT OF APPEAL (Sir Baliol Brett, M.R., Bowen and Fry, L.JJ.), May 14, 30, 1884]

[Reported 13 Q.B.D. 872; 53 L.J.Q.B. 551; 51 L.T. 100; 32 W.R. 781]

Solicitor—Costs—Solicitor appearing in person—Costs recoverable from opponent.

Where a solicitor sues or defends an action in person, and obtains judgment with costs, he is entitled to recover from his adversary the same costs as would have been allowed if he were not a party to the action, but were acting as solicitor for another person. The costs to be allowed, however, must not include any items which the union of the two characters renders impossible or unnecessary, and where any items are attributable to the fact that the solicitor is acting in the two characters, such items should be treated on taxation as attributable to his character as party to the action, and not to his character as solicitor.

Notes. Applied: *Re Donaldson* (1884), 27 Ch.D. 544; *Bidder v. Bridges*, [1887] W.N. 208. Explained: *Re Wallis, Ex parte Lickorish* (1890), 25 Q.B.D. 176. Considered: *Stone v. Lickorish*, [1891] 2 Ch. 363. Applied: *Tolputt v. Mole*, [1911] 1 K.B. 87. Considered: *Reed v. Gray*, [1952] 1 All E.R. 241. Referred to: *Carson v. Pickersgill* (1885), 54 L.J.Q.B. 484; *Tolputt v. Mole*, [1911] 1 K.B. 836.

As to a solicitor's costs when he appears in person, see 36 HALSBURY'S LAWS (3rd Edn.) 123; and for cases see 42 DIGEST 253 et seq.

Cases referred to in argument:

Jervis v. Dewes (1836), 4 Dowl. 764.

Parsloe v. Foy (1833), 2 Dowl. 181; 42 Digest 251, 282*a*.

Leaver v. Whalley (1833), 2 Dowl. 80; 42 Digest 253, 284*b*.

Sclater v. Cottam (1857), 29 L.T.O.S. 309; 3 Jur.N.S. 630; 5 W.R. 744; 35 Digest (Repl.) 770, 4473.

Price v. M'Beth (1864), 33 L.J.Ch. 460; 10 L.T. 521; 10 Jur.N.S. 579; 12 W.R. 818; 35 Digest (Repl.) 776, 4539.

Re West, Ex parte Chamberlayne (1850), 4 De G. & Sm. 17; 19 L.J.Bey. 10; 15 L.T.O.S. 165; 14 Jur. 997; 64 E.R. 715; 4 Digest (Repl.) 168, 1545.

Gugy v. Brown (1866), 4 Moore, P.C. (N.S.) 315; 36 L.J.P.C. 38; L.R. 1 P.C. 411; 15 W.R. 721.

Appeal from a decision of the Divisional Court (DENMAN, MANISTY and WATKIN WILLIAMS, JJ.), reported 12 Q.B.D. 452, on a summons to review a taxation of costs in an action for money had and received brought by the plaintiffs against the defendants, a firm of solicitors.

At the trial the dispute was referred to a barrister who decided in favour of the defendants, and directed that the plaintiffs should pay to the defendants their costs of the reference and certificate, and the plaintiffs should bear their own costs. The defendants, who had conducted their own defence, presented their bill of costs for taxation. The solicitor for the plaintiffs objected that the defendants, being solicitors, and having appeared throughout the whole of the action as defendants in person, ought not to be allowed any other costs than costs out of pocket, or such costs as they would be entitled to if they were non-professional men. The master overruled the objection and allowed costs as between party and party, with the exception of certain charges for instructions.

The plaintiffs applied by summons to review the taxation. MATHEW, J., referred the summons to the court, and the Divisional Court refused the plaintiffs' application.

Cock for the plaintiffs.

H. Tindal Atkinson for the defendants.

Cur. adv. vult.

May 30, 1884. **SIR BALIOL BRETT, M.R.**—In this case an action was brought against the defendants, who are solicitors. The result of the litigation was in the defendants' favour, and they recovered costs against the plaintiffs. The defendants claimed to have their costs taxed as if they were acting as solicitors for another person, and the question is, whether this contention can be maintained.

It is argued on the one side that, with regard to taxation of costs, there is no difference between a solicitor and any other party to an action who sues or defends in person; and, on the other side, that a solicitor who sues or defends in person and is successful is entitled to the same costs as if he were acting for a client. In my opinion, neither view is strictly accurate. I think the costs of a solicitor under such circumstances must be taxed differently from the costs of another person, but I do not agree with the suggestion that a solicitor acting on his own behalf is entitled to the same costs as if he were acting for a client.

The law is that, if a person is forced into litigation, and is successful, the person who has forced him into the litigation should indemnify him against the pecuniary loss which it has occasioned to him. A person who is not a solicitor having been successful in litigation should be indemnified against the pecuniary loss which his opponent has caused him to suffer; but the difficulty is, that one cannot say how much of the loss sustained has been caused by the successful party's own over-anxiety, and how much by the conduct of his opponent; that is the difficulty which gives rise to the difference in amount between costs taxed as between party and party and costs taxed as between solicitor and client. Where a person who is not a solicitor sues or defends in person the law does not indemnify him for his loss of time, but if a party appears by a solicitor it costs money, and what he pays is to be paid back to him. When a party appears in person his own time and trouble is not a pecuniary loss of which the law will take cognisance, and, therefore, he can only recover his costs out of pocket. Whatever he pays out of pocket is a pecuniary loss, for which he is to be indemnified, but his own trouble and annoyance is not such a loss. A solicitor is entitled to employ another solicitor to act for him, and if he does so he has to pay, and is entitled to recover the costs which he incurs. If the solicitor acts on his own behalf, and has to do for himself what otherwise would be done for him by another solicitor, that is not loss of time but of money. To say that he must employ another solicitor in order to be entitled to recover these costs amounts to mere circuitry. Therefore, when a solicitor sues or defends in person, the items which he is entitled to charge against his opponent are substantially the same as his out-of-pocket costs where he employs another solicitor.

This being so, it is true to say that the costs of a solicitor acting on his own behalf are to be taxed differently from the costs of any other litigant; he cannot charge for instructing himself, because in fact he has not done so. In the same way, to speak of a consultation with himself would be nonsense, and he cannot attend upon himself. This seems to me to be the rule, that where a solicitor sues or defends in person, and recovers judgment for costs, he is entitled to the same costs as if he were not a party to the litigation, but were acting on behalf of a client, subject to this, that his costs are not to include items which the union of the two characters in the same individual renders impossible, such as instructions to, consultations with, and attendances on a solicitor, who in such a case is the party himself; and where any items are attributable to the fact of his acting in both characters, such items should be treated as attributable to his character as

A party, and not to his character as solicitor. As far as I can see, no rule to the contrary has ever been laid down. Then is there an inveterate practice the other way? Even if there were, that would not be conclusive, for the practice of the masters cannot make the law; but it has been ascertained that the practice is not uniform, and in some cases a rule similar to that which I have stated has been adopted. Therefore, there is no authority against that rule, and it appears to me to be sensible.

In the report of the case in the LAW REPORTS in the court below the headnote goes a step further than the judgment. It is this:

"Where an action is brought against a solicitor who defends it in person and obtains judgment, he is entitled upon taxation to the same costs as if he had employed a solicitor, except in respect of items which the fact of his acting directly renders unnecessary."

This is nearly the same as what I have already stated.

I think, therefore, that the judgment in the court below is substantially right, and that the statement in the headnote to the report is even more right; but the taxation in the present case is not accurate, and, therefore, the bill of costs must go back to the master in order that he may ascertain whether any items have been allowed which ought not to have been allowed according to the rule which I have stated. What the effect of this may be we cannot now tell, and, therefore, we will consider the question as to the costs of this appeal when we know the result. For the present the question of costs will be reserved.

BOWEN, L.J.—I am of the same opinion both as to the decision and as to the reasons for it.

The great principle is, that the courts are open to everybody for the purpose of asserting civil rights; and if a person is injured by the assertion of a wrongful claim, the protection afforded to him is that which is the creation of statute, that costs are awarded to the successful party. This protection was first introduced by the Statute of Gloucester (6 Edw. 1, c. 1), and the view has always been that a person who has wrongly been put to expense should be indemnified. The following passage from 2 COKE'S INSTITUTES, 288, in my opinion, gives the key to the true view as to costs:

"Here is expresse mention made but of the costs of his writ; but it extendeth to all the legall cost of the suit, but not to the costs and expences of his travell and losse of time, and, therefore, costages commeth of the verb constare, and that againe of the verb constare, for these costages must constare to the court to be legall costs and expences."

What does COKE mean by this passage? He means that the party is only to be allowed legal costs, and such as are the exact and natural result of his having been forced into litigation. Professional skill and labour are recognised by law as the result of litigation; but private expenditure of time and labour is not what the law can measure, nor is it dependent on litigation. Private expenditure of time and labour is outside the litigation; but professional skill and labour are not less the results of litigation because they are used by the litigant himself. I can see no rule which makes it right to allow costs if the work is done through another solicitor, but not to allow costs for the same work if it is done for the litigant by his own clerks.

I agree with the Master of the Rolls that this is not a question of solicitors' privilege. The practice has not been altogether uniform, and the Chancery and common law practice have differed somewhat. We find the rule thus stated by LUSH, L.J. (2 LUSH'S PRACTICE (3rd Edn.) 896), who was a very great authority on all matters of practice:

"A party not an attorney, suing or defending in person, is entitled to no more than his expenses out of pocket or at most to a reasonable allowance beyond for his loss of time, but an attorney regularly qualified is allowed to make the

same charges for business done when he sues or defends in person as when he acts as attorney for another." A

I think that what is meant by this passage is in substance the same as the view expressed by the Master of the Rolls, with which I concur.

FRY, L.J.—I am of the same opinion. In no sense is this a question of the privilege of solicitors. The conclusion at which we arrive will prove beneficial to the non-professional public, for, if the rule were otherwise, a solicitor engaged in litigation would always employ another solicitor, and in that case the opposing party if he were unsuccessful would have to pay full costs. B

Appeal dismissed.

Solicitors: *Harries, Wilkinson & Raikes; Defendants in person.* C

[Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.]

JACKSON v. SMITH. Ex Parte DIGBY

[CHANCERY DIVISION (Kay, J.), June 21, July 10, 1884]

[Reported 53 L.J.Ch. 972; 51 L.T. 72]

Solicitor—Charging order—Change of solicitor—Solicitor previously acting for partner during dissolution proceedings—Right to charging order upon fund in court as against partners and creditors.

In an action brought by one partner against his co-partner for the dissolution of the partnership, judgment for dissolution was given and accounts taken and vouched, but before the certificate was ready one of the partners changed the solicitors who had been acting for him up to that time. The solicitors who had first acted applied under s. 28 of the Solicitors Act, 1860 [now s. 72 of the Solicitors Act, 1957], for an order that their costs might be charged upon a fund in court to the credit of the action and certain other funds forming part of the partnership estate. The creditors of the partnership appeared to oppose the application. F

Held: as the creditors were present in court an order could be made charging the applicants' costs, charges, and expenses properly incurred upon the whole fund as against the creditors as well as against both of the partners. G

Emden v. Carte (1) (1881), 19 Ch.D. 311, applied.

Notes. Section 28 of the Solicitors Act, 1860, has been repealed. The power of the court to make a charging order in favour of a solicitor is now contained in s. 72 of the Solicitors Act, 1957. H

Considered: *Ridd v. Thorne*, [1902] 2 Ch. 344; *Wimbourne v. Fine*, [1952] 2 All E.R. 681. Referred to: *Newport v. Pougher*, [1937] Ch. 214.

As to statutory charging orders in favour of solicitors, see 36 HALSBURY'S LAWS (3rd Edn.) 184 et seq.; and for cases see 42 DIGEST 290 et seq. For the Solicitors Act, 1957, s. 72, see 37 HALSBURY'S STATUTES (2nd Edn.) 1116. I

Cases referred to:

- (1) *Emden v. Carte* (1881), 19 Ch.D. 311; 51 L.J.Ch. 371; 45 L.T. 328; 30 W.R. 17, C.A.; 42 Digest 297, 3315.
- (2) *Greer v. Young* (1883), ante, p. 513; 24 Ch.D. 545; 52 L.J.Ch. 915; 49 L.T. 224; 31 W.R. 930, C.A.; 42 Digest 291, 3267.
- (3) *Hamer v. Giles, Giles v. Hamer* (1879), 11 Ch.D. 942; 48 L.J.Ch. 508; 41 L.T. 270; 27 W.R. 834.

- A (4) *Bailey v. Birchall, Barnes v. Ratcliffe, Bailey v. Ratcliffe* (1865), 2 Hem. & M. 371; 5 New Rep. 237; 11 Jur.N.S. 57; 71 E.R. 507; 42 Digest 292, 3268.
- (5) *Bulley v. Bulley* (1878), 8 Ch.D. 479; 47 L.J.Ch. 841; 38 L.T. 401; 26 W.R. 638, C.A.; 42 Digest 292, 3271.

Also referred to in argument:

- B *Charlton v. Charlton* (1882), 31 W.R. 237; 42 Digest 213, 2384.
- Re Green, Green v. Green* (1884), 26 Ch.D. 16; 54 L.J.Ch. 54; 50 L.T. 513; 32 W.R. 373, C.A.; 42 Digest 299, 3325.

Adjourned Summons issued by the applicants, Digby & Digby, solicitors, asking for a declaration that they were entitled to a charge upon the sum of £479 13s. 11d., money deposited in court to the credit of an action for the dissolution of a partnership between Jackson and Smith; and upon the sum of £208 0s. 10d. or other the balance in the hands of the late receiver in the partnership action, being on account of the debts and effects recovered or preserved in the action; for the taxed costs of the applicants in reference to the action as the solicitors of the plaintiff, including the costs of this application, and that the amount of such costs, when taxed as between solicitor and client, might be raised and paid to the applicants out of the aforesaid sums.

On April 1, 1882, judgment was pronounced dissolving the partnership, and it was ordered that the partnership property should be sold with the approbation of the judge, and the purchase money paid into court, and, in the meantime, a receiver was appointed to get in the outstanding debts and effects of the partnership.

In December, 1882, up to which time the business had been carried on as directed by the court, and had realised a profit, the business premises, goodwill, and stock-in-trade were put up for sale by auction, and the stock-in-trade sold for £479 13s. 11d., which was paid into court. The receiver got in large sums of money belonging to the partnership, and paid many debts owing by it. It was alleged that there was still a balance due from that receiver. In July, 1883, Messrs. Digby and Digby applied to the court on behalf of the plaintiff for the removal of the receiver first appointed, and for the appointment of another. An order to that effect was made. In April, 1884, the plaintiff ceased to employ Messrs. Digby and Digby as his solicitors in this action. The accounts of the plaintiff and defendant had been taken into chambers, and vouched, and the certificate was nearly ready, but the action had not been heard on further consideration. There were debts owing to the partnership creditors, to a considerable amount, still remaining unpaid.

By the Solicitors Act, 1860, s. 28:

"In every case in which an attorney or solicitor shall be employed to prosecute or defend any suit, matter, or proceeding in any court of justice, it shall be lawful for the court or judge before whom any such suit, matter, or proceeding has been heard, or shall be depending, to declare such attorney or solicitor entitled to a charge upon the property recovered or preserved, and upon such declaration being made such attorney or solicitor shall have a charge upon and against and a right to payment out of the property, of whatsoever nature, tenure, or kind the same may be, which shall have been recovered or preserved through the instrumentality of any such attorney or solicitor, for the taxed costs, charges, and expenses of or in reference to such suit, matter, or proceeding; and it shall be lawful for such court or judge to make such order or orders for taxation of and for raising and payment of such costs, charges, and expenses out of the said property as to such court or judge shall appear just and proper."

Church for the solicitors.

Chadwyck Healey for the plaintiff.

J. Gatey for the defendant.

Graham Hastings, Q.C., and *Chadwyck Healey* for the creditors.

KAY, J.—This application raises a question of some difficulty, but, as there have been several decisions upon s. 28 of the Solicitors Act, 1860, I will not reserve my judgment. A

The application is made under these circumstances. The action was brought for the dissolution of the partnership between the plaintiff and defendant. Judgment for dissolution has been given, and accounts directed to be taken. That has been done, and the accounts vouched, and the certificate is nearly ready. In the meantime the plaintiff has changed his solicitors, and the solicitors who acted for him at first now come and ask that their costs may be charged, under s. 28 of the Solicitors Act, 1860, upon a fund now in court to the credit of the action, and certain other sums, which have been recovered by a receiver appointed at the instance of the plaintiff while they were his solicitors. This receiver realised certain assets of the partnership, and paid the proceeds into court, and there are still, it seems, certain further sums in his hands, or the hands of his successor, forming part of the partnership estate. These are the funds upon which it is sought to obtain a charge. B

It is admitted that it would be proper to make the charge, not only against the plaintiff's interest in the fund, but also against that of the defendant, as was done in *Greer v. Young* (2), where it was held that the charge was in the nature of a charge for salvage moneys, and that a solicitor was entitled to it as against all the parties to the action. But the question is whether the charge can be made as against the creditors in a partnership action. It is said that, according to the usual form of order, the costs in a partnership action are directed to be paid only out of the assets remaining after the creditors' debts have been paid: *Hamer v. Giles* (3). But it is clear that the creditors have no lien on the assets, they are not parties to the action, though the assets are administered to them by the court; but the judgment in a partnership action is not a judgment for payment to the creditors of the debts due to them, as the judgment in an action for the administration of a man's estate is, in the case of his creditors, so that these creditors cannot say that any lien of theirs is being interfered with. C D E

However, if the creditors were not before the court no order prejudicial to their interests could be made, and if they were not here before me now I should have made an order such as was made in *Hamer v. Giles* (3). But they are here, being represented by counsel, so that I have before me all the parties interested in the fund. Who the creditors are has been practically ascertained in chambers, so that I can now deal with the fund in court in the presence of all parties. F

Then it is said that I cannot make a charge taking priority to the creditor's claims. Why not? It has been decided that a solicitor by whose exertions a fund has been preserved, has a right to a charge on the fund to the extent, not only of his clients' interest therein, but also of all parties, provided that he has no right to any charge against persons in their absence. As was said by *COTTON, L.J.*, in *Greer v. Young* (2) (24 Ch.D. at p. 555): G

"First, it was said that there was no power to charge any property except the property of the person who had employed the solicitor. But that is contrary to the words of the section, which does not say 'upon the property of the person who employed him,' but 'upon the property recovered or preserved.' Undoubtedly, the quantum of the interest of the person who employed the solicitor is an important element of consideration. It is, generally speaking, the interest of the plaintiff, or of the defendant, which is recovered in the action, and to determine whether a fund has been recovered in the action, it is material to consider what is the interest of the plaintiff or defendant. But to say that the court has only power to charge the interest of the plaintiff or the defendant would be to repeal the Act." H I

Looking at the reason of the thing it is plain that that was the intention of the Act. The ground of the charge, as was said in *Greer v. Young* (2), is the recovery of the property, and it is in the nature of a salvage charge. So that the solicitors

A might say, "But for our exertions the property might never have been realised at all, so that it is right that our charge should attach, not only against the parties, but against you creditors also, who, without us, might have got nothing." To this the creditors object that they did not employ the solicitors, and the charge ought not to affect them. But it was decided, not only in *Greer v. Young* (2), but long before by LORD HATHERLEY in *Bailey v. Birchall* (4) and again by the Court of Appeal in *Bulley v. Bulley* (5), that such an answer would be insufficient. How then can these creditors get over this? If there is good ground for making the charge against persons who do not employ the solicitor so long as they take a benefit from the result of the action, why should not the order be made against these creditors now before me? Assuming these funds to have been "recovered or preserved" by the solicitors, the creditors have derived as much benefit from it as the parties, so that, on the ground of its being a salvage charge, the charge would equally attach against them.

Though perhaps I could not have made the order against the creditors in their absence, yet, as they are here I can, and I accordingly make an order charging these costs upon the whole fund, and as against the creditors as well as the plaintiff and defendant, but such costs must be those mentioned in *Emden v. Carte* (1), viz., the costs, charges, and expenses properly incurred, and I leave it to the taxing master to say what comes within that. I will not by this order direct them to be raised now, as before that is done the court must be satisfied that the client cannot pay them, as the Act was not intended to enable a person to avoid paying his solicitor, but to give the solicitor a means of getting a charge upon the fund as a collateral security in case his client cannot pay, so as to prevent him from losing his costs altogether. I, therefore, give liberty to apply as to raising the costs, and, if the application comes before me, I shall take care that the case is a proper one for ordering that to be done before I accede to it. That involves many considerations, and, among others, whether or not the client is able to pay.

Solicitors: *Digby & Digby*; *A. Tabor*; *J. E. & H. Scott*, for *S. S. Smith*, Fenny Stratford; *H. J. Haynes*.

[Reported by A. J. HALL, Esq., Barrister-at-Law.]

PONSONBY *v.* PONSONBY

[COURT OF APPEAL (Baggallay, Cotton and Lindley, L.J.J.), May 30, 1884]

[Reported 9 P.D. 122; 53 L.J.P. 112; 51 L.T. 174; 32 W.R. 746]

Variation of Settlement—Power of court—Power to deal with capital of fund as well as income—Matrimonial Causes Act, 1859 (22 & 23 Vict., c. 61), s. 5.

On an application made under s. 5 of the Matrimonial Causes Act, 1859 [now s. 25 of Matrimonial Causes Act, 1950], the court has power to deal with the capital of a settlement as well as the income.

A wife who had obtained a decree absolute of divorce from her husband applied to the court for the variation of certain settlements under s. 5 of the Matrimonial Causes Act, 1859. There were no children of the marriage, but the judge in the exercise of his discretion under the section refused to give her any part of the capital of the fund which had been settled by the husband and allocated her only a portion of the income therefrom.

Held: although the court had jurisdiction to deal with the capital it would not in this case be in the interest of the wife to give her any part of it; and so far as the amount of income allocated to her was concerned the Court of Appeal would not interfere with the discretion exercised by the judge.

Notes. Section 5 of the Matrimonial Causes Act, 1859, has been replaced by s. 25 of the Matrimonial Causes Act, 1950.

Considered: *Meredyth v. Meredyth*, [1895] P. 92; *Dormer (otherwise Ward) v. Ward*, [1900-3] All E.R.Rep. 363. Applied: *Lorriman v. Lorriman and Clair*, [1908] P. 282. Referred to: *Tallack v. Tallack and Broekema*, [1927] All E.R. Rep. 676.

As to variation of settlements in general, see 12 HALSBURY'S LAWS (3rd Edn.) 451 et seq.; and for cases see 27 DIGEST (Repl.) 641 et seq. For the Matrimonial Causes Act, 1950, s. 25, see 29 HALSBURY'S STATUTES (2nd Edn.) 412.

Case referred to in argument:

Wigney v. Wigney (1882), 7 P.D. 177; 51 L.J.P. 60; 46 L.T. 441; 30 W.R. 722, C.A.; 27 Digest (Repl.), 653, 6150.

Appeal from an order of BUTT, J., reported 9 P.D. 58, on a motion by a former wife to vary certain marriage settlements.

The former wife, the petitioner in a divorce suit, obtained a decree absolute of divorce from her husband, the respondent, on the grounds of his adultery and cruelty on May 22, 1883. There were no children of the marriage. On Mar. 18, 1884, the present motion was made and the registrar made a report by which it appeared that by a post-nuptial settlement, dated Oct. 8, 1873, the respondent assigned all his real and personal estate (with certain trifling exceptions) to trustees to raise £2,000 for the benefit of himself for life, with remainder to the petitioner for life, with an ultimate remainder to himself absolutely on failure of issue. He also covenanted to pay the said sum of £2,000 and to effect a policy of insurance upon his own life for £1,000. The policy was never effected, and the only funds that had come to the hands of the trustees was a sum of £300 and accumulations amounting to £24 17s. 4d. It appeared that on the death of the respondent's father he would be entitled to a sum of £1,700 which would be available for making up the £2,000. The respondent was also entitled to a life interest in £2,500, which was not included in the settlement, but he had charged this so that he only derived an income of £20 from it. He had no other means of support as he had been dismissed from the navy. The petitioner had no means, and was entirely dependent upon her friends and relatives for support.

BUTT, J., ordered that the petitioner should receive the income of the trust fund so long as the fund did not exceed £1,000 and that the respondent should retain the income of the rest of the fund.

A By s. 5 of the Matrimonial Causes Act, 1859 :

“The court after a decree of nullity of marriage or dissolution of marriage may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage or of their respective parents as to the court shall seem fit.”

B *Searle* for the petitioner.

Middleton for the respondent.

C **BAGGALLAY, L.J.**—I am of opinion that, beyond a doubt, we have jurisdiction to deal with the capital as well as the income. But we must have regard to the interest of the lady, and we do not think it would be for her interest to give her any portion of the capital.

D The next question is as to the amount of income to be given her. I do not say what I might have thought right to do if the case had been before me in the first instance. But the judge in the court below has exercised the discretion conferred on him by the Act, and he thought it reasonable to give the petitioner the income of £1,000 only of the fund. If the fund had been originally the wife's property it might have been different, but, in the circumstances of this case, I am not disposed to interfere with the exercise of the judge's discretion. The appeal must, therefore, be dismissed.

E **COTTON, L.J.**—I am also of opinion that we have undoubted power under the Matrimonial Causes Act, 1859, s. 5, to deal with the capital of the settled fund. The word “property” extends not only to income, but to capital, and the court has jurisdiction to deal with the capital in the same way as the income, for the benefit of the husband, wife, and children, if there are any. In any case of emergency I should not hesitate to do so. But in the present case I do not think it would be for the benefit of the wife to pay her any portion of the capital.

F As regards the income, I do not think it is a case in which we ought to interfere with the discretion of the learned judge. If he had given the whole income I might not have differed from him; but, as he has given part, I see no reason for overruling his discretion.

LINDLEY, L.J.—I agree.

G *Appeal dismissed.*

Solicitors : *Prideaux & Sons; Guscotte & Co.*

[*Reported by W. C. Biss, Esq., Barrister-at-Law.*]

Re KLOEBE. KANNREUTHER v. GEISELBRECHT

[CHANCERY DIVISION (Pearson, J.), November 26, December 8, 1884]

[Reported 28 Ch.D. 175; 54 L.J.Ch. 297; 52 L.T. 19;
33 W.R. 391; 1 T.L.R. 139]

Intestacy—Administration—Application of assets—English and foreign creditors—Priority.

The *lex fori rei sitæ* governs the collection and administration of the personal assets of a deceased person. By the law of England all creditors are entitled to be paid equally with all other creditors of the same nature and there is no law under which English creditors are to be preferred to foreigners.

The deceased at the time of his death was domiciled in Greece and was carrying on business in Greece and in London in partnership and also in London on his own account. He left in London certain assets belonging to his separate estate. A creditor of the partnership resident in England brought an administration action. Only one separate creditor, a foreigner, brought in a claim to the action, but claims of creditors of the partnership, some English and some foreign, were admitted. The English creditors claimed that the assets found in England should be applied in paying the English creditors in full in priority to the foreign creditors.

Held: the court recognised no distinction between English and foreign creditors, but, the assets being separate estate, the separate creditor must be paid in full, and the residue of the assets distributed among the joint creditors, English and foreign, *pari passu*.

Notes. Considered: *Re Lorillard, Griffiths v. Catforth*, [1922] All E.R.Rep. 500. Referred to: *Re Azoff-Don Commercial Bank*, [1954] 1 All E.R. 947.

As to actions by creditors in general, see 16 HALSBURY'S LAWS (3rd Edn.) 437; and for cases see 24 DIGEST (Repl.) 867 et seq.

Cases referred to:

- (1) *De la Vega v. Vianna* (1830), 1 B. & Ad. 284; 8 L.J.O.S.K.B. 388; 109 E.R. 792; 11 Digest (Repl.) 536, 1463.
- (2) *Cook v. Gregson* (1854), 2 Drew. 286; 2 Eq. Rep. 1132; 23 L.J.Ch. 734; 2 W.R. 401; 61 E.R. 729; sub nom. *Cooke v. Gregson, Cooke v. Kent*, 23 L.T.O.S. 86; 23 Digest (Repl.) 353; 4207.
- (3) *Eames v. Hacon* (1881), 18 Ch.D. 347; 50 L.J.Ch. 740; 45 L.T. 196; 29 W.R. 877, C.A.; 23 Digest (Repl.) 205, 2421.
- (4) *Blackwood v. R.* (1882), 8 App. Cas. 82; 52 L.J.P.C. 10; 48 L.T. 441; 31 W.R. 645, P.C.; 11 Digest (Repl.) 394, 509.
- (5) *Preston v. Melville* (1841), 8 Cl. & Fin. 1; 8 E.R. 1, L.C.; 11 Digest (Repl.) 393, 507.

Also referred to in argument:

- Wilson v. Lady Dunsany* (1854), 18 Beav. 293; 2 Eq. Rep. 706; 23 L.J.Ch. 492; 23 L.T.O.S. 73; 18 Jur. 762; 2 W.R. 288; 52 E.R. 115; 23 Digest (Repl.) 350, 4176.
- Simpson v. Fogo* (1863), 1 Hem. & M. 195; 1 New Rep. 422; 32 L.J.Ch. 249; 8 L.T. 61; 9 Jur.N.S. 403; 11 W.R. 418; 1 Mar.L.C. 312; 71 E.R. 85; 21 Digest (Repl.) 609, 989.
- Enohin v. Wylie* (1862), 10 H.L.Cas. 1; 31 L.J.Ch. 402; 6 L.T. 263; 8 Jur.N.S. 897; 10 W.R. 467; 11 E.R. 924, H.L.; 11 Digest (Repl.) 394, 508.
- Re Melbourn, Ex parte Melbourn* (1870), 6 Ch. App. 64; 40 L.J.Bcy. 25; 23 L.T. 578; 19 W.R. 83, L.J.J.; 4 Digest (Repl.) 364, 3312.
- Thurburn v. Steward* (1871), L.R. 3 P.C. 478; 7 Moo.P.C.C.N.S. 333; 40 L.J.P.C. 5; 19 W.R. 678; 17 E.R. 127, P.C.; 5 Digest (Repl.) 916, 7574.

A **Action** brought by a creditor for the administration of the estate of Charles Jules Alexander Kloebe, deceased, who died in Greece in 1882 domiciled in Greece.

The deceased was at the time of his death carrying on business at Syra, in the kingdom of Greece, and in London in partnership under the name of Kloebe & Co., and also in London on his own account. He left assets in London belonging to his separate estate, consisting of a policy of insurance on his own life, and certain marbles in the hands of a wharfinger. This administration action was brought by a creditor residing in England of the firm of Kloebe & Co. Only one separate creditor brought in a claim in the action, and she was a foreigner. Claims of creditors of the firm of Kloebe & Co., some English and some foreign, were admitted to an amount far exceeding the assets. The claims of English creditors alone were sufficient to exhaust the assets in England. It did not appear whether there were any assets elsewhere. The assets had been realised, and the proceeds paid into court. The case coming on for further consideration, the plaintiff claimed that the proceeds of the assets found in England should be applied in paying the English creditors in full in priority to the foreign creditors.

Cozens-Hardy, Q.C., and Thompson for the plaintiff.

M. Cookson, Q.C., and Emden for the defendant.

D *McSwinney* for the separate foreign creditor.

Cur. adv. vult.

Dec. 8, 1884. **PEARSON, J.**, stated the facts, and continued: It was argued before me that the creditor who has taken out administration ought to be paid in full before all the others, because they are not resident here, and the law of administration is that assets here should be applied first in payment of debts here. At the end of the argument I stated I had no doubt what my decision would be, but, in consequence of having been told that there were decisions of learned judges, to whom I am bound to pay and do pay the greatest respect, which supported that contention, I thought it better to look at those judgments to see if they really did so. I am glad to find that they do not. It appeared to me, if that contention had anything in it, it must have been the practice of the court in actions for the administration of the estates of deceased persons domiciled abroad to inquire as to the nationality of the different creditors, and I can find no case in which the court, in distributing assets, has made such an inquiry or ordered that English creditors should be paid in priority to others. There is not a fragment of authority for such a practice.

G I think Mr. WESTLAKE, in a passage cited, lays down the law correctly. In his work on PRIVATE INTERNATIONAL LAW (2nd Edn.), s. 102, he says:

H "Every administrator, principal, or ancillary, must apply the assets reduced into possession under his grant in paying all the debts of the deceased, whether contracted in the jurisdiction from which the grant issued or out of it, and whether owing to creditors domiciled or resident in that jurisdiction or out of it in that order of priority which, according to the nature of the debts or of the assets, is prescribed by the laws of the jurisdiction from which the grant issued."

I The effect is that, although it is said, and no doubt correctly said, that mobilia sequuntur personam, yet as *lex fori rei sitæ* must be observed in the collection of assets, so also it is to be observed in the administration of those assets when collected. Therefore, if a man dies domiciled in England possessing assets in France, the French assets must be collected in France, and distributed according to the law of France. If the French creditors are entitled to be paid in priority, that rule must be observed, because it is the law of France. But if it should happen that a man died domiciled in France leaving assets in England, those assets can only be collected under an English grant of administration, and, being so collected, must be distributed according to the law of England. No doubt in a case in which French assets were distributed so as to give French creditors as

such priority, then, in distributing the English assets, the court would be astute A
to equalise the payments and take care that no French creditors should come in
and receive anything till the English creditors had been paid an equal amount.
But subject to that, which is for the purpose of doing what is equal and just
to all the creditors, I know of no law under which the English creditors are to be
preferred to foreigners. On the other hand, the rule is, they are all to be treated B
equally, subject to what priorities the law may give them, from whatever part
of the world they come. In the case cited by counsel for the defendant of *De la*
Vega v. Vianna (1) LORD TENTERDEN says (1 B. & Ad. at p. 288):

"A person suing in this country must take the law as he finds it. He cannot,
by virtue of any regulation in his own country, enjoy greater advantages than
other suitors here, and he ought not therefore to be deprived of any superior C
advantage which the law of this country may confer. He is to have the same
rights which all the subjects of this kingdom are entitled to."

That has been the rule in this country, so far as I know, from the earliest times.

Three cases have been cited by counsel for the plaintiff in support of the opposite
contention. The first is *Cook v. Gregson* (2), before KINDERSLEY, V.-C. The facts
were these: A man died domiciled in Ireland, leaving property both in Ireland D
and England. The same persons proved his will in both countries. At that time
the law in Ireland gave judgment creditors priority over simple contract creditors.
Before the Irish creditors were paid, Irish assets were transmitted to this country,
and it was said that, inasmuch as the transmission had occurred, they had become
English assets, and the Irish judgment creditors must remain in the same position
as the other creditors. The Vice-Chancellor said that was not so; the Irish judg- E
ment creditors had priority in Ireland, and were entitled to be paid according
to the Irish rules of priority. That is a statement no one can dispute, nor would
the case have been cited before me but for one passage in the Vice-Chancellor's
judgment in which he says (2 Drew. at p. 288):

"It so happens that in this case the same persons are executors in both
countries, but the case must be decided on the same ground as if they were
different. Now, if they were different persons, it is clear that the duty of each F
would be this: he must take care first to pay the debts owing in the country
in which he is executor, and then, and not till then, if there is a surplus he
may send it to the other country."

That is to say, a man who takes out a grant as executor or administrator is bound
to deal with the property under that grant according to the laws of the country G
which gives him the grant; and, accordingly, if you take out administration in
Ireland you must administer all the assets in the Irish jurisdiction according to
the law there, and you have no right to get rid of the assets there in order to
give to any persons priorities which they would not have in Ireland. But in this
case the assets are all in England, and the creditors coming in will be governed
by the *lex fori* of the country where the assets already are—by that law they H
are entitled to be paid equally.

The next case is that of *Eames v. Hacon* (3). I have read that case over
several times, and can find nothing in it to support the contention raised before
me. SIR GEORGE JESSEL, M.R., said (18 Ch.D. at p. 351):

"Forbes & Co. took out administration in India for the use and benefit of the
plaintiff, and on what ground can they refuse to pay over the money to their
principal? No doubt by taking out administration in India they made them- I
selves liable to be sued by creditors there, and cannot be called upon to pay
over anything more than the surplus after satisfying the intestate's Indian
liabilities."

I think that is the only sentence which has anything to do with the point. No one
doubts that if there are Indian assets they must be distributed according to the
law of India; if there are English assets they must be distributed according to the

A law of England. No one doubts that according to the law of the country under whose jurisdiction the assets are, they must be distributed so far as the payment of debts is concerned. I am not speaking of the assets which remain after the payment of debts, when the law of a man's domicile comes into play.

The third case is *Blackwood v. R.* (4), in the Privy Council. SIR ARTHUR HOBHOUSE, in delivering the judgment of the court, says (8 App. Cas. at pp. 92, 93):

B "The grant of probate does not of its own force carry the power of dealing with goods beyond the jurisdiction of the court which grants it, though that may be the court of the testator's domicile. At most it gives to the executor a generally recognised claim to be appointed by the foreign country or jurisdiction. Even that privilege is not necessarily extended to all legal personal representatives, as for instance, when a creditor gets letters of administration in the court of the domicile. And when a legal personal representative has been constituted in the foreign country, whether he be the executor of the domicile or another, the administration of assets must take place in the foreign country with the effect of giving the foreign creditors priority as regards the foreign assets, as is shown by the cases of *Preston v. Melville* (5); *Cook v. Gregson* (2)."

D I think you may take a slight exception to the language of that. I do not think SIR ARTHUR HOBHOUSE intended to say that in every country where a deceased man may have left assets they are to be distributed so as to give the creditors of that country priority, or that he meant to assert that in India, for instance, an Englishman who had been trading with an Indian merchant would not have as great a right to be paid *pari passu* as anyone else.

E But, whatever the law in India or France may be, in England the law has always been that you must enforce claims in this country according to the practice and rules of our courts; and, according to them a creditor, whether from the furthest north or the furthest south, is entitled to be paid equally with all the other creditors of the same nature. I must refuse to alter that which has been law in this country ever since there was a Court of Chancery, and which I must say, for the sake of honesty, I hope always will be.

F Solicitors: *Field, Roscoe & Co.*; *Goldberg & Langdon*; *Stibbard, Gibson & Co.*

[Reported by J. R. BROOKE, Esq., Barrister-at-Law.]

RUDOW v. GREAT BRITAIN MUTUAL LIFE ASSURANCE SOCIETY

[COURT OF APPEAL (Sir George Jessel, M.R., Baggallay and Lush, L.JJ.), April 26, 1881]

[Reported 17 Ch.D. 600; 50 L.J.Ch. 504; 44 L.T. 688; 29 W.R. 585]

Company—Winding-up—Stay of other proceedings—Unregistered company—Judgment against company after petition to wind-up—No objection by company that petition pending—No order made on petition—Discretion of court. Costs—Chancery proceedings—Two defendants—Plaintiff successful against one defendant and unsuccessful against other—Form of order—One defendant to pay other defendant's costs.

After the death of his wife, W. assigned to R. his claim due on a policy of insurance taken out on the life of his wife and effected with an unregistered company. On July 28, 1879, R. commenced an action against the company and W. to recover the sum due under the policy. In their defence, delivered on Nov. 21, 1879, the company denied liability, but subsequently they paid into court the amount claimed. On July 27, 1880, W. took out a summons against R. and the company for payment of his costs and the summons was adjourned. On Aug. 6, 1880, R. took the money out of court, and R.'s costs against the company were taxed and paid, but no provision was made for W.'s costs. In October, 1880, two petitions were presented for winding-up the company, and on Nov. 19, 1880, a winding-up order was made which was discharged by the Court of Appeal on Nov. 24, 1880, but the petitions were ordered to stand over to ascertain the wishes of the policy-holders. On Dec. 3, 1880, W.'s summons was heard. The company did not take the objection that a winding-up petition was pending, and R. was ordered to pay W.'s costs and the company was ordered to pay R. the amount R. would so pay. On Jan. 9, 1881, the Court of Appeal ordered the matter to be referred back for a scheme to be settled for reduction of the company's contracts and directed the petitions to stand over. R. having paid W.'s costs, applied to the company on Feb. 26, 1881, for payment of the amount so paid, and, on the company's failure to pay, R. contemplated the issue of execution, but on Mar. 18, 1881, the company sought an order under s. 85 of the Companies Act, 1862, to restrain R. from issuing execution. The order was refused on the ground that s. 85 of the Act of 1862 applied only to registered companies. On appeal by the company,

Held: (i) s. 85 of the Companies Act, 1862, which empowered the court, at any time after presentation of a petition to wind-up a company, upon application of the company to restrain further proceedings in an action or other proceeding against the company, was by s. 199 of that Act imported into that part of the Act applying to unregistered companies; section 204 of the Act, which provided that an unregistered company should not, except in the event of its being wound-up, be deemed to be a company under the Act, did not prevent the application of s. 85 to unregistered companies if a petition to wind-up was pending, although no order to wind-up had been made; in such a case the court had a discretion whether it would stay execution, and if, after presentation of the petition, the company had allowed judgment to be signed without having taken the objection that a winding-up petition was pending, the court would not interfere to prevent the creditor from issuing execution; accordingly the order to restrain R. from issuing execution would be refused; (ii) the old practice adopted by the old Court of Chancery of ordering the plaintiff to pay the costs of one of two defendants and to add such costs to his own was improper, and the proper form of order was that one defendant should pay the other defendant's costs.

- A Notes.** The court has a discretion to order the unsuccessful defendant to pay the successful defendant's costs. This it may do by ordering payment of costs direct by the unsuccessful defendant to the successful defendant, or by ordering the plaintiff to pay the costs of the successful defendant, allowing him to include those costs in those payable to him by the unsuccessful defendant; see *Bullock v. London General Omnibus Co.* [1907] 1 K.B. 264; *Sanderson v. Blyth Theatre Co.* [1903] 2 K.B. 533. In the present case it was considered more appropriate to order direct payment between defendants, but this is a matter in the discretion of the court: *Mayer v. Harle* [1960] 2 All E.R. 840. Thus, insofar as the present case indicates that the "old form" is improper, it is not now good law.

C Section 24 of the Supreme Court of Judicature Act, 1873, has been replaced by ss. 36-43 of the Supreme Court of Judicature (Consolidation) Act, 1925, see 18 HALSBURY'S STATUTES (2nd Edn.) 474-480. Sections 85, 199 and 204 of the repealed Companies Act, 1862, are now replaced by ss. 226, 402, and 404 of the Companies Act, 1948 (3 HALSBURY'S STATUTES (2nd Edn.) 645, 757, 758).

Applied: *Re Azoff-Don Commercial Bank*, [1954] 1 All E.R. 947. Referred to: *Russian and English Bank v. Baring Bros. & Co.*, [1936] 1 All E.R. 505.

D As to companies which can be wound-up as unregistered companies, see 6 HALSBURY'S LAWS (3rd Edn.) 801; and for cases see 10 DIGEST (Repl.) 1184. As to costs in actions against two or more defendants, see 30 HALSBURY'S LAWS (3rd Edn.) 318; and for cases see DIGEST (PRACTICE) 877 et seq.

Cases referred to in argument:

E *Re London Cotton Co.* (1866), L.R. 2 Eq. 53; 14 L.T. 135; 12 Jur.N.S. 133; 14 W.R. 575; 10 Sol. Jo. 416; sub nom. *Re London Cotton Manufacturing Co.*, 35 L.J.Ch. 425; 10 Digest (Repl.) 902, 6122.

Re Taylor, Re Williams, Ex parte Railway Steel and Plant Co. (1878), 8 Ch.D. 183; 47 L.J.Ch. 321; sub nom. *Re Railway Steel and Plant Co., Ltd., Taylor v. Railway Steel and Plant Co., Ltd., Williams v. Railway Steel and Plant Co., Ltd.*, 38 L.T. 475; 26 W.R. 418; 10 Digest (Repl.) 1020, 7020.

F *Re Bastow & Co.* (1867), L.R. 4 Eq. 681; 36 L.J.Ch. 899; 16 L.T. 788; 15 W.R. 1038; 10 Digest (Repl.) 1020, 7016.

Appeal by the company from a decision of BACON, V.-C., refusing to make an order restraining the plaintiff from issuing execution, on the ground that s. 85 of the Companies Act, 1862, applied only to registered companies.

G On July 28, 1879, Ernestina Rudow commenced an action against the company, an unregistered mutual life assurance society, and C. G. Würth, to recover £100, on a policy of assurance effected by the defendant Würth on the life of S. A. Würth (since deceased) and mortgaged by C. G. Würth, after the death of S. A. Würth, to the plaintiff. The defendant company delivered a statement of defence on Nov. 21, 1879, in which they denied their liability, but subsequently paid into court the amount claimed, which was taken out by the plaintiff on Aug. 6, 1880, and under the order the plaintiff's costs against the defendant company were taxed and paid, but no provision was then made for the costs of the defendant Würth.

H On July 27, 1880, Würth took out a summons in the action against the plaintiff and the defendant company, asking for payment of his costs. At the request of the plaintiff the summons was adjourned into court.

I In October, 1880, two petitions were presented to wind-up the company. On Nov. 19, 1880, a winding-up order was made by HALL, V.-C. On Nov. 24, 1880, the winding-up order was discharged by the Court of Appeal but the petitions were not dismissed, being only ordered to stand over, in order that the wishes of the policy-holders might be ascertained. Würth's summons in the action was heard on Dec. 3, 1880, and the company did not take the objection that a winding-up petition was pending. The plaintiff was ordered to pay Würth his taxed costs of the action, and that the plaintiff be at liberty to add what she should so pay to her own costs of the action; and that the defendant company should pay to the plaintiff her costs not already taxed of the action, including what she should pay to

the defendant Würth, such costs to be taxed, the costs of the plaintiff and the defendant Würth, of and consequent on the application, to be costs in the action. On Jan. 19, 1881, an order was made by the Court of Appeal that it should be referred to HALL, V.-C., to settle a scheme for the reduction of the contracts entered into by the company, pursuant to s. 22 of the Life Assurance Companies Act, 1870, and that the petitions to wind-up should stand over. The plaintiff having paid Würth's costs, applied to the company for payment of them and her own costs on Feb. 26, 1881. Payment not being made, the plaintiff's solicitors suggested that execution should be issued. On Mar. 18, 1881, the defendant company moved before BACON, V.-C., for an order restraining the plaintiff from issuing execution and the company appealed against the refusal to make the order.

Hemming, Q.C., and Speed for the company.

Marten, Q.C., and Pugh for the plaintiff.

SIR GEORGE JESSEL, M.R.—This is an application by way of appeal from an order made by BACON, V.-C., refusing, with costs, an application to stay proceedings on an order, in the nature of a judgment, to pay the costs to the plaintiff in the action.

The action was brought, by the holder of a policy for £100, against the company. The company appears to have had no defence to the action, but there was some suggestion that someone else claimed the money. In the result, and before any proceedings were had in the winding-up, the company paid the money into court, the plaintiff took the money out of court, and applied for the costs of her action, and an order was made for the costs of the action, which have been duly taxed and paid. But it appeared that the holder of the policy had mortgaged the policy, or rather the claim (for it was after the death of the insured) to the plaintiff, and therefore the mortgagor, a person of the name of Würth, was made a party defendant to the action, and when the plaintiff, having taken the money out of court and being satisfied, got an order for her costs, Würth applied for his costs to be provided for, on the ground that he was a necessary party to the action.

This was disputed by the company, and in consequence, although an order was made to pay the plaintiff's costs of the action, no order was then made to pay Würth's costs, and the defendant Würth's costs stood over to a subsequent period. In the meantime a petition was presented for winding-up the company, and an order was made for winding-up, which was subsequently discharged by the court. That petition is still pending. After the order was made by the Court of Appeal, the petition being then pending, Würth's summons came on to be heard before BACON, V.-C., on Dec. 3, 1880, and on that occasion the company did not take the objection that the pending of the petition for winding-up was an answer to Würth's application, but allowed an order to be made to this effect, that the plaintiff should pay Würth's costs and have them over against the company, and that order is not now appealable, having been made on Dec. 3, 1880. The result therefore was that, by virtue of that order, the plaintiff became liable to pay Würth's costs in full, and was made liable on the terms of the company paying her over again. It was in fact the machinery which was adopted by the old Court of Chancery, and which is no longer either necessary or useful, but which is mischievous, and, as this Court has already laid down in the early part of to-day, is no longer to be used.

That being the position of matters, the plaintiff would remain liable to pay Würth's costs in full, and if this application were to succeed and a winding-up order were eventually to be made on the petition against the company, she would get a dividend on the costs she so pays to Würth. Of course it is manifest that would be doing the plaintiff a great injustice. She would not have agreed to or allowed the order to go to make her liable to pay costs to Würth, except on the condition that she was to be indemnified by being paid over again the same sum as against the company, and therefore, by allowing that order of Dec. 3. to go, her condition has been materially changed, and changed by whose act? By the

A act of the company. The company was entitled under s. 24 (5) of the Supreme Court of Judicature Act, 1873, to avail itself of the right to say that every matter of equity on which an injunction against the prosecution of any such proceeding might have been obtained if that Act, had not passed, might be relied on by way of defence thereto, and consequently might have objected to the order going; or
 B the company might have applied under the latter part of the same sub-section for an order to stay proceedings. But they did neither, and allowed the litigation to proceed to judgment on Dec. 3, in the way I have mentioned, and then afterwards, the time for appealing against that order having expired, apply to restrain the plaintiff, who had paid Würth, from proceeding to execution on the order she has obtained, to indemnify herself by being repaid the amount she has paid.

C It is manifest that, if the court has a discretion, it ought not to exercise the discretion in favour of the company, but in favour of the plaintiff, and s. 85 of the Companies Act, 1862, is expressed clearly. It is not obligatory upon the court to make the order, but it is discretionary, and such discretion has been repeatedly exercised. I admit there must be some judicial grounds for its exercise, but in this case the position of the plaintiff has been so changed by the action of the company that it would not, in my opinion, be just to allow the company now to
 D restrain proceedings on this judgment.

I have a word or two, however, to say on the ground upon which BACON, V.-C., decided this case, for I am unfortunately unable to accede to it. He did not decide it on the merits, but by reason of his opinion being that the court had not jurisdiction to make the order, this being an unregistered company. It is necessary to look at one or two sections of the Companies Act, 1862, to see, as I think we
 E shall clearly see (with respect to him), that he had jurisdiction. Section 85 is general, "and may at any time after presentation of the petition for winding-up a company under this Act" make the order. Then s. 199 does this. It says that an unregistered company, subject to certain restrictions,

"may be wound-up under this Act, and all the provisions of this Act with respect to winding-up shall apply to such company,"
 F with certain exceptions and additions which I need not read for this purpose. Therefore there is a general rule that, subject to what follows, all the provisions shall apply. That of course, would import s. 85 if it stood alone. Section 201 provides:

"The court may at any time after the presentation of a petition for winding-up
 G an unregistered company, and before making an order for winding-up the company, upon the application of any creditor of the company, restrain further proceedings in any action, suit, or proceeding against any contributory of the company, or against the company."

Section 201 was necessary, because, in the case of an unregistered company, you might sue the contributory as well as the company.

H Section 85 applies only to a registered company, and it is on the application of the company, or a creditor, or a contributory. But this is not on the application of the company, but the application of a creditor only, and it restrains proceedings against the contributory or company, and it is for a different purpose, and on the application of a different person, and, standing alone without the subsequent section which I am going to mention, I think it would still be held not to interfere with the application of s. 85. But any question on that part of the
 I Act is got rid of by the provisions of s. 204, that

"the provisions made by this part of the Act with respect to unregistered companies shall be deemed to be made in addition to and not in restriction of any provisions hereinbefore contained."

Therefore it is quite plain that, so far, s. 85 applies to an unregistered company. But there are these latter words at the end of s. 204 upon which BACON, V.-C., relied, that

"an unregistered company shall not, except in the event of its being wound-up, be deemed to be a company under this Act, and then only to the extent provided by this part of this Act;"

and he read "being wound-up" as if it had been "having been wound-up," which would make the Act absolutely unworkable. You must hold the provisions anterior to the actual order for winding-up to apply, and that he seems to have forgotten. It is plain that "being wound-up" means the provisions as to winding-up, and reading it in that way the whole of the Act becomes sensible, and s. 85 applies, therefore, as much to the winding-up of an unregistered company as to the winding-up of a registered company. It appears to me, therefore, that the order made by BACON, V.-C., ought to be affirmed, though not for the same reasons which he gave in pronouncing it.

BAGGALLAY, L.J.—I am of the same opinion. I am unable to agree with the view taken by BACON, V.-C., that he had no jurisdiction to make such an order as was asked in this action. It appears to me that, apart from the observations that have been made by SIR GEORGE JESSEL, M.R., on the provisions of the Supreme Court of Judicature Act, s. 24 (5) and s. 24 (6) of the Supreme Court of Judicature Act, 1873, give ample jurisdiction to BACON, V.-C., in whose branch of the Chancery Division the action was pending. [His LORDSHIP then stated the facts and continued:] All the parties interested were before the court, and the facts were known to the parties, or must be presumed to have been known. It has been suggested that there was some doubt as to whether a winding-up order had been discharged and the proceedings had been got rid of; but if parties come before the court, and come under a mistake of that kind, it is their duty, as soon as they find there has been some surprise or mistake, to consider whether it may form a ground for appeal against the order.

Then it is suggested that there is something like collusion between the plaintiff and the defendant Würth. That, again, was either a sufficient reason for objecting to the order made on Dec. 3, 1880, for appealing against it if it was made in opposition to the party. We must assume that, there being no appeal against the order of Dec. 3, 1880, that order was properly made, and was binding between the parties. It has been admitted that there has been no change, as far as regards the winding-up proceedings, since Dec. 3, 1880, down to the present day. If the order which was made by BACON, V.-C., on Dec. 3, 1880, was right then, why should it be wrong now? If we assent to the application of the company, it can only be on some ground which was inconsistent with that order made on Dec. 3, 1880. There is no suggestion made on the part of the company which would be a full and sufficient reason why the order of Dec. 3, 1880, should not be made. It appears to me that the appeal should be dismissed.

LUSH, L.J.—I am of the same opinion on both points; and, as regards the immediate subject of this application to us, I think it would be most unjust indeed to accede to the request which is made to us. The order was merely the machinery by which Würth's application was acceded to. Instead of making an order, which I quite agree is the proper one now to be made, for the company to pay, the court adopted the old practice, and ordered the plaintiff to pay Würth in the first instance, the company to repay the plaintiff. It would be most unjust, after the plaintiff had paid, to prevent the plaintiff from having recourse over, because that was a part of the intention and the mode by which the payment was to be made. That the company might have prevented, if they had chosen, and, letting that opportunity slip, they have entirely altered the position of the plaintiff. It would be most unjust to prevent the plaintiff from having recourse over for the repayment of the costs which she has had to pay. Therefore, the appeal will be dismissed with costs.

Appeal dismissed.

Solicitors: *Prideaux & Sons; Greenfield & Abbott.*

[Reported by FRANK EVANS, ESQ., Barrister-at-Law.]

A

HARVEY v. HARVEY

[CHANCERY DIVISION (Chitty, J.), March 27, April 8, 1884]

[Reported 26 Ch.D. 644; 51 L.T. 508; 48 J.P. 468; 33 W.R. 76]

B

Contempt of Court—Attachment—Execution—Right of sheriff to break open doors in order to execute—Wilful contempt.

Where a writ of attachment is issued against a party to an action for contempt of court in refusing to comply with an order for the delivery over of certain documents, the sheriff charged with the execution of the writ may, after due notice, break open the outer door of the defaulting party's house in order to execute it.

C

Semble: that the sheriff is entitled to take such action whenever the contempt consists of a wilful contempt for disobedience to an order of the Court.

Notes. Referred to: *Selous v. Croydon R.S.A.* (1885), 53 L.T. 209; *R. v. Lambeth County Court Judge and Jonas* (1887), 36 W.R. 475; *Mander v. Falcke*, [1891] 3 Ch. 488; *Re Evans, Evans v. Noton*, [1893] 1 Ch. 252; *Seldon v. Wilde*, [1910] 2 K.B. 9; *Taylor, Plinston Bros. & Co., Ltd. v. Plinston* (1911), 81 L.J.Ch. 34.

D

As to the distinction between attachment and committal, see 8 HALSBURY'S LAWS (3rd Edn.) 31 and 32; and for cases see 16 DIGEST (Repl.) 58-59.

Cases referred to:

E

(1) *Burdett v. Abbott* (1811), 14 East, 1; 104 E.R. 501; affirmed (1812), 4 Taunt. 401, Ex. Ch.; (1817), 5 Dow, 165, H.L.; 16 Digest (Repl.) 91, 1013.

(2) *Cook's Case* (1639), Cro. Car. 537.

(3) *Seymayne's Case* (1604), 5 Co. Rep. 91, a; 77 E.R. 194; sub nom. *Seyman v. Gresham*, Cro. Eliz. 908; sub nom. *Seymayne v. Gresham*, Moore, K.B. 668; Yelv. 29; 21 Digest (Repl.) 566, 614.

F

(4) *Briggs' Case* (1615), 1 Roll. Rep. 336; 81 E.R. 526; 16 Digest (Repl.) 91, 1012.

(5) *Anon.* (1744), Willes, 459; 125 E.R. 1269; 16 Digest (Repl.) 91, 1010.

(6) *Re Freston* (1883), ante p. 889; 11 Q.B.D. 545; 52 L.J.Q.B. 545; 49 L.T. 290; 31 W.R. 804, C.A.; 16 Digest (Repl.) 9, 15.

(7) *Re M'Williams* (1803), 1 Sch. & Lef. 174; 16 Digest (Repl.) 10, *16.

G

(8) *Marris v. Ingram* (1879), 13 Ch.D. 338; 49 L.J.Ch. 123; 41 L.T. 613; 28 W.R. 434; 5 Digest (Repl.) 1099, 8868.

(9) *Ex parte Parker* (1797), 3 Ves. 554.

(10) *Abud v. Riches* (1876), 2 Ch.D. 528; 45 L.J.Ch. 649; 34 L.T. 713; 24 W.R. 637; 3 Char. Pr. Cas. 371; 16 Digest (Repl.) 90, 997.

(11) *Sprunt v. Pugh* (1878), 7 Ch.D. 567; 26 W.R. 473; 21 Digest (Repl.) 691, 1868.

H

(12) *Louten v. Colchester Corpn.* (1817), 2 Mer. 395; 35 E.R. 991; 21 Digest (Repl.) 693, 1916.

Also referred to in argument:

Solly v. Greathead (1805), 32 E.R. 1053, L.C.; sub nom. *Anon.*, 11 Ves. 170; 41 Digest 97, 361.

I

Stockdale v. Hansard (1840), 11 Ad. & El. 253; 8 Dowl. 522; 3 State Tr.N.S. 723; 3 Per. & Dav. 330; 9 L.J.Q.B. 75; 4 Jur. 68; 113 E.R. 411; 21 Digest (Repl.) 633, 1205.

Morgan v. Copeland (1836), 1 Jo. Ex. Ir. 248, n.; 41 Digest 123, e.

Moone v. Rose (1869), L.R. 4 Q.B. 486; 10 B. & S. 421; 38 L.J.Q.B. 236; 20 L.T. 606; 17 W.R. 729.

Motion by the plaintiff, Thomas Harvey, for an order that the sheriff of Kent might be committed to prison for contempt of court in neglecting to arrest the defendant, Henry Gordon Harvey, as directed by the court.

By an order of the court, dated July 13, 1883, it was ordered that the defendant should, within seven days after the service of the order, deliver over to the plaintiff, or his solicitors, certain deeds and documents of title in pursuance of the judgment in the action, as directed by an award made by virtue of a compromise. The defendant, who was duly served with the order, did not comply with it, and thereupon a motion was made asking for leave for the plaintiff to issue an attachment against the defendant for his contempt in not having complied with the order. On this motion, notice of which was duly served on the defendant, the Vacation judge, on Aug. 15, 1883, made an order on which an attachment subsequently issued. That order recited the order of July 13, 1883, and ordered that the plaintiff should be at liberty to issue a writ of attachment against the defendant "for his contempt in not having complied with the said order." The writ of attachment was issued on Aug. 27, and was in the form adapted to the case, commanding the sheriff to attach the defendant so as to have him before the court to answer touching his contempt. The writ was endorsed with a short statement showing the nature of the contempt.

The defendant, who was a clergyman, resided at what was apparently his own house in Dover, in the county of Kent. The place of his residence was known to the sheriff of Kent, whose officers had watched the house with a view to the defendant's arrest. The defendant was aware that the officers were endeavouring to arrest him, and in order to prevent his arrest he had barred his house and refused to allow any one to enter it. He had written a letter to one of the public newspapers (the original of which was produced), from the statements in which it appeared that he pretended to mistake the officers for thieves and tramps, and, with the object of deterring the officers from entering the house, he had intimated that he was armed with a revolver. Under these circumstances the sheriff failed to arrest the defendant, alleging that he was not entitled to break into the house for the purpose of his arrest.

Romer, Q.C., and Jemmett for the applicant.
Cock for the sheriff.

CHITTY, J.—This is a motion to commit the sheriff of Kent for breach of duty in not arresting the defendant Harvey on a writ of attachment. In the course of the argument an objection was taken for the sheriff that the motion was wrong in form, because a proper notice to return the writ had not been previously given to the sheriff, pursuant to Ord. 52, r. 11. But towards the close of the argument, this point was abandoned by the sheriff's counsel, who stated that he was desirous of obtaining a decision of the court upon the merits.

The question in substance is whether the sheriff may lawfully break open the outer door of the defendant's house, after due notice, in order to effect his arrest. The facts are not in dispute. [His LORDSHIP stated the facts, and proceeded:] The argument for the sheriff is founded on the maxim that a man's house is his castle, and that the defendant has the privilege, or right, of keeping it barred, so as to prevent the sheriff from breaking in for the purpose of executing this writ; and it was argued that this privilege extends to all cases where the process is a civil process at the suit of a subject, including an attachment for contempt.

The defendant has been adjudged by the court to be guilty of a wilful contempt for disobedience to an order of the court. The order was not an order to pay a debt or sum of money, but for delivery of deeds. Under rr. 5 and 20 of Ord. 42 of the Rules of 1875, an order requiring any person to do any act other than the payment of money, or to abstain from doing anything, may be enforced by writ of attachment. Rules 7 and 24 of Ord. 42 of the existing rules are to the same effect. The order for attachment in the case before me clearly falls within these rules. The question must be decided according to the authorities.

The leading authority on the subject is that of *Burdett v. Abbott* (1), decided in the year 1811, in which the prior decisions were reviewed. In that case the Serjeant-at-Arms of the House of Commons had broken open the house of Sir

A Francis Burdett in execution of a warrant issued by the Speaker for his arrest and committal to the Tower. The warrant was issued pursuant to an order of the House based upon a resolution that Sir Francis Burdett had been guilty of breach of privilege by the publication of a libel. The Court of King's Bench decided that the Serjeant-at-Arms was justified in breaking into the house, founding its judgment on the right of the sheriff to break into a house in the execution
B of a writ to arrest for contempt issued under the authority of a court of law. LORD ELLENBOROUGH, in giving judgment, said (14 East, at pp. 154, 155):

C 'Nothing is more certain than that, in the ordinary cases of the execution of civil process between subject and subject, no person is warranted in breaking open the outer door in order to execute such process. The law values the private repose and security of every man in his own house, which it considers as his castle, beyond the civil satisfaction of a creditor. But I have already observed that the distinction taken in argument stands upon an extra-judicial opinion in the YEAR BOOK of the 13 Edw. 4, 9. It is there stated to have been held, 'that for felony, or suspicion of felony, a man may break open the house to take the felon; for it is for the common weal to take them.' And likewise
D CHOKE said:

E 'Where the king has an interest, that the writ is a non omittas propter aliquam libertatem, etc. So the liberty of the party's house shall not hold where, etc., but otherwise it is for debt or trespass; the sheriff or other cannot break open his house to take him; for this is only the particular interest of the party. And this is cited in FITZ. ABR. BARRE, pl. 110. Therefore, even in that case, the interest in the king in the execution of process seems only to be put in contradistinction to the interest of an individual in process sued out for his own particular benefit, inasmuch as the process of the Crown respects the public justice and public interest of the realm; but it is not put in contradistinction to process for contempt, in which the public at large have as much interest as in other criminal process. If it
F rested upon that alone, I should not have thought it an authority, especially when I find an older case in H. 18 Edw. 2, which is in FITZ. EXECUTION, pl. 152, where it is said, "Note, that the minister of the king coming to levy execution of damages recovered may break open the house fastened if he cannot have the key; for it is not lawful for any to disturb the execution of the king's minister," etc.'

G It is not, however, clear that this might not relate to a levy by the king's minister, as he is called, for the king's debt, and not to a levy by the king's officer for the debt of an individual subject. But in the latter sense the point was certainly ruled otherwise (and according to the dictum in the YEAR BOOK, 13 Edw. 4, 9) in the YEAR BOOK, 18 Edw. 4, 4, pl. 19, referred to in BRO. ABR. EXECUTION, pl. 100; for there all the justices agreed that trespass lay against
H the sheriff for breaking the house to execute fieri facias, for by the fieri facias he may take the goods, but may not break the house. What is said by the judges in that case is confirmed by a still more important authority, a decision in a case of life and death. This was *Cook's Case* (2), who was indicted for murder in voluntarily killing a sheriff's officer while attempting to break into the house for the purpose of executing civil process against him; and this was
I held to be manslaughter, and not murder. Upon the authority, therefore, of that case I should say that it stands perfectly clear, that an execution at the suit of an individual cannot be carried into effect by breaking open the outer door; and, therefore, it remains to be considered whether in this case the house was broken in the execution of process for the particular interest of an individual, or whether it was done for the public weal. That it falls under the latter description cannot, I think, be doubted. And without going into the other books cited by the Attorney-General to show that the privilege of keeping the outer door shut against process is confined to process in civil suits,

it is sufficient to refer to *Semayne's Case* (3), as reported in Cro. Eliz. 908, where it is said,

'that afterwards, in Michaelmas term (2 Jac. 1), this cause was argued again; and that Williams agreed with the opinion of YELVERTON and FENNER in omnibus, and that the sheriff might not break any man's house to take execution unless in the Queen's case, or for a contempt, etc.'

We understand by this a contempt of any of His Majesty's courts of justice; but it cannot be contended that the Houses of legislature are less strongly armed in point of protection and remedy against contempts towards them than the Courts of Justice are. There is also *Briggs' Case* (4), cited by the Attorney-General, which came on before COKE, C.J., and it is to be found in Roll. Rep. 336. It appears from the search which has been made in that case, that the sheriff was ruled for not returning an attachment against Briggs; and there it was held clearly that on process of contempt the outer door might be broken open. Therefore, upon authorities the most unquestionable, this point also has been settled, that where an injury to the public has been committed in the shape of an insult to any of the courts of justice, on which process of contempt is issued, the officer charged with the execution of such process may break open doors, if necessary, in order to execute it, and then he goes on to say that it had been made out, among other things, 'that the mode of executing that warrant in this case, by breaking the house, after due notification and demand of admission without effect, is justifiable upon the ground of its being an execution of a process for contempt, to which the personal privilege of the individual in respect to his door must give way for the public good.'

Then BAYLEY, J., in his judgment says (*ibid.* at p. 162) :

"Then as to the breaking of the outer door to execute the warrant, I think that whoever reads *Semayne's Case* (3) will see that LORD COKE was making the distinction between those cases in which the king, standing forward as prosecutor on behalf of the subject on public grounds, was party, and other cases in which the subjects were parties only in respect of their private rights; but he was not meddling with cases of contempt. Process of contempt, however, has been held in other cases to warrant the breaking of the outer door for the purpose of executing it. It was so in *Semayne's Case* (3) and in *Briggs' Case* (4), and there is another case (*Anon.* (5)) in which an attachment for a contempt was treated, not as a civil, but as a criminal process; and, therefore, it was held it might be executed on a Sunday, and the reason assigned is, that a contempt of the court is a breach of the peace. Now, in every breach of the peace the public are considered as interested, and the execution of process against the offender is the assertion of a public right; and in all such cases I apprehend that the officer has a right to break open the outer door, provided there is a request of admission first made for the purpose, and a denial of the parties who are within."

This case is a direct authority for the proposition that the sheriff can break open outer doors when he is directed to arrest for a contempt of court. Contempt is treated as in the nature of a criminal proceeding, and the attachment is regarded as a punishment for an offence. No distinction is drawn or attempted to be drawn with regard to the nature of the contempt.

Such a distinction was, however, drawn in *Re Freston* (6) (see ante, p. 889) recently before the Court of Appeal. There the question raised was one not with reference to the privilege of a man's house, but with reference to the analogous privilege of his person from arrest in the case of a solicitor on his way to or from a court of justice. The solicitor, in his character of a solicitor, had been ordered to deliver up certain documents, and to pay a sum of money and costs. He subsequently delivered the documents, but did not pay the money or the costs, and the attachment was issued against him for nonpayment. Before the attachment

A was issued he paid the money, but not the costs, and he was subsequently arrested on the attachment on his way from a police-court. It was held that the police-court was a court of justice, and the question was whether the privilege extended to arrests on attachments for contempt of court. The Queen's Bench Division had apparently held that all attachments for contempt of court are now the same, and have the same incidents. SIR BALIOL BRETT, M.R., declined to assent to that proposition. In the course of his judgment (11 Q.B.D. at p. 553) he cited with approval the following passage from LORD REDESDALE's judgment in *M'Williams' Case* (7):

"There can be no doubt that the thing to be considered is, not the form of the process, but the cause of issuing it. If the ground of the proceeding be a debt, it is a process of debt; if the ground be a contempt, as, for instance, disobedience of some order of the court, where the object was not to recover a debt by means of the process, the consequences of such a process are in some degree of a criminal nature";

and the Master of the Rolls added:

"This passage seems to me to show the distinction between the two kinds of attachment."

LINDLEY, L.J., in his judgment, after referring to the passage above quoted from LORD REDESDALE's judgment, and to the fact that he had pointed out that all contempts are not the same, said:

"They are of different kinds; some contempts are merely theoretical, but others are wilful, such as disobedience to injunctions, or to order to deliver up documents—in these cases there is no privilege from arrest."

He there puts expressly the case of disobedience to an order to deliver up documents, and states that an attachment for such a contempt was something more than merely civil process, and that therefore there was no privilege. FRY, L.J., in his judgment drew a similar distinction. He says (*ibid.* at p. 557):

"It is plain that where attachment is mere process, privilege exists; where it is punitive or disciplinary, the privilege does not exist."

And then he says:

"Further, if the attachment were mere process, Freston could obtain his discharge *ex debito justitiæ* on showing that he had performed what was required by the master's order. I do not think that he could have done so in the present case; the court would have had a jurisdiction to exercise its discretion, and to punish him further."

The case before me falls within the precise words of LINDLEY, L.J.'s judgment, and within the principles enunciated by the other members of the Court of Appeal. In treating of the various kinds of contempt, which were dealt with as contempt by the Court of Chancery, it must be borne in mind that great alterations have taken place in the law and practice in these matters in recent times. Formerly that court acted in personam, and process of contempt was the ordinary method of compelling a defendant to appear, and of enforcing the decrees and orders of the court, including decrees and orders for payment of money. The process of contempt to compel an appearance (which was bailable) has been abolished. By the Judgments Act, 1838, s. 18, decrees and orders of the Court of Chancery for payment of money to a person had the effect of judgments at common law, and were accordingly enforceable by the ordinary writs of execution, such as a *fieri facias* and an *elegit*. By the Debtors Act, 1869, arrest and imprisonment for making default in payment of a sum of money were abolished, except in certain specified cases. The exceptions in s. 4, according to *Marris v. Ingram* (8), appear generally to be cases of misconduct. The power reserved by s. 5 to commit for a limited period for nonpayment of certain judgment debts is made exercisable by order, and such order is to be executed in the same manner as a writ of *capias*

ad satisfaciendum. The result is to restrict the suitor's right to an attachment for nonpayment of money to the cases excepted by s. 4, as is evident from r. 4 of Ord. 42 of the rules now in force. A

The distinction as to contempt for nonpayment of money was recognised as long ago as the year 1797, when *Ex parte Parker* (9), referred to in COOKE'S BANKRUPTCY LAW, edition of 1799, p. 115, and cited in *M'Williams' Case* (7) was decided. In that case it was held that an attachment for nonpayment of money was to be considered only as process to enforce payment of a debt and analogous to an execution. The rules under the Judicature Acts introduced an important alteration in regard to attachments. Formerly an attachment issued as ordinary civil process, as of course on the application of a party, as appears from *Abud v. Riches* (10); but now under Ord. 44, r. 2, an attachment issues only after an order of the court made on notice to the person sought to be attached. By the first rule of the same order a writ of attachment has the same effect as a writ of attachment out of the Chancery Division has heretofore had; but the orders are silent as to the manner of executing the writ; whereas Ord. 43, r. 1, says that writs of fieri facias and elegit shall be executed in the same manner as heretofore. By Ord. 42, rr. 7 and 24, already cited, attachment and committal are apparently placed on the same footing, and in *Sprunt v. Pugh* (11), on a motion against a receiver, in which I myself was counsel, SIR GEORGE JESSEL, M.R., stated his opinion, though it does not appear in the report, that the distinction between committal for contempt and attachment for contempt was practically abolished. The difference between them seems mainly to be in the more summary process of the former, and in the degree of inconvenience and expense attending it. The distinction between an order for committal and an attachment for contempt was formerly considered to be that committal was the proper remedy for doing an act prohibited by injunction or the like, whereas attachment was the remedy for neglecting to do some act ordered to be done. Committal for contempt never took place except by order of the court. Interference with a ward of court, interfering with the due administration of justice, as by intimidating witnesses, or ill-treating a process-server, and breaches of an injunction, were and still are all alike treated as in the nature of offences punishable by committal. B C D E F

After the decisions in *Burdett v. Abbott* (1) and *Re Freston* (6) it is scarcely necessary to deal with the statements in the textbooks. In DANIELL'S PRACTICE (6 Edn.), p. 887, it is stated that the sheriff cannot break open doors in the execution of a writ of attachment. But the author is there dealing only with the mesne process to enforce appearance. The only authority he cites is CHITTY'S ARCHBOLD, but the passage referred to relates merely to the execution of an ordinary writ of execution, and when the author deals with disobedience to decrees he does not repeat the passage. I may add that on a writ of sequestration, which issued formerly by order, but which, under Ord. 42, r. 4, is now (as appears from *Sprunt v. Pugh* (11) issuable without order, the sequestrators can break open outer doors, as appears from *Lowten v. Colchester Corpn.* (12). So the sheriff may break open outer doors on writs of capias utlagatum and habere facias possessionem, both of which contain a non omittas clause. G H

The result appears to be that in a merely civil process at the suit of a subject (such as the execution of a writ of fieri facias) the sheriff cannot break open outer doors, but he can do so on a writ of attachment for a contempt of court of such a nature as has been committed in this case. I

Solicitors: *Hasties* for *Hasties*, East Grinstead; *Palmer & Bull*.

[Reported by A. COYSGARNE SIM, Esq., Barrister-at-Law.]

A

EARL OF LYTTON v. DEVEY

[CHANCERY DIVISION (Bacon, V.-C.), November 7, 1884]

[Reported 54 L.J.Ch. 293; 52 L.T. 121; 1 T.L.R. 41]

B

Letter—Ownership—Rights of sender and recipient—Copyright in contents.

The property in letters is in the person to whom they are sent and that person has a right to retain them. But the sender of a letter has still that kind of interest, if not property, in the letter which gives him a right to restrain any use being made of the communication made in the letter. The only exception to this principle is if the letter contains materials which it is necessary for the recipient to use for his own justification, or for vindicating his character from any charges which are brought against him.

C

Notes. Considered: *Labouchere v. Hess*, [1895-9] All E.R.Rep. 1216; *Macmillan v. Dent*, [1906] 1 Ch. 101.

D

As to copyright in letters in general, see 8 HALSBURY'S LAWS (3rd Edn.) 377-378; and for cases see 13 DIGEST (Repl.) 99 et seq.

Case referred to:

(1) *Pope v. Curl* (1741), 2 Atk. 342; 26 E.R. 608, L.C.; 13 Digest (Repl.) 99, 410.

E

Also referred to in argument:

Thompson v. Stanhope (1774), Amb. 737; 27 E.R. 476, L.C.; 13 Digest (Repl.) 100, 422.

Gee v. Pritchard (1818), 2 Swan. 402; 36 E.R. 670; 13 Digest (Repl.) 100, 421.

Lord and Lady Perceval v. Phipps (1813), 2 Ves. & B. 19; 35 E.R. 225; 13 Digest (Repl.) 99, 419.

F

R. v. Labouchere (1884), 12 Q.B.D. 320; 53 L.J.Q.B. 362; 50 L.T. 177; 48 J.P. 165; 32 W.R. 861; 15 Cox, C.C. 415; 32 Digest (Repl.) 230, 2519.

R. v. Topham (1791), 4 Term Rep. 126; 100 E.R. 931; 32 Digest (Repl.) 227, 2465.

Hopkinson v. Lord Burghley (1867), 2 Ch. App. 447; 36 L.J.Ch. 504; 15 W.R. 543, C.A.; 13 Digest (Repl.) 99, 412.

G

Earl of Granard v. Dunkin (1809), 1 Ball. & B. 207; 13 Digest (Repl.) 101, *98.

Folsom v. Marsh, 2 Story (Amer.) 100.

Motions by the Earl of Lytton in two actions brought by him as executor of the late Lord Lytton against the defendant, Miss Louisa Devey, the executrix of the late Lady Lytton, for the return of certain letters in the possession of the defendant which were written by the late Lord Lytton to the late Lady Lytton.

H

The motion in the first action, dated Oct. 13, 1884, was to restrain the defendant from printing or publishing any letters written by the late Lord Lytton to the late Lady Lytton or any other person, or any copies thereof or extracts therefrom, until the trial of the action or further order. The motion in the second action, dated Nov. 5, 1884, was to restrain the defendant from parting with the said letters, or any copies thereof, or extracts therefrom, to any person other than the plaintiff, until the trial of the action or further order.

I

The late Lord Lytton married the late Lady Lytton on Aug. 29, 1827, and they lived together until 1836, when a separation deed was entered into. By that deed, which was dated April 19, 1836, after reciting that unhappy differences had arisen between Lord Lytton and his wife, and that they had agreed to live separate; and reciting that Lord Lytton had agreed to make a provision of £400 a year for the maintenance and support of his wife for life, and £50 for each of the two children

of the marriage so long as he should consent to their remaining with Lady Lytton; it was witnessed that Lord Lytton covenanted with the trustees therein mentioned that it should and might be lawful for Lady Lytton, from time to time, and at all times thereafter, to live separate and apart from the said Lord Lytton, in such sort and manner as if she were sole and unmarried, and that he the said Lord Lytton would not compel Lady Lytton to live with him by any ecclesiastical censures or proceedings; and, also, that Lady Lytton should be absolutely freed and discharged from the power, command, will, restraint, and government of Lord Lytton; and that it should be lawful for Lady Lytton from thenceforth to have, take, and enjoy, to her own separate and absolute use, with full power of disposition by delivery, deed, or will, all such furniture, wearing apparel, jewels, articles and things whatsoever, in the nature of furniture, wearing apparel, and jewels, as then were or should thereafter be hers, or reputed to be hers. The deed then contained a covenant by Lord Lytton with the trustees, to pay to them, during the separation, a sum of £400 a year for the benefit of Lord Lytton, and also a sum of £100 for the two children of the marriage, so long as he should consent to their remaining with Lady Lytton.

Lord Lytton died in January, 1873, leaving the plaintiff the sole executor of his will; late Lady Lytton died on Mar. 12, 1882, leaving the defendant her executrix.

In 1883 Lord Lytton published a life of his father under the title of *THE LIFE, LETTERS, AND LITERARY REMAINS OF EDWARD BULWER, LORD LYTTON*. The defendant announced her intention of publishing the letters belonging to the late Lady Lytton, in vindication of the character of the late Lady Lytton, which she alleged was attacked in the book of Lord Lytton; and an article appeared in the "Pall Mall Gazette" of Oct. 7, 1884, containing extracts from some of the letters, and stating the defendant's intention to publish. On Nov. 1, 1884, the plaintiff demanded from the defendant the delivery up to him of the letters in question. This demand was not complied with, and thereupon the above actions were instituted and the motions made.

The plaintiff, in his affidavit, stated that most of the letters proposed to be published by the defendant related to private matters, and that he strongly objected to, and had never authorised, the proposed publication. The defendant justified the proposed publication as necessary to vindicate the character and clear the memory of the late Lady Lytton from the aspersions cast upon her in Lord Lytton's book. She alleged that the sympathies of the reader were skilfully enlisted on the side of the late Lord Lytton in regard to the separation between him and his wife, whereas the separation was in fact caused by the cruel and heartless conduct of the late Lord Lytton. Also that the plaintiff had led the reader of his work to gather that the late Lady Lytton was extravagant, hard and shallow, and lacking in maternal instincts. The defendant further alleged that the whole impression of Lady Lytton's character, conveyed by the book, was false and misleading. In answer to this, the plaintiff made an affidavit denying in toto the alleged misrepresentation of his mother's character in his book, denying also the alleged cruel and heartless conduct of his father; and also denying the alleged inferences which the defendant had drawn from his work.

Marten, Q.C., Methold and Herbert Stephen for the plaintiff.

Millar, Q.C., G. Millar and H. G. Watts for the defendant.

BACON, V.-C.—This case has been argued at most immoderate length; but, in my opinion, the law upon the subject is plain, and has existed since long before *Pope v. Curl* (1) was decided, namely, that the property in letters remains in the person to whom they are sent. The right to retain them remains in the person to whom the letters are sent, but the sender of the letters has still that kind of interest, if not property, in the letters, which gives him a right to restrain any use being made of the communications which he has made in the letters so

A sent to him. I will not have it supposed that I entertain a moment's doubt about that being the settled law. The letters written by the late Lord Lytton to his wife were hers while she lived, and belong in property to her representative, the defendant in this suit. But then the right to publish them is another thing; and that right does not exist. It would be strange indeed, if, because a man writes to another a confidential communication, that other has a right to publish it to the world. It is a matter between themselves. It would be neither just, nor right, nor lawful that any publication of these communications should be made.

There is one qualification, one exception it may be said, to that general principle, which I have just stated. That is if the letters contain materials which it is necessary for the sendee—if I may use such a word—to use for his own justification, or for vindicating his character from any charges which are brought against him. It is upon that ground mainly that the case has been argued before me, because, referring to defendant's affidavit and to the argument I have heard from her counsel, an attempt has been made to show that by the publication of the plaintiff, he has imputed something, no matter what, to the late Lady Lytton which her personal representative has a right to refute, and, if necessary, to prove her justification by referring to these letters. That is a totally different thing from publishing letters. She may have such a right, and in one of the cases referred to the court so held, and said that the court will look into it if necessary to see whether the publication could be justified on the ground of vindication or not. [His LORDSHIP examined the evidence, and concluded:] So that the pretence on which the publication is attempted to be justified by the defendant is wholly removed by the extracts which have been referred to in the argument; and she herself, notwithstanding the vague, general accusations which she makes in her affidavit, in which reference is made to the extracts in the second volume, does not add one other statement nor say that the publication of Lord Lytton's contains anything like the charge which is alleged.

Then as to the property in these letters. As I have said, the property is in the sendee. The property is rightly in Lady Lytton's representatives. The motion F that the deed of separation, because it provides that the household furniture and certain things enumerated shall be the separate estate of the late Lady Lytton, leaves all the rest of the property in her possession still subject to the marital control, cannot possibly be entertained. Nobody can read the deed of separation and put any such construction upon it. All the furniture and things of that sort which are there mentioned are her separate estate, but letters written to her before her marriage were her separate property notwithstanding the marriage; all that she G had acquired during the marriage with the consent and authority of her husband remains hers. Her wearing apparel and furniture, and the pony in the stable, if she had one, or any other article of which she had had the use or enjoyment, in my opinion, remained hers, notwithstanding the marriage, wholly exempt from the marital control. Another reason may be suggested why, if the right to the H property was not complete, she would still retain it. The late Lord Lytton contracts that he will not take any proceedings in the Ecclesiastical Court, as it was then called, to compel her to live with him; but there was nothing to restrain her from preferring any complaint—if she had any complaint to make, which I do not believe—and to adduce proof of it by these letters which were in her possession, and are now in the possession of her legal personal representative.

I The right, therefore, to restrain the publication of these letters, because the exclusive right to publish is not, and never was, in the representative of the late Lady Lytton, is established on this motion. The right to the possession of the letters is challenged in the second action. When the cause comes to be heard, that will be decided. It is right to say that in the meantime the defendant should not be at liberty to part with the possession of these letters, because some other defendant might be introduced who might take it into his head to publish them. Upon the two motions, therefore, I am of opinion that the plaintiff is entitled to the

injunction which he asks, restraining the publication by the defendant of any of the letters mentioned in the pleadings. And, with respect to the second motion, he is entitled to an injunction to secure the letters remaining in statu quo, not disturbing the possession of them, but restraining the publication.

Solicitors: *Gregory & Co.; Askurst, Morris, Crisp & Co.*

[Reported by G. MACAN, Esq., Barrister-at-Law.] B

Re GOODMAN'S TRUSTS

[COURT OF APPEAL (James, Cotton and Lush, L.JJ.), March 1, 4, April 18, 1881]

[Reported 17 Ch.D. 266; 50 L.J.Ch. 425; 44 L.T. 527;
29 W.R. 586]

Intestacy—Distribution—Next-of-kin—Child legitimated per subsequens matrimonium.

On the death of an intestate domiciled in England, a daughter of the intestate's deceased brother, born in Holland before her parents' marriage, but legitimated there by the subsequent marriage of her parents, claimed to be entitled to a share of the intestate's personalty.

Held (LUSH, L.J., dissentiente): such legitimated child was entitled as one of the intestate's next-of-kin.

Boyes v. Bedale (1) (1863), 1 Hem. & M. 798, disapproved.

Notes. The Statute of Distribution (1670) (9 HALSBURY'S STATUTES (2nd Edn.) 658) was repealed, except as to deaths before 1926, by the Administration of Estates Act, 1925, s. 56, Sched. 2, Part 1. See now s. 46 of that Act (9 HALSBURY'S STATUTES (2nd Edn.) 751).

The principle of legitimation by the subsequent marriage of the parents of a child born out of wedlock was introduced into the law of England by the Legitimacy Act, 1926, s. 1 (1) (2 HALSBURY'S STATUTES (2nd Edn.) 493).

Followed: *Re Andros, Andros v. Andros*, ante, p. 467. Explained: *Re Grove, G Voucher v. Treasury Solicitor* (1888), 40 Ch.D. 216. Considered: *B. & J. Abraham v. A.-G.*, [1934] p. 17; *Re Luck, Walker v. Luck*, [1940] 3 All E.R. 807. Followed: *Re Bischoffsheim, Cassel v. Grant*, [1947] 2 All E.R. 830. Referred to: *Re Wilson, Grace v. Lucas*, [1954] 1 All E.R. 997; *Bamrose v. Daniel*, [1954] 3 All E.R. 263; *Re Wilby*, [1956] 1 All E.R. 27; *Re Marshall, Barclays Bank, Ltd. v. Marshall*, [1957] 3 All E.R. 172; *Coleman v. Shang*, [1961] 2 All E.R. 406.

As persons legitimated by extraneous law, see 3 HALSBURY'S LAWS (3rd Edn.) 96; and for cases see 3 DIGEST (Repl.) 420 et seq.

Cases referred to:

- (1) *Boyes v. Bedale* (1863), 1 Hem. & M. 798; 3 New Rep. 798; 33 L.J.Ch. 283; 10 L.T. 131; 10 Jur.N.S. 196; 12 W.R. 232; 71 E.R. 349; 3 Digest (Repl.) 424, 209.
- (2) *Doe d. Birtwhistle v. Vardill* (1826), 5 B. & C. 438; on appeal (1835), 2 Cl. & Fin. 571; 9 Bli.N.S. 32; subsequent proceedings, sub nom. *Birtwhistle v. Vardill* (1840), 7 Cl. & Fin. 895; 4 Jur. 1076; 7 E.R. 1808; sub nom. *Doe d. Birtwhistle v. Vardill*, 6 Bing.N.C. 385; West, 500; 1 Scott, N.R. 828, H.L.; 3 Digest (Repl.) 424, 203.
- (3) *Fenton v. Livingstone* (1859), 3 Macq. 497; 33 L.T.O.S. 335; 23 J.P. 579; 5 Jur.N.S. 1183; 7 W.R. 671, H.L.; 3 Digest (Repl.) 423, 202.

- A (4) *Re Wright's Trusts* (1856), 2 K. & J. 595; 25 L.J.Ch. 621; 27 L.T.O.S. 219; 20 J.P. 675; 2 Jur.N.S. 465; 4 W.R. 541; 69 E.R. 920; 3 Digest (Repl.) 420, 184.
- (5) *Hensloe's Case* (1600), 9 Co. Rep. 36, b.; 77 E.R. 784; 23 Digest (Repl.) 47, 340.
- (6) *Blackborough v. Davis* (1701), 1 Ld. Raym. 684; 1 Com. 96, 108; Holt, K.B. 43; 1 P. Wms. 41; 1 Salk. 38, 251; 12 Mod. Rep. 615; 91 E.R. 1355; 23 Digest (Repl.) 247, 3009.
- B (7) *Dalrymple v. Dalrymple* (1811), 2 Hag. Con. 54; 161 E.R. 665; on appeal (1814), 2 Hag. Con. 137, n.; 22 Digest (Repl.) 618, 7112.
- (8) *Shedden v. Patrick* (1854), 23 L.T.O.S. 194; 1 Macq. 535, H.L.; 3 Digest (Repl.) 426, 219.
- C (9) *Strathmore Peerage Case* (1821), 6 Bli.N.S. 487; 54 Lords' Journals, 554; 5 E.R. 673, H.L.; 3 Digest (Repl.) 420, 183.
- (10) *Skottowe v. Young* (1871), L.R. 11 Eq. 474; 40 L.J.Ch. 366; 24 L.T. 220; 19 W.R. 583; 3 Digest (Repl.) 425, 212.
- (11) *Re Wilson's Trusts* (1865), L.R. 1 Eq. 247; 35 L.J.Ch. 243; 30 J.P. 163; 14 W.R. 161; sub nom. *Re Wilson's Trusts, Ex parte Shaw*, 13 L.T. 576; 12 Jur.N.S. 132; affirmed, sub nom. *Shaw v. Gould* (1868), L.R. 3 H.L. 55; 37 L.J.Ch. 433; 18 L.T. 833, H.L.; 44 Digest 808, 6613.
- D (12) *Re Don's Estate* (1857), 4 Drew. 194; 27 L.J.Ch. 98; 30 L.T.O.S. 190; 21 J.P. 694; 3 Jur.N.S. 1192; 5 W.R. 836; 62 E.R. 75; 3 Digest (Repl.) 424, 205.
- (13) *Thomson v. Advocate-General* (1845), 12 Cl. & Fin. 1; 13 Sim. 153; 4 L.T.O.S. 389; 9 Jur. 217; E.R. 1294, H.L.; 11 Digest (Repl.) 385, 456.
- E (14) *Arnold v. Arnold* (1837), 2 My. & Cr. 256; Donnelly, 252; 6 L.J.Ch. 218; 1 Jur. 255; 47 E.R. 353, L.C.; 21 Digest (Repl.) 109, 547.
- (15) *Wallace v. A.-G., Jeyes v. Shadwell* (1865), 1 Ch. App. 1; 35 L.J.Ch. 124; 13 L.T. 480; 11 Jur.N.S. 937; 14 W.R. 116, L.C.; 21 Digest (Repl.) 111, 558.
- F (16) *Udny v. Udny* (1869), L.R. 1 Sc. & Div. 441, H.L.; 3 Digest (Repl.) 420, 182.
- (17) *Goodman v. Goodman* (1862), 3 Giff. 643; 6 L.T. 641; 8 Jur.N.S. 554; 66 E.R. 565; 3 Digest (Repl.) 421, 190.
- (18) *Sussex Peerage Case* (1844), 11 Cl. & Fin. 85; 6 State Tr.N.S. 79; 3 L.T.O.S. 277; 8 Jur. 793; 8 E.R. 1034, H.L.; 11 Digest (Repl.) 566, 40.
- G Also referred to in argument:
Munro v. Saunders (1832), 6 Bli.N.S. 468; 5 E.R. 665, H.L.; 3 Digest (Repl.) 421, 187.
Rose v. Rose (1840), 4 Wils. & S. 289, H.L.; 3 Digest (Repl.) 424, 207.
Enohin v. Wylie (1862), 10 H.L.Cas. 1; 31 L.J.Ch. 402; 6 L.T. 263; 8 Jur.N.S. 897; 10 W.R. 467; 11 E.R. 924, H.L.; 23 Digest (Repl.) 243, 2947.
- H *Dogliani v. Crispin* (1866), L.R. 1 H.L. 301; 35 L.J.P. & M. 129; 15 L.T. 44, H.L.; 23 Digest (Repl.) 115, 1172.
Munro v. Munro (1840), 7 Cl. & Fin. 842; 7 E.R. 1288, H.L.; 3 Digest (Repl.) 421, 188.

I **Appeal** from a decision of SIR GEORGE JESSEL, M.R., reported 14 Ch.D. 619, in an administration action.

The testatrix, Rachel Goodman, spinster, died, domiciled in England, in 1878, having bequeathed a third part of her residuary personal estate to a niece who had died during the testatrix's lifetime. At the date of the death of the testatrix her sole relatives were the children of her two deceased brothers, Isaac and Leyon Goodman. Of Isaac there were four children living. Leyon Goodman had three children by Charlotte Smith, born respectively in 1815, 1818, and 1820, in London. In 1820 he left England with the intention of permanently residing abroad, and went to Amsterdam, whither he was followed by Charlotte Smith and the three

children, and he resided there until 1826. From that date until that of his death in 1832 he resided in Brussels; and while at Amsterdam he had by Charlotte Smith another child, born in 1821 (afterwards Mrs. Pieret), and after her birth in 1822 he married Charlotte Smith at Amsterdam, and by the act or register of marriage it was declared that the parents intended to legitimise all the children before mentioned. After such marriage there was a fifth child born (afterwards Mrs. Denis). The four children born before the marriage were, according to the law of Holland, legitimate.

The question was, whether Mrs. Pieret could take as next-of-kin a part, according to the Statute of Distribution, in the share which had lapsed by the death of the niece of the testatrix. SIR GEORGE JESSEL, M.R., held that Mrs. Pieret, being illegitimate according to English law, could not so take. Mrs. Pieret appealed.

Davey, Q.C., and *Speed* for Mrs. Pieret.

Alexander for Mrs. Denis.

Brabant and *Bleby* for other parties.

Cur. adv. vult.

April 13, 1881. **LUSH, L.J.**—This case raises a question of great importance—viz., whether, in the administration of the goods of an intestate English subject domiciled in England, a child of the intestate's brother, born illegitimate in Holland but legitimated in that country by the subsequent marriage of the father and mother, both being at the time of the birth and marriage domiciled in Holland, is entitled to claim as one of the next-of-kin under the Statute of Distribution.

The contention on the part of Mrs. Pieret is, that her status in Holland as a legitimated child of the brother of the intestate entitles her as brother's child within the meaning of that statute, thus raising the question whether the statute is to be interpreted with reference to the civil law or to the common law. It was admitted, and, as far as my researches have enabled me to form an opinion, rightly admitted by the counsel on both sides, that no decision is to be found in our books which sanctions such a construction. It is well established that the distribution of an intestate's property is governed by the law of his domicile. If the father of the claimant, being domiciled in Holland and dying intestate, had left personal property in this country, our courts would have administered it, not under the Statute of Distribution, but according to the law of Holland, and in that administration the claimant would have been treated as one of his lawful children. To that extent, and with reference to that course of administration, it might truly have been said that the status in her own country was recognised and accepted as her status here. But we are dealing with the estate of an intestate who was domiciled in England, and in such a case the administration is to be according to English law. This is admitted on all sides, but then it is argued for Mrs. Pieret that English law, even when it has to deal with an English estate, has so far yielded to the comity of nations as to accept the status, established by the law of the claimant's domicile, and, departing from its own table of consanguinity, to treat as of kin a person who, if born in this country, would have been *filius nullius*. This is the point on which I have the misfortune to differ from my learned colleagues.

The only authority for this doctrine is to be found in the opinion of foreign jurists, and in some dicta of our own judges based on those opinions. It will be remembered that in the well-known case of *Doe d. Birtwhistle v. Vardill* (2), which I shall presently have to discuss more fully, LORD BROUGHAM warmly advocated this doctrine in the House of Lords, and, with perfect consistency, sought to carry it to its full extent as applicable to the succession to lands where, as in that case, the alleged heir was a British subject; but the House declined to adopt his view, and decided that a Scotsman, legitimated in Scotland by the subsequent marriage of his parents, could not take as heir to his father in England, because he was not born in lawful wedlock. I cannot help remarking, in passing, that, this point being established, a decision in favour of the present claimant would now present the

A singular anomaly pointed out by LORD BROUGHAM, that the same person may be both legitimate and illegitimate in the same country—legitimate as regards succession to personalty, illegitimate as regards succession to real estate. In Mrs. Pieret's own country no such anomaly exists. She is legitimated there for all purposes. But if she died seised of real estate in this country, intestate and childless, her estate would undoubtedly go to the Crown, although her personalty, if she succeed in her present claim, would go to those who, by the law of Holland, are her kindred.

I believe I may say, with perfect accuracy, that no trace of such an inroad on the ancient common law of England is to be found in any digest or treatise on English law, nor in any dicta of judges, until comparatively modern times. That it was part of the ancient law of England that a person born out of lawful wedlock was deemed *filius nullius* cannot be disputed. And, as such a person had no kindred in the ascending line, it follows that he had no collateral relations. The oft-quoted Statute of Merton (20 Hen. 3, c. 9) shows that the clergy of that day sought to introduce the canon law, which, like the civil law, recognised the subsequent marriage of the parents as legitimating the previous issue, but that the barons stoutly resisted it. To understand the early part of this statute, it must be remembered that general bastardy, where it was put directly in issue whether in a real or in a personal action (2 ROLLE'S ABRIDGMENT, 586, tit. Triall, Bastardie, 30; 1 ROLLE'S ABRIDGMENT, 361, tit. Bastardie, L. 1) was tried by certificate of the ordinary, the validity of the marriage being supposed to be within the exclusive cognisance of the Church (COMYNS DIGEST, Bastardy, D. 2); but special bastardy, as it was called, of which the question put in the King's writ, mentioned in the statute, is an instance, was tried by the country—that is, by the rules of the common law (*ibid.*); and general bastardy, when not put directly in issue, was also tried by the country. This explained the answer of the bishops to the King's writ. The Statute of Merton is in these terms:

“To the King's writ of bastardy, whether one being born before matrimony may inherit in like manner as he that is born after, all the bishop answered, that they would not, nor could not, answer it, because it was directly against the common order of the church. And all the bishops instanted the lords that they would consent that all such as were born afore matrimony should be legitimate, as well as they that be born within matrimony, as to the succession of inheritance, forsomuch as the church accepth such for legitimate. And all the earls and barons with one voice answered that they would not change the laws of the realm, which hitherto have been used and approved.”

It was argued that this decision of the barons affected only the law of inheritance, and that it may be inferred, from the demand of the bishops being confined to that branch of our law, that the canon law already prevailed in the succession to personalty; and some of the reasoning in *Doe d. Birtwhistle v. Vardill* (2) undoubtedly favours this view. But this appears to me to be pure speculation, and, when the subject is considered in all its bearings, it will be seen that there is no foundation for it.

It is easy to conceive why, at that day, prominence should be given to real estate, and that the bishops might well conclude that, if the canon law were introduced into the law of inheritance, it would be let in without hesitation to the succession to personalty. The church had no more jurisdiction to certify the question proposed in the writ in a personal, than in a real, action. It was always tried by the country. It is true that the ordinary had at that time the disposal of the goods of an intestate, and, after paying the widow and children their *partes rationabiles*, they might apply the surplus as they pleased, free from the control of the temporal courts (2 BLACKSTONE'S COMMENTARIES, 494–5; 1 WILLIAMS ON EXECUTORS (8th Edn.), pt. 1, bk. v, p. 402). How they disposed of the surplus is immaterial to the present question. If the common law had recognised any distinction at that time between the succession to real and the succession to

personal estate, it would have been a strong argument for the bishops, and something, one would expect, would have been said about it. A

The Statute of Merton has been the subject of further consideration since *Doe d. Birtwhistle v. Vardill* (2) was decided. Even LORD BROUGHAM, who so strenuously opposed that decision, said, in the later case of *Fenton v. Livingstone* (3) that *Doe d. Birtwhistle v. Vardill* (2),

"in some of the opinions of the learned judges below, is supposed to have been decided in consequence of a statutory provision; but the Statute of Merton is only declaratory of the common law, or rather it is a refusal to alter that law." B

LORD WENSLEYDALE expressed himself to the same effect, and Wood, V.-C., in his judgment in *Re Wright's Trusts* (4), says (25 L.J.Ch. at p. 627):

"Ever since the discussion that took place in *Doe d. Birtwhistle v. Vardill* (2), it has been acknowledged by all parties, and by LORD BROUGHAM, who was opposed to the view of the judges, that the Statute of Merton, though it is confined to the inheritance of lands, is nevertheless to be taken as a declaratory Act of the common law as it existed. That is strongly verified by the presumption which arises from the contemporaneous change in the form of the writ directed to the bishop, which used to be open, but which, from fear of the bishop's attachment to the law of the church, they have altered, and instead of sending an open writ to him as to bastardy in an open form, they always send to inquire whether the child was born in wedlock." C D

I have already shown that, when bastardy was put directly in issue, the writ went to the bishop to certify as well in a personal as in a real action. I, therefore, read the Statute of Merton, as declaring that no innovation on the ancient law of England, of the nature of that demanded by the bishops, shall be made at all. Not that the civil law was unknown to or unnoticed by the temporal courts. In 1 ROLLE'S ABRIDGMENT, tit. "Bastard" D, it is said, quoting 47 Edw. 3, 14 b.; 11 Hen. 4, 84; BRACTON, lib. 5, fol. 416, 417: E

"Si A. ad issue per B. et puis ils intermarrie, uncore l'issue est bastard per nostre ley. Mes mulier per ley ciuill," F

mulier being the designation of one born of a wife. There is here no suggestion of any distinction between successor to real and successor to personal estate. BLACKSTONE thus deals with the question who are bastards (book I, c. 16, original ed. vol. 1, p. 442):

"A bastard, by our English laws, is one that is not only begotten, but born out of lawful matrimony. The civil and canon laws do not allow a child to remain a bastard if the parents afterwards intermarry; and herein they differ most materially from our law, which, though not so strict as to require that the child shall be begotten, yet it makes it an indispensable condition that it shall be born after lawful wedlock. And the reason of our English law is surely much superior to that of the Roman, if we consider the principal end and design of establishing the contract of marriage, taken in a civil light, abstractedly from any religious view, which has nothing to do with the legitimacy or illegitimacy of the children. The main end and design of marriage, therefore, being to ascertain and fix upon some certain person to whom the care, the protection, the maintenance, and the education of the children should belong; this end is undoubtedly better answered by legitimating all issue born after wedlock, than by legitimating all issue of the same parties, even born before wedlock, so as wedlock afterwards ensues: 1. Because of the very great uncertainty there will generally be in the proof that the issue was generally begotten by the same man, whereas, by confining the proof to the birth, and not to the begetting, our law has rendered it perfectly certain what child is legitimate, and who is to take care of the child. 2. Because by the Roman law a child may be continued a bastard, or made legitimate, at the option of the father and mother, by a marriage ex post facto, thereby opening a door to many frauds and G H I

A partialities, which by our law are prevented. 3. Because by those laws a man may remain a bastard till forty years of age, and then become legitimate by the subsequent marriage of his parents; whereby the main end of marriage, the protection of infants, is totally frustrated. 4. Because this rule of the Roman law admits of no limitations as to the time or number of bastards so to be legitimated; but a dozen of them may, twenty years after their birth, by the subsequent marriage of their parents, be admitted to all the privileges of legitimate children. This is plainly a great discouragement to the matrimonial state, to which one main inducement is usually not only the desire of having children, but also the desire of procreating lawful heirs. Whereas our constitutions guard against this indecency, and at the same time give sufficient allowance to the frailties of human nature. For, if a child be begotten while the parents are single, and they will endeavour to make an early reparation for the offence by marrying within a few months after, our law is so indulgent as not to bastardise the child, if it be born, though not begotten, in lawful wedlock; for this is an incident that can happen but once, since all future children will be begotten, as well as born, within the rules of honour and civil society. Upon reasons like these we may suppose the peers to have acted at the Parliament of Merton, when they refused to enact that children born before marriage should be esteemed legitimate. From what has been said it appears that all children born before matrimony are bastards by our law."

In another chapter (book II, c. 15, original ed. vol. 2, p. 248) BLACKSTONE states one instance in which our law has shown indulgence to persons born out of lawful wedlock, but whose parents afterwards intermarry. He says:

E "There is indeed one instance in which our law has shown them some little regard, and that is usually termed the case of bastard eigné and mulier puisné. This happens when a man has a bastard son and afterwards marries the mother and by her has a legitimate son, who in the language of the law is called a mulier, or, as GLANVILLE expresses it in his Latin, *filius mulieratus*, the woman before marriage being *concubina*, and afterwards *mulier*. Now here the eldest son is bastard, or bastard eigné, and the younger son is legitimate or mulier puisné. If then the father dies and the bastard eigné enters upon his land and enjoys it to his death, and dies seised thereof, whereby the inheritance descends to his issue, in this case the mulier puisné and all other heirs (though minors, feme coverts, or under any capacity whatsoever) are totally barred of their rights. And this (1) as a punishment on the mulier for his negligence in not entering during the bastard's life, and evicting him; (2) because the law will not suffer a man to be bastardised after his death who entered as heir and died seised, and so passed for legitimate in his lifetime; (3) because the canon law (following the civil) did allow such bastard eigné to be legitimate on the subsequent marriage of his mother, and therefore the laws of England (though they would not admit either the civil or canon law to rule the inheritances of this kingdom yet) paid such regard to a person thus peculiarly circumstanced, that after the land had descended to his issue, they would not unravel the matter again and suffer his estate to be taken. But this indulgence was shown to no other kind of bastard, for, if the mother was never married to the father such bastard could have no colourable title at all."

I These extracts, written nearly a century after the passing of the Statute of Distribution, show that the learned commentator was not aware of any concession to the canon and civil law which should entitle a legitimated *ante natus* to rank in our table of consanguinity as a child born in wedlock. If he had, surely he would in one or other of these passages have mentioned it.

The ordinary continued to have the disposal of the goods of an intestate until the statute 31 Edw. 3, stat. 1, c. 11. That Act required him to depute "the next and most faithful friends" of the intestate to administer his goods. "That is," said COKE, "the next of blood who are not attainted of treason, felony, or have other

lawful disability, but are lawful friends": *Hensloe's Case* (5). This is the original of administrator: WILLIAMS ON EXECUTORS (8th Edn.), pt. 1, bk. 5, p. 415. The statute 21 Hen. 8, c. 5, s. 3, is founded on the authorities cited by COKE. It enlarges, in some degree, the power of the ecclesiastical judge by providing that in case any person dies intestate, or the executor named in any testament refuse to prove it, the ordinary shall grant administration to "the widow of the deceased, or to the next of his kin, or to both, as by the discretion of the same ordinary shall be thought good," and the section goes on to say that

"where divers persons claim the administration as next-of-kin, which be equal in degree of kindred to the testator, or persons deceased, and where any person only desireth the administration, as next-of-kin, where indeed divers persons be in equality of kindred as is aforesaid, that in every such case the ordinary to be at his election and liberty to accept any one or more making request where divers do require the administration."

The "next-of-kin" mentioned in this statute are the "next-of-kin" mentioned in the Statute of Distribution. Any person filling that relation so as to be entitled to share in the distribution is entitled in his order, subject to the discretion of the ordinary given by the last-quoted Act, to take out administration. I have been unable to find an instance in which administration to an English estate has been granted to, or even applied for by a child born out of wedlock, but domiciled and legitimated in a foreign country. WILLIAMS, J., says (WILLIAMS ON EXECUTORS (8th Edn.), p. 1493):

"It is obvious to observe how near a resemblance this Statute of Distribution bears to the ancient English law de rationabile parte bonorum.... It also bears some resemblance to the Roman law of succession, ab intestato, which, and because the Act was also penned by an eminent civilian (SIR WALTER WALKER), has occasioned a notion that the Parliament of England copied it from the Roman Prætor, though it is little more than a restoration with some refinements and regulations of our old constitutional law, which prevailed as an established right and custom from the time of King Canute downwards, many centuries before JUSTINIAN's laws were known or heard of in the western parts of Europe."

And HOLT, C.J., laid it down in *Blackborough v. Davis* (6), in reference to this statute, that if the spiritual court attempted a distribution, contrary to the rules of the common law, the court would prohibit them, "for by that statute," said he, "they are restrained to the rules allowed among us."

I now come to the dicta of judges which are supposed to sanction the doctrine contended for by the applicant, viz., that English law recognises for the purposes of succession to the personal estate of an intestate domiciled in England, the status of legitimacy which the applicant has acquired in his or her foreign domicile. The first in order and importance is *Doe d. Birtwhistle v. Vardill* (2) (first reported in 5 B. & C. 438). The facts were that W. domiciled in England, died intestate, leaving one brother, who was domiciled in Scotland, and who, after having had an illegitimate son, married the mother of the child, who thereby became, by the law of Scotland, legitimated. The plaintiff was that son, and he claimed to inherit the lands in England as heir to W. TINDAL, who afterwards became Lord Chief Justice of the Common Pleas, contended for the plaintiff that legitimacy was a personal status which accompanied the man wherever he went, and, after citing HUBER, DE CONFLICTU LEGUM, bk. 1, tit. 3, and other writers on international law, in support of the proposition, said it must be conceded that the rules laid down by these writers could only apply where our laws admit the existence of a corresponding status, and where they are not at variance with any positive law, and instanced the status of slavery as one which was not recognised in this country. After quoting *Dalrymple v. Dalrymple* (7), that the validity of a foreign marriage must be tried by the law of the country where it was celebrated, and that the status

A thereby acquired is recognised in every other country, he says (5 B. & C. at pp. 443, 450):

B "In like manner in cases of intestacy, the foreign law prevailing at the place of the intestate's domicile has governed the distribution of property in this country. . . . The argument for the plaintiff only extends to the recognition of the status of marriage and of legitimacy, which are known to the whole of Europe where Christianity is professed. We do recognise the foreign marriage, why not the consequences also?"

C The counsel on the other side pressed on the court that this country does not recognise any foreign status where it is contrary to the spirit of our moral, religious, and political opinions. I have set out the substance of the argument in order to explain passages in the judgment which are ambiguous, and which I venture to think have been misunderstood. ABBOTT, C.J., said (*ibid.*, at pp. 451, 452):

D "The rule as to the law of domicile has never been extended to real property, nor have I found in the decisions of Westminster Hall any dictum giving countenance to the idea that it ought to be so extended. Two decisions in the House of Lords have, however, been referred to whence it has been said such an opinion may be inferred. It is, therefore, satisfactory to know that this case may be carried before that tribunal. There being no authority for saying that the right of inheritance follows the domicile of the parties, I think it must follow that of the country where the land lies. Personal property has no locality, and, even with respect to that, it is not correct to say that the law of England gives way to the law of a foreign country, but that it is part of the law of England that personal property should be distributed according to the *jus domicilii*. It is not against our law that a foreign marriage, however solemnised, should be held good. We adopt the law of all Christian countries as to marriage; but it by no means follows that we are to adopt all the consequences of such marriages which are recognised in foreign countries—it is sufficient if we admit all such consequences as follow from a lawful marriage solemnised in this country."

F The single paragraph that "it is part of the law of England that personal property should be distributed according to the *jus domicilii*" forms the basis of Mrs. Pieret's argument. But to my mind it is obvious, looking to the argument and the well-established rules of distribution, that the domicile referred to is not that of the person who claims to participate in the distribution, but the domicile of the intestate whose property is under administration. The property of an intestate domiciled in a foreign country is, and always has been, distributed according to the foreign law; and, if the property in question had belonged to a person domiciled in Holland, Mrs. Pieret would undoubtedly have been entitled. But the property of an intestate domiciled in England is, and always has been distributed according to English law. The concluding sentence of the judgment expresses the view of the Lord Chief Justice as to the law of England, and limits its recognition of the consequences of marriage to such as follow from a lawful marriage in England. BAYLEY, J., says (*ibid.*, at p. 453):

H "I concede that the *lex loci* governs the question of marriage, but whether all the consequences recognised in a foreign country as following upon a marriage there are also to be recognised in this country, is a very different question, and I think must be answered in the negative."

I HOLROYD and LITTLEDALE, JJ., expressed themselves to the same effect. Though the judgment is confined to the point in question, viz., the right of succession to real estate, the observations quoted in answer to the arguments show conclusively, to my mind, that neither of these judges would, under the circumstances of this case, have sanctioned the appellant's claim.

The two cases in the House of Lords quoted in the argument and referred to by the Lord Chief Justice are *Shedden v. Patrick* (8) and *Strathmore Peerage Case*

(9). *Shedden v. Patrick* (8) was an appeal from the Court of Session. W. Shedden of New York entered into a regular marriage there with a woman who had previously borne him two children. He died there intestate, having an estate in Ayrshire. The marriage had not the effect in that country of rendering the children legitimate. It was held that the son could not inherit the estates in Scotland, because his legitimacy or illegitimacy must be determined according to the laws of America, where his parents were domiciled, and where he was born, and by the laws of that country he was illegitimate. It was argued in *Doe d. Birtwhistle v. Vardill* (2) and perhaps rightly argued, that if the claim in *Shedden v. Patrick* (8) had been founded on circumstances similar to those on which the case in question depended, the claim would have been established by the House of Lords, for the House was sitting to administer the law of Scotland; and, if the civil law had prevailed in America as it prevailed in Scotland, the claimant might have been held legitimate by the law of Scotland and entitled to inherit. The *Strathmore Peerage Case* (9) was decided on the same principle.

It cannot, I should think, be doubted that a person legitimated by a subsequent marriage would, in any country where the canon or civil law prevails, be recognised as legitimate; but we are dealing with English law, which has never that I can find adopted this rule of the canon or civil law, but, on the contrary, has persistently repudiated it, and steadily abided by the common law of England.

The next reported stage of *Doe d. Birtwhistle v. Vardill* (2) is in 2 Cl. & Fin. 57, and 9 Bli.N.S. 32. The question had been argued before the judges, and their opinion was delivered by ALEXANDER, C.B. It is clear that the opinion of foreign jurists had influenced the learned judges, and they drew a distinction between what is there called "real and personal status," the last being that which respects the person, and follows it everywhere; the first that which is connected with the land and adherent to it, and is as immovable as the subject to which it is applied. They intended this doctrine, I have no doubt, to be applied as well to the administration of the goods of an intestate domiciled in England as to those of an intestate domiciled abroad. The quotation from LORD STOWELL's judgment in *Dalrymple v. Dalrymple* (7) shows how strongly they had been prepossessed in favour of this distinction. *Dalrymple v. Dalrymple* (7) was a suit by an alleged wife for restitution of conjugal rights, and the only question touched on by the judgment was the validity of a Scottish marriage. After recapitulating the facts, LORD STOWELL (then SIR WILLIAM SCOTT) says (2 Hag. Con. at pp. 58, 59):

"Being entertained in an English court, the cause must be adjudicated according to the principles of English law applicable to such a case. But the only principle applicable to such a case by the law of England is, that the validity of Miss Gordon's marriage rights must be tried by reference to the law of the country, where, if they exist at all, they had their origin. Having furnished this principle, the law of England withdraws altogether, and leaves the legal question to the exclusive judgment of the law of Scotland."

Not a word is said, from the beginning to the end of a long and elaborate judgment devoted to the effect of the evidence, on the single question of marriage or no marriage, as to the status of the children here or in Scotland, for no such question could possibly arise in that case. Yet ALEXANDER, C.B., quotes it as if it dealt with the status of ante-born children. He says, at the commencement of the judgment, after stating that the first question in order regarded the status or condition of the then claimant (2 Cl. & Fin. at pp. 573, 574):

"I believe I express the opinions of the judges when I say, in the well-considered language of LORD STOWELL in *Dalrymple v. Dalrymple* (7),

"The cause being entertained in an English court must be adjudicated according to the principles of English law applicable to such a case: but the only principle applicable to such a case by the law of England is, that the status or condition of the claimant must be tried by reference to the law of the

A country where the status originated. Having furnished this principle, the law of England withdraws altogether, and leaves the question of status in the case put to the law of Scotland.'

Such is the sentiment of that great judge, and such is his language varied only so far as to apply to a question of legitimacy what was said of a question respecting the validity of a marriage."

B Thus, the preliminary question in the cause leading up to the point which the court had to determine was, notwithstanding what had been said by the judges in the court below, without reasoning or discussion quietly assumed. DR. STORY, I may here observe, adopts the version of *Dalrymple v. Dalrymple* (7) given by ALEXANDER, C.B., and, starting from that, broadly lays it down that the status of legitimacy or illegitimacy, decided by the law of the place where the marriage took place, must be deemed equally true and valid everywhere else, quoting *Doe d. Birtwhistle v. Vardill* (2) from the report in 9 Bli.N.S. 32 (STORY, CONFLICT OF LAWS, 93 e.). The judges nevertheless, resting on the Statute of Merton, were of opinion that this doctrine was not applicable to immovable property, and advised the House that the claimant, not being born in wedlock, could not inherit as heir.

D LORD BROUGHAM strongly opposed both the distinction between movable and immovable property, which the judges had drawn, and their conclusion, and advocated the adoption of the civil law as regards succession in both cases. He pointed out with great force the anomalies and inconveniences which would result from such a distinction (2 Cl. & Fin. at pp. 595, 596):

E "That a man may be bastard in one country and legitimate in another seems of itself a strong position to affirm, but more staggering is it when it is followed up by this other, that in one and the same country he is to be regarded as bastard when he comes into one court to claim an estate in land, and legitimate when he resorts to another to obtain personal succession; nay, that the same court of equity, when the real estate happens to be impressed with a trust, must view him as both bastard and legitimate in respect of a succession to the same intestate. Further still, should he happen to be next-of-kin to his uncle, who had a mortgage upon the estate, he must be denied his succession to the land of the mortgagor in his quality of bastard, and be allowed to come in as an incumbrancer upon the selfsame estate in his capacity of legitimate son of the same mortgagor. All this is assumed to be law by the learned judges who have decided below, and advised your Lordships here. . . . May I be permitted most respectfully to express a doubt whether or not this question has received all due consideration at the hands of those learned judges, and whether they have not dealt with it a little too easily; made somewhat too light of it."

G The learned Lord, deeming the decision wrong, thought it desirable that the case should undergo further consideration. LORD LYNDBURST expressed himself as struck with some of the views put by LORD BROUGHAM, and thought they required very full and patient consideration, and, LORD DENHAM concurring, the case was ordered to be further argued before the judges. In 1840 the case was argued again before TINDAL, C.J., VAUGHAN, BOSANQUET, PATTESON, WILLIAMS, COLERIDGE, COLTMAN, and MAULE, JJ., and PARKE and GURNEY, BB., and the unanimous opinion of the judges was delivered by TINDAL, C.J. One cannot but observe a marked difference between this opinion and that delivered by ALEXANDER, C.B. The opinions of foreign jurists were, as before, insisted on by counsel, but, instead of taking for granted the proposition that the status of the claimant, as regards succession to chattels, must be tried by reference to the law of the country where the status originated, TINDAL, C.J., left that question untouched. He said (7 Cl. & Fin. at pp. 935, 937):

"There can be no doubt but that marriage, which is a personal contract when entered into according to the rites of the country where the parties are domiciled and the marriage celebrated, must be considered and treated as a proper

and complete marriage throughout the whole of Christendom. But it does not, therefore, follow that with the adoption of the marriage contract the foreign law adopts also all the conclusions and consequences which hold good in the country where the marriage was celebrated. . . . But admitting, for the sake of argument, and we are not called upon to give our opinion on that point, that B., legitimate in Scotland, is to be taken to be legitimate all over the world, the question still recurs whether for the purpose of constituting an heir to land in England something more is not necessary to be proved on his part than such legitimacy; and if we are right in the grounds on which we have rested the first point, one other step is necessary, viz., to prove that he was born after an actual marriage between his parents."

No doubt this was said with reference to the succession to real estate, the point in question in the cause. But what I desire to call attention to is, that the ultimate opinion of the judges gives no sanction to the appellant's claim, but leaves that question open. LORD BROUGHAM adhered to his former opinion, though he did not oppose the judgment being affirmed. The case, therefore, stands as a binding authority that, for the purpose of succession to real estate, the foreign status of legitimacy by the subsequent marriage of the parents is not recognised by the law of England. It remains to be decided, so far as this case or any other case up to 1840 (the date of this judgment) is concerned, whether the solecism already pointed out shall be introduced into our law, or whether the succession to personal estate, always supposing it to be the estate of an intestate domiciled in England, shall follow the succession to realty.

I now come to *Skottowe v. Young* (10), as to legacy duty, on which great stress was laid by the counsel for Mrs. Pieret. There, an Englishman by birth, but domiciled in France, was possessed of considerable real estate in England. He married in France a French lady, by whom he had previously had two daughters, and these daughters were legitimate according to French law, and placed on the same footing as children born in wedlock. By his will he devised his real estate to trustees on trust for sale and conversion, giving a share in the proceeds to each of his two legitimate daughters, whom he described in the will as his daughters. The question argued was, at what rate legacy duty was to be paid upon these legacies. The Commissioners of Inland Revenue claimed 10 per cent, on the ground that these daughters were illegitimate and "strangers in blood" within the meaning of the Legacy Duty Act (55 Geo. 3, c. 184), s. 2. The petition prayed for a declaration that the legacy duty was only 1 per cent., treating them as children of the testator. STUART, V.-C., in giving judgment, referred to *Birtwhistle v. Vardill* (2) as a case in which it was admitted that the claimant then held in England the status of a legitimate son, except for the purpose of inheriting real estate, and treated these legatees, therefore, as entitled to rank as children, and in that character liable to a duty of only 1 per cent. The Vice-Chancellor's estimate of the effect of *Doe d. Birtwhistle v. Vardill* (2) is, I venture to say, certainly erroneous. Very different was LORD CRANWORTH's view, as expressed by him in *Shaw v. Gould* (11) (L.R. 3 H.L. at p. 70):

"The opinions of the judges in that case, and of the noble Lords who spoke in the House, left untouched the question of legitimacy, except so far as it was connected with succession to real estate. I think they inclined to the opinion that for purposes other than succession to real estate, for purposes unaffected by the Statute of Merton, the law of domicile would decide the question of status. No such decision was come to, for no question arose except in relation to heirship to real estate. But the opinion given in the case seems to me to show a strong bias towards the doctrine that the question of status must, for all purposes unaffected by the feudal law as adopted and acted on in this country, be decided by the law of the domicile."

This is all that can be said of *Doe d. Birtwhistle v. Vardill* (2), so far as it bears on the question now under discussion, and more than can be said of the opinions of the judges in the second argument.

- A KINDERSLEY, V.-C., took what I venture to call the same erroneous view of *Doe d. Birtwhistle v. Vardill* (2) in his judgment in *Re Don's Estate* (12), as STUART, V.-C., took. But this is not the only part of the judgment of STUART, V.-C., which is unsatisfactory. It had been established twenty-six years before by the House of Lords, in *Thomson v. Advocate-General* (13), as a general principle of law applicable to all such cases, that personal property in England follows the law of the domicile of the testator or intestate, and that it is precisely the same as if the personal property had been in the foreign domicile at the time of his death. Further, that the Act imposing legacy duties was limited to Great Britain, and that, notwithstanding the general terms contained in the schedule, those terms must be read in connection with the first section of the Act, and must receive that limited construction and interpretation which is alone consistent with the first section. On these principles it was decided that where a British-born subject died domiciled in Demerara, possessed of personal property in Scotland, probate being taken out there for the purpose of administering and legacies paid to legatees residing in Scotland, such legacies were not liable to legacy duty. In *Thomson v. Advocate-General* (13) LORD LYNTHURST, L.C., referred to what LORD COTTENHAM, L.C., said in *Arnold v. Arnold* (14) (2 My. & Cr. at p. 270) that, independently of authority, he should, on the construction of the Legacy Duty Act, 1796, s. 2, have been of opinion that the legacies in question were not legacies given by the will of a person intended by the Act, for that when the Act speaks of "any will of any person," and of the legacies being payable out of the personal estate, it must be considered as speaking of persons and wills and personal estate in this country, that being the limit of the sphere of the enactment.
- E After the passing of the Succession Duty Act (16 & 17 Vict., c. 51), an attempt was made to charge such legacies with succession duty. This also failed, and on the same grounds: *Wallace v. A.-G.* (15). This decision, which was by CRANWORTH, L.C., was given five years before *Skottowe v. Young* (10) was argued, yet none of the three cases was referred to by STUART, V.-C. If any distinction could be drawn between a legacy bequeathed out of the proceeds of land directed to be sold (which is in terms chargeable with legacy duty under the Act) on the ground that, at the date of the testator's death, it was real estate, it would have been satisfactory to know that that point was taken and dealt with; but it was not. The legacies were treated throughout as payable out of personality. "The trust for conversion," said the Vice-Chancellor, "is valid, and the subject of the gift is, therefore, personal estate." If this had been legacies out of personality
- G no duty would have been payable. If legacy duty had been payable in this case, the decision would have been quite right. For the court was administering a foreign, not an English estate, and as by the foreign law the petitioners took as children of the testator, they could not be charged in any other character.
- H One other case supposed to be favourable to Mrs. Pieret remains to be noticed. It is *Fenton v. Livingstone* (3). LORD WENSLEYDALE's judgment is quoted as supporting Mrs. Pieret's claim. I read it in an entirely opposite sense. The question in the cause related to the succession to real estate in Scotland, and to that only. The claimant was the issue of an incestuous marriage in England, which was solemnised before the passing of the Marriage Act, 1835, and in the Scottish courts he was held entitled to succeed as heir, because the mother being dead and the marriage not having been questioned in the lifetime of the parties must be taken as a valid marriage. The Lords reversed this decision. In giving judgment, LORD WENSLEYDALE said:
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"It must be considered as established that the law of a man's domicile regulates his rights to personal property, wherever situated, upon the acknowledged principle of *mobilia sequuntur personam*, and, therefore, the succession to his effects takes place according to the law of the place where he is domiciled at the time of his death in the cases of intestacy or testacy. It is now fully and perfectly settled by our law that the law of the domicile regulates the

distribution of personal estate in the former case, and the form of the will in the latter. The law of the domicile also regulates the personal qualities which take effect from birth, such as legitimacy or illegitimacy, absolutely as to the succession of personal property, but subject to a qualification as to realty. The laws of the State affecting the personal status of its subjects travel with them wherever they go, and attach to them in whatever country they are resident."

It must be admitted that there is some obscurity in the first and last of these passages. But, read with the intermediate passages, they appear to me clearly to mean that his rights "as to the disposition of his personal property are regulated by the law of the domicile," "and, therefore, the succession to his effects takes place according to the law of the place where he is domiciled," not where the claimant is domiciled. So in the next sentence.

"The law of the domicile [that is the same domicile spoken of, the domicile of the owner of the property] regulates also the personal qualities which take effect from birth, such as legitimacy or illegitimacy, absolutely as to the succession to personal property, but subject to a qualification as to realty."

The argument is, a person who is legitimate in England, but not legitimate in Scotland, is entitled in the administration of personal property which happens to be in Scotland of an intestate domiciled in England, just as he would be if the estate were administered in England, but it is not so as regards real property in Scotland. The succession to that is governed by the law of Scotland. On this ground the case was said to bear a close resemblance to *Birtwhistle v. Vardill* (2).

I now come to the authorities on the other side. In *Re Wright's Trusts* (4) WOOD, V.-C., held that a child born in France of a French mother by an Englishman who had not then become domiciled in France could not be legitimated, in the view of English law, by anything that afterwards occurred in France, and could not, therefore, take under an English will as "child of her father." *Udny v. Udny* (16) is to the same effect. I mention this case because it was cited in the argument, and referred to and distinguished by WOOD, V.-C., in the case which is precisely in point, namely, *Boyes v. Bedale* (1). An Englishman, residing in England, bequeathed a sum of £5,000 on trust, after the death of his nephew, to whom he gave the dividends for life, to divide the principal amongst the children of his nephew attaining the age of twenty-one years, or if only one such child, then to that only child. The only child the nephew had was one born in France of a French mother long after the death of the testator, but after the nephew had acquired a French domicile. Some years after the child's birth the parents intermarried, and the child then became legitimated by the French law. The question was whether such child could take under the bequest. After taking time to consider, the learned Vice-Chancellor delivered a long and elaborate judgment, reviewing the authorities, and especially quoting from STORY'S CONFLICT OF LAWS, and holding it to be clear that the daughter could not in an English court, administering the trusts of an English will, be recognised as a "child." He adopts the rule laid down by STORY (s. 279 a), that

"where the will or testament is made in the place of the domicile of the testator, the general rule of the common law is, that it is to be construed according to the law of the place of his domicile in which it is made . . . and this rule equally applies whether the judicial inquiry as to its meaning and interpretation arises in England or any other country."

And the Vice-Chancellor said that, in a case under the Statute of Distribution, he apprehended the law would be the same, and that it was quite clear that descendants not legitimate ab initio but legitimated in another country, would never under the statute take a part in the distribution of the property. In *Re Wilson's Trusts* (11) affirmed sub nom. *Shaw v. Gould* (11), KINDERSLEY, V.-C., followed with approval, the rule expressed by WOOD, V.-C., that

- A "the word 'children' in an English will must be construed to mean children lawfully begotten, unless an intention appears in the will to use the term in a different manner."

It is argued, and with truth, that the reference of Wood, V.-C., to the Statute of Distribution was an obiter dictum. But does it not follow as a logical
B sequence from the decisions? If a testator uses the very words of the Statute of Distribution, and bequeaths legacies to his "brother's children," or his "next of kindred in equal degree," and nothing appears to show that he intended to use the words in any other than their legal sense, a legitimated child, such as the applicant is, would not, according to the authorities, be entitled to rank as a legatee. On what principle can the same words in an English statute, passed to
C supply the place of a will, and intended to govern the administration of the estate of a domiciled Englishman, receive a different meaning? I have already observed that the estate in this country of an intestate domiciled in a foreign country is administered according to the foreign law, and not under the Statute of Distribution; and I cannot help thinking that this distinction has not been always borne in mind, either in arguments, or in reading judgments, or foreign treatises. In
D such a case it is correct to say that English law recognises the foreign status; but it is a mistake to apply this maxim to the administration of the estate of a domiciled Englishman. I am, therefore, of opinion that this statute, like any other, must be construed in the sense which the common law puts upon its words, and that "children" means such, and such only, as are recognised in our table of consanguinity. I cannot allow myself to be influenced by considerations of
E hardship or inconvenience. The question for us is, what the law is, not what we may think it ought to be. Anomalies and absurdities may be pointed out on both sides, some of which, as resulting from a decision in favour of Mrs. Pieret, I have already alluded to.

For these reasons I am of opinion that the judgment of the Master of the Rolls is right, and ought to be affirmed.

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COTTON, L.J.—The question in this appeal is as to the right of Mrs. Pieret to share in a portion of the personal estate of Rachel Goodman, as to which she died intestate. Rachel Goodman was a domiciled Englishwoman, she died a spinster, and at the time of her death she had neither father nor mother, brother, nor
G sister; but two of her deceased brothers left children, who survived her. Leyon Goodman, one of these brothers, had cohabited with Charlotte Smith, and while domiciled in England had by her three children. After the birth of these children, he removed to Amsterdam, and he was, therefore, down to the time of his death domiciled in Holland. While domiciled there, in 1821 he had by Charlotte
H Smith another child, Hannah, the present appellant, afterwards the wife of Jean Pieret. Leyon Goodman in the year 1822 married Charlotte Smith. The evidence shows that by the law of Holland, this marriage made Hannah Pieret, and also the three children born while Leyon Goodman was in England, legitimate.

Under the Statute of Distribution the personal estate of Rachel Goodman as to which she died intestate was divisible among the children of her deceased brothers. No claim was made on behalf of the three children of Leyon Goodman born while
I he was domiciled in England; but Hannah Pieret claimed to share, and SIR GEORGE JESSEL, M.R., decided against her claim. In support of this decision it was urged that, in an English Act of Parliament, the nearest of kin must be taken to mean those who, by the law of England, are recognised as nephews and nieces, that is, as legitimate children of the intestate's deceased brothers. This is doubtless correct, but the question is, who are, by the laws of England, recognised as legitimate? It is urged, in support of the decision of SIR GEORGE JESSEL, M.R., that the law of England recognises as legitimate those children only who are born in wedlock. This is correct as regards the children of persons who, at the time of the

children's birth, are domiciled in England. But the question as to legitimacy is one of status, and in my opinion, by the law of England, questions of status depend on the law of the domicile.

For this proposition there is authority. It is stated by STORY, J., in his book on the CONFLICT OF LAWS, s. 93, that foreign jurists also generally, although not universally, maintain that the question of legitimacy, or illegitimacy, is to be decided exclusively by the law of the domicile of origin. And in para. 93e, he states that "the same general doctrine is avowedly adopted by the courts of England," and he refers to the opinion expressed by LORD STOWELL in *Dalrymple v. Dalrymple* (7), that by the law of England the status or condition of a claimant is tried by reference to the law of the country where that status originated. Moreover, in *Birtwhistle v. Vardill* (2), when it first came before the House of Lords in 1830 (2 Cl. & Fin. 571), ALEXANDER, C.B., when giving the unanimous opinion of the judges who were consulted, refers with approval to the opinion so expressed by LORD STOWELL, as applicable to the case before the House. In *Fenton v. Livingstone* (3) LORD WENSLEYDALE, in a passage which I do not repeat without qualification, expresses himself thus:

"The laws of the State affecting the personal status of its subjects travel with them wherever they go, and attach to them in whatever country they are resident."

KINDERSLEY, V.C., in his judgment in *Re Don's Estate* (12), to which I shall afterwards refer, lays down the same rule. If, as in my opinion is the case, the question whether a person is legitimate depends on the law of the place where his parents were domiciled at his birth, that is, by his domicile of origin, I cannot understand on what principle, if he be by that law legitimate, he is not legitimate everywhere, and I am of opinion that, if a child is legitimate by the law of the country where at the time of its birth its parents were domiciled, the law of England, except in the case of succession to real estate in England, recognises and acts on the status thus declared by the law of the domicile. In fact, the respondents wish to use the proposition that, in an English Act of Parliament, those only are next-of-kin or children of a deceased brother whom the law of England recognises as legitimate, as if it were whom the law of England would recognise as legitimate if at the time of their birth, their domicile, that is, the domicile of their parents, had been English. But, in my opinion, in deciding questions of legitimacy, that is, of status, the law of England looks to the law of the actual, not of an hypothetical, domicile. I am of opinion that, on principle, as by the law of Holland, where the parents of Hannah Pieret were in fact domiciled at the time of her birth, she is legitimate, the law of England, for the purpose of succession to personal estate, ought to hold her to be legitimate.

This, on principle, is very obvious; but the cases may have established a different rule, and it is necessary to consider the authorities which were relied on in argument in support of the decision of SIR GEORGE JESSEL, M.R. The case which was much discussed was that of *Birtwhistle v. Vardill* (2), which, in 1830, and again in 1840, came before the House of Lords. All that was actually decided in that case was, that the eldest son, born in Scotland before marriage of parents domiciled there, though by Scottish law legitimate by reason of subsequent marriage of his parents, was not capable of taking land in England as heir of his father. The unanimous opinion of the judges, as expressed on two occasions, was that he could not; but ALEXANDER, C.B., states the question to be considered as being, whether, by law of England, a man is heir of English land merely because he is the eldest legitimate son of his father, and, though he gives his opinion that he is not, he, particularly in the passage to which I have already referred, treats the general question of his status, that is, of his legitimacy, as one to be determined by the law of the place where the parents were domiciled at the time of his birth. He was then delivering the unanimous opinion of the judges who had been consulted. When the case was before the House of Lords in 1840, TINDAL, C.J.,

A delivered the unanimous opinion of the judges then consulted, and he stated (7 Cl. & Fin. at p. 925) the ground of their opinion to be that they held it

"to be a rule or maxim of the law of England, with respect to the descent of land in England from father to son, that the son must be born after actual marriage between his father and mother."

B TINDAL, C.J., does not, it is true, so distinctly as was done by ALEXANDER, C.B., state the proposition that legitimacy must depend on the law of the country of the parents' domicile at the time of birth, but he treats the Statute of Merton as referring only to the question of the right to inherit land in England, and there occurs this passage (ibid. at p. 932):

C "The contest above adverted to was a contest between the ancient law and custom of England on the one hand, and the canon law on the other, which should prevail as to the hereditary succession to land in England, canon and civil law being acknowledged and prevailing in England in all other respects, with the single exception of its application to the descent of land."

The decision in that case, therefore, was not at variance with the rule which, in
D my opinion, is, on principle, the correct one, and the opinion expressed by the judges strongly supports my view. But it was urged that the opinion expressed by the judges as to the legitimacy of the son born before marriage was intended to apply only to his right to share in the personal estate of the father domiciled in Scotland, as the eldest son was admittedly legitimate by the law of Scotland, by which the succession to the father's personal estate must be governed. This
E construction would reduce to a nullity the opinion there expressed by the judges, and, in my opinion, they did intend to express their opinion that the claimant, being legitimate by the law of Scotland where his parents were domiciled at his birth and at the date of their marriage, must be considered as legitimate in England, except for the purpose of succession to real estate, and that this depended on a special rule of the feudal law as adopted in England.

F This, in my opinion, was the view taken by LORD CRANWORTH in *Shaw v. Gould* (11) which, however, has been quoted in a different sense. KINDERSLEY, V.-C., took the same view in *Re Don's Estate* (12). He says (4 Drew. at p. 197):

"It appears to me that on the authorities applicable to this question the principle is this, that the legitimacy or illegitimacy of any individual is to be determined by the law of that country which is the country of his origin. If
G he is legitimate in his own country, then all other civilised countries, at least all Christian countries, recognise him as legitimate everywhere."

He then refers to *Birtwhistle v. Vardill* (2), and treats it as an exception to the general rule above stated by him, founded on the rules of inheritance attached to land in this country.

H Although the decision in *Birtwhistle v. Vardill* (2) is not against the appellant and the opinions expressed in that and the other cases to which I have referred are in his favour, *Boyes v. Bedale* (1), and the opinions expressed by WOOD, V.-C., in that case are undoubtedly in favour of the decision of SIR GEORGE JESSEL, M.R., in the court below. In *Boyes v. Bedale* (1) the question was on the construction of a bequest in the will of a domiciled Englishman to the children of a person named, and WOOD, V.-C., held that a child exactly in the same position as Hannah Pieret was not entitled under this bequest. He said that the will, being that of a domiciled Englishman, must be construed according to English law, which, in my opinion, is correct so far as to require that this word "children" shall be construed "legitimate children." But the Vice-Chancellor held that English law recognised as legitimate only those children born in wedlock. This, though correct as regards the children of persons domiciled in England at the time of their birth, is, in my opinion, erroneous as to children born of parents who at the time of their birth were domiciled in a country by the law of which the children were legitimate. At

the end of his judgment in *Boyes v. Bedale* (1) the Vice-Chancellor expressed his opinion that any claim under the Statute of Distribution would be dealt with in the same way. *Re Wright's Trusts* (4), also a decision of Wood, V.-C., is not inconsistent with the opinion already expressed by me, and explains how the children of Leyon Goodman who were born while he was domiciled in England make no claim. They, like the children excluded by the Vice-Chancellor in *Re Wright's Trust* (4), were born while their parents were domiciled in a country by the law of which no subsequent marriage of persons domiciled there could legitimate children born before their marriage. The exclusion of these children is therefore in accordance with the rule as to status already expressed by me.

The judgment in *Re Wilson's Trusts* (11), affirmed by the House of Lords sub nom. *Shaw v. Gould* (11), is not an authority on the questions involved in the case, for there, by the law of England, the mother of the children had not been effectually divorced from her first husband, and her marriage with the father of the children was void, and the children were illegitimate. *Boyes v. Bedale* (1), though mentioned with approval by KINDERSLEY, V.-C., in *Re Wilson's Trusts* (11), is really the only decision which supports the judgment of SIR GEORGE JESSEL, M.R., and *Skottowe v. Young* (10) is certainly a decision in favour of the appellants. In that case STUART, V.-C., held that children of a testator domiciled abroad, who were in exactly the same position as regards legitimacy as Hannah Pieret, were, under the Legacy Duty Act, liable to pay duty at the rate of 1 per cent. only; that is, as children of the testator within the meaning of that Act. Moreover, though in *Goodman v. Goodman* (17) the point raised on this appeal is not mentioned in the judgment, STUART, V.-C., who decided that case, and the counsel who argued it, appear to have assumed that, if Hannah Pieret was born after her father acquired a domicile in Holland, she was to be considered as a legitimate child according to the law of England, and entitled as such under the will of the testator in that case. There is, therefore, a conflict of decisions, and, as in my opinion the decision in *Boyes v. Bedale* (1) is contrary to principle and erroneous, I think that we ought not to follow that case, and that Hannah Pieret is to be treated as a legitimate child of Leyon Goodman, and as such entitled to share in the personal estate as to which Rachel Goodman died intestate, as one of her next-of-kin.

JAMES, L.J.—I concur in the judgment of COTTON, L.J., in the conclusion and reasoning.

According to my view, the question as to what is the English law as to an English child is entirely irrelevant. There is of course no doubt as to what the English law as to an English child is. We have in this country from all time refused to recognise legitimization of issue by the subsequent marriage of the parents, and possibly our peculiarity in this respect may deserve all that was said in its favour by BLACKSTONE, the somewhat indiscriminate eulogist of every peculiarity and anomaly in our system of law. But the question is, what is the rule which the English law adopted and applies to a non-English child? This is a question of international equity and international law.

According to that law as recognised, and that equity as practised in all other civilised communities, the status of a person, his legitimacy or illegitimacy, is to be determined everywhere by the law of the country of his origin—the law under which he was born. It appears to me that it would require a great force of argument derived from legal principles, or great weight of authority clear and distinct, to justify us in holding that our country stands in this respect aloof in barbarous insularity from the rest of the civilised world. On principle, it appears to me that every consideration goes strongly to show, at least that we ought not so to stand. The family relation is at the foundation of all society, and it would appear almost an axiom that the family relation, once duly constituted by the law of any civilised country, should be respected and acknowledged by every other member of the great community of nations. England has been for centuries

- A a country of hospitality and commerce. It has opened its shores to thousands of political refugees and religious exiles, fleeing from their enemies and persecutors. It has opened its ports to merchants of the whole world, and has by wise laws induced and encouraged them to settle in our marts. But would it not be shocking if such a man, seeking a home in this country, with his family of legitimated children, should find that the English hospitality was as bad as the worst form of the persecution from which he had escaped, by destroying his family ties, by declaring that the relation of father and child no longer existed, that his rights and duties and powers as a father had ceased, that the child of his parental affection and fond pride, whom he had taught to love, honour, and obey him, for whom he had toiled and saved, was to be thenceforth, in contemplation of the law of his new country, a fatherless bastard?
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- C Take the case of a foreigner resident abroad, with such a child. If that child were abducted from his guardianship and brought to this country, can anyone doubt that the courts of this country would recognise his paternal right and guardianship, and order the child to be delivered to any person authorised by him? But suppose, instead of sending, he were to come himself to this country in person, would it be possible to hold that he would lose his right to the guardianship of the child in this country because of the historical or mythical legend that the English barons and earls many centuries ago cried out in Latin, *Nolimus leges Angliæ mutare*? Can it be possible that a Dutch father, stepping on board a steamer at Rotterdam, with his dear and lawful child, should, on his arrival at the port of London, find that the child had become a stranger in blood and in law, and a bastard, *filius nullius*? It may be suggested that that would not apply
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- E to a mere transient visit or a temporary commorancy, during which the foreign character of the visitor and his family would be recognised, with all its incidents and consequences, but that it would only apply to a man electing to have a permanent English domicile. But what could, in that view, be more shocking than that a man, having such a family residing with him, perhaps for years, in this country as his lawful family, recognised as such by every court in the kingdom,
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- G being minded at last to make this country his permanent domicile, should thereby bastardise his children; and that he could re-legitimate them by another change of domicile from London to Edinburgh? And why should we on principle think it right to lay down a rule leading to such results? I protest that I can see no principle, no reason, no ground for this, except an insular vanity, inducing us to think that our law is so good and so right, and every other system of law is naught, that we should reject every recognition of it as an unclean thing. But it is not merely on principle, but on authority to my mind conclusive, that this question ought to be determined in favour of the appellant.

- I will not go through the roll of authorities which COTTON, L.J., has cited. But I content myself with the one case of *Birtwhistle v. Vardill* (2). In that case we have the careful and elaborate judgment of the judges summoned to advise the
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- I House of Lords. And in that judgment, or advice, there are two distinct propositions clearly and distinctly enunciated. The first was, that the claimant was for all purposes and to all intents legitimate. The second was, that such legitimacy did not necessarily, and did not in fact in that case, include heirship to English land. The first proposition was accepted by the Law Lords without any doubt or question; the second was questioned. After further reference to the judges and further hearing, the case was at last determined in accordance with the second proposition. But the first proposition has never been really questioned. No doubt it may be said that the only decision was against the heirship in that case. But the weight of such an authority, particularly of advice tendered by the assembled judges to the House of Lords, is not affected by that consideration. It is the *ratio decidendi*, the rules, maxims, and principles of law which are to be found there, by which we are to guide ourselves. In fact, as is well known, the House has frequently put hypothetical states of fact and abstract questions of law, for the advice and opinion of the judges, of which I recollect one notable instance in

the *Sussex Peerage Case* (18). What the assembled judges said in *Birtwhistle v. Vardill* (2), and what the Lords held was, that the case of heirship to English land was a peculiar exception to the rights incident to that character and status of legitimacy, which was admitted by both judges and Lords to be the true character and status of the claimant. It was only an additional instance of the many anomalies which at that time affected the descent of land. Legitimate relationship in the first degree was of no avail if the claimant were an alien, or if he were of the half-blood, or in the direct ascending line, which, *pace* BLACKSTONE, were precious absurdities in the English law of real property. But in this particular case the exception is at all events plausible. The English heirship, the descent of English land, required not only that the man should be legitimate, but as it were porphyro-genitus, born legitimate within the narrowest pale of English legitimacy. Heirship is an incident of land, depending on local law, the law of the country, the county, the manor, and even of the particular property itself, the *forma doni*. Kinship is an incident of the person, and universal. It appears to me that a statement of the law so given, and so accepted nearly fifty years ago, which has been adopted without question by jurists as a correct statement of English adhesion to the universal law and comity of nations, is not to be questioned at this time by any tribunal short of the House of Lords, and I should humbly think not by them.

There is only one authority to the contrary, *Boyes v. Bedale* (1) on which I will say a few words. The decision there was on the ground that in an Englishman's will, the children of a nephew must mean children who would be lawful children if they were English children. That seems to me a violent presumption. It was an accident in that case that the testator was an Englishman. But supposing it had been the will of a Frenchman, dying domiciled in England, and made in favour of his French relations and their children, or of his own children, there being children legitimate and legitimated, what would have been said of such a presumption and such a construction? In that case, by way of obiter dictum, the learned judge goes on to say that the same construction would be applied to kindred under the Statute of Distribution. This point was never argued, and never considered, I believe, by counsel, and must, I think, have been hastily uttered by the Vice-Chancellor at the close of an oral judgment. It must be borne in mind that the Statute of Distribution is not a statute for Englishmen only, but for all persons, whether English or not, dying intestate and domiciled in England (and not for any Englishman dying domiciled abroad); and it was to provide for what was thought an equitable distribution of the assets, as to which the man had, through inadvertence, not expressed his testamentary intentions. And, as the law applies universally to persons of all countries, races, and religions whatsoever, the proper law to be applied in determining kindred is the universal law, the international law, adopted by the comity of States. The child of a man would be his child so ascertained and so determined, and, in the next degree, the lawful child of his brother or sister would be his nephew or niece.

The real importance of *Dalrymple v. Dalrymple* (7) has not been sufficiently appreciated. There must have been hundreds of cases in which a Scotsman, or a foreigner, with legitimated children or other kindred, elected to domicile himself, for business, or health, or pleasure, in London or elsewhere in England. Can it be doubted that the English Court of Probate, of whose conception of the law *Dalrymple v. Dalrymple* (7) is an authoritative exponent, would, without question, have admitted the right of such child or kin to take out administration? And, if such right had ever been questioned, would not the fact of such a question being whether a man, by changing his domicile had bastardised his child, have created a sensation which would have vibrated throughout the civilised world, wherever there was a writer on international law and comity? The fact that no such case is to be found shows the universal consensus of all persons conversant with the Court of Probate and administration (the appropriate court in that behalf) that no such question in fact existed. That answer goes back not only to the year in

A which the judgment in *Dalrymple v. Dalrymple* (7) was pronounced, but to the furthest limit to which the knowledge and experience of the learned judge who pronounced it extended. Moreover, if such a question had ever been raised in the distribution of assets by the Court of Chancery, ALEXANDER, C.B., must, in his long experience in that court, have been aware of it, and would not have omitted to refer to it in the advice which, on behalf of the judges, he tendered to the House of Lords in *Birtwhistle v. Vardill* (2).

Appeal allowed.

Solicitors: *Wild, Brown & Wild; Capron, Dalton, Hutchins & Brabant.*

[*Reported by FRANK EVANS, Esq., Barrister-at-Law.*]

C

D

Re OAK PITS COLLIERY CO.

[COURT OF APPEAL (Baggallay, Lindley and Holker, L.JJ.), April 28, May 18, 1882]

[*Reported 21 Ch.D. 322; 51 L.J.Ch. 768; 47 L.T. 7; 30 W.R. 759*]

E

Company—Winding-up—Right of landlord to distrain for rent after a winding-up order—Companies Act, 1862 (25 & 26 Vict., c. 89), s. 87.

F

In 1879, E., the owner of certain land granted a new lease to the Oak Pits Colliery Co. of the Oak Pit Colliery and of the minerals in the adjoining land, excluding the surface, at an agreed rental and payment of certain royalties. As soon as the agreement was executed the company brought plant and machinery on to the surface of the adjoining land and sank three trial pits, finding coal. In 1880 the company mortgaged their lease by way of a sub-lease, and the mortgagees took possession of the colliery but made no attempt to interfere with or take possession of the minerals in the adjoining land. Three days later a petition was presented to wind-up the company and subsequently an order was made and a liquidator was appointed. The liquidator did not take possession of the colliery or of the adjoining land and minerals therein and the colliery remained in the possession of the mortgagees. The liquidator took no steps to give up the land to E. In May, 1880, the liquidator had the company's plant and machinery which was on the adjoining land valued with a view to a sale which did not at that time take place, and in fact the machinery and plant remained on the land until sold in July, 1881. E. applied for leave to distrain on the plant and machinery or to have the proceeds of sale therefrom paid to him in respect of arrears of rent which had accrued after the commencement of the winding-up.

G

H

I

Held: E. was not entitled either to distrain or to the proceeds of sale because (i) in view of the fact the mortgagees had a legal mortgage the liquidator never had possession of any part of the colliery or of the minerals under the adjoining land; (ii) as the surface of the adjoining land upon which the plant and machinery had rested was not leased to the company E. was not entitled to distrain in any event because a distress for rent could only be made on the property held by the tenant of his landlord, and in respect of which the rent was payable; (iii) the mere facts that the liquidator had left the company's plant and machinery where he found them until he sold them in July, 1881, that he had them valued with a view to a sale which was not carried out, and that he took no steps to surrender to E. the company's interest in the colliery and in

the adjoining land were not enough to show that the liquidator had retained the property for the purpose of advantageously disposing of it or had continued to use it so as to entitle E. to payment in full of the rent—although it might have been different had E. endeavoured to re-enter and the liquidator had objected.

Per Curiam: the following rules have been established by the decided cases as to when a landlord should be given leave under s. 87 of the Companies Act, 1862 [now s. 231 of Companies Act, 1948], to distrain after a winding-up order, or to be paid his rent in priority to other creditors:

Where the rent is in arrear at the commencement of the winding-up, (i) leave will not be given where the landlord is a legal creditor of the company, even though the liquidator has retained possession of the property and carried on the company's works; but (ii) where the landlord is not a legal creditor of the company by reason of their not being his tenant, leave will be given, although the liquidator has offered to allow the arrears to be proved as a debt.

Where the rent has accrued after the commencement of the winding-up, (i) where the liquidator has retained possession for the purposes of the winding-up, i.e., for carrying on the company's business, or kept the property to sell or do the best he can with it, leave will be given; (ii) where the liquidator has retained possession by arrangement with the landlord and for the landlord's and the company's benefit, leave will not be given, unless the liquidator has agreed to pay rent; (iii) where the liquidator has done nothing but abstain from trying to get rid of the demised property, leave will not be given.

Where the liquidator retains property for the purpose of advantageously disposing of it, or continues to use it, the rent for the whole period of retainer or use will be payable in full as an expense incurred for the purpose of the winding-up, without reference to the amount which could be realised by distress.

Notes. Considered: *Re Watson, Kipling & Co.* (1883), 23 Ch.D. 500. Applied: *Re International Marine Hydropathic Co.* (1884), 28 Ch. 470; *Re National Arms and Ammunition Co.* (1885), 28 Ch.D. 474. Considered: *Re Higginsshaw Mills and Spinning Co.*, [1896] 2 Ch. 544; *Hand v. Blow*, [1901] 2 Ch. 721. Applied: *Re Levy & Co., Ltd.*, [1918-19] All E.R.Rep. 319. Referred to: *Re Blazer Fire Lighter*, [1895] 1 Ch. 402; *Re Rylands Glass Co., York, etc., Bank v. Ryland's Glass Co.* (1904), 49 Sol. Jo. 67; *Re South Rhondda Colliery Co. (1898), Ltd.* (1928), 72 Sol. Jo. 453; *Gerard v. Worth of Paris, Ltd.*, [1936] 2 All E.R. 905.

As to the right to distrain where there is a winding-up, see 6 HALSBURY'S LAWS (3rd Edn.) 694 et seq.; and for cases see 10 DIGEST (Repl.) 1021 et seq. For the Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 452.

Cases referred to:

- (1) *Re Traders' North Staffordshire Carrying Co., Ex parte North Staffordshire Rail. Co.* (1874), L.R. 19 Eq. 60; 44 L.J.Ch. 172; 31 L.T. 716; 39 J.P. 212; 23 W.R. 205; 10 Digest (Repl.) 1023, 7042.
- (2) *Re Coal Consumers' Association* (1876), 4 Ch.D. 625; 46 L.J.Ch. 501; 35 L.T. 729; sub nom. *Re Coal Consumers' Co., Ltd., Ex parte Hughes*, 25 W.R. 300; 10 Digest (Repl.) 1022, 7029.
- (3) *Thomas v. Patent Lionite Co.* (1881), 17 Ch.D. 250; 50 L.J.Ch. 544; 44 L.T. 392; 29 W.R. 596, C.A.; 10 Digest (Repl.) 1022, 7037.
- (4) *Re North Yorkshire Iron Co.* (1878), 7 Ch.D. 661; 26 W.R. 367; sub nom. *Re North Yorkshire Iron Co., Ltd., Ex parte Richardson, Johnson & Co.*, 47 L.J.Ch. 333; 38 L.T. 143; 10 Digest (Repl.) 1023, 7048.
- (5) *Re South Kensington Co-operative Stores* (1881), 17 Ch.D. 161; 29 W.R. 662; sub nom. *Re South Kensington Co-operative Stores, Ltd., Ex parte Seymour*, 50 L.J.Ch. 446; 44 L.T. 471; 10 Digest (Repl.) 978, 6734.
- (6) *Re Brown, Bayley and Dixon, Ex parte Roberts and Wright* (1881), 18 Ch.D. 649; 50 L.J.Ch. 738; 45 L.T. 347; 30 W.R. 5; 10 Digest (Repl.) 1025, 7063.

- A (7) *Re Exhall Coal Mining Co., Ltd.* (1864), 4 De G.J. & Sm. 377; 4 New Rep. 127; 10 Digest (Repl.) 1022, 7040.
- (8) *Re Regent United Service Stores* (1878), 8 Ch.D. 616; 38 L.T. 493; 42 J.P. 630; 26 W.R. 579; sub nom. *Re Regent United Service Stores, Ex parte Burke*, 47 L.J.Ch. 677, C.A.; 10 Digest (Repl.) 1023, 7043.
- B (9) *Re Lundy Granite Co., Ex parte Heaven* (1871), 6 Ch. App. 462; 40 L.J.Ch. 588; 24 L.T. 922; 35 J.P. 692; 19 W.R. 609, L.J.J.; 10 Digest (Repl.) 1023, 7047.
- (10) *Re Silkstone and Dodsworth Coal and Iron Co.* (1881), 17 Ch.D. 158; sub nom. *Re Silkstone and Dodsworth Coal and Iron Co., Ex parte Perkins*, 50 L.J.Ch. 444; 44 L.T. 405; 29 W.R. 484; 10 Digest (Repl.) 1024, 7053.
- C (11) *Re Progress Assurance, Ex parte Liverpool Exchange Co.* (1870), L.R. 9 Eq. 370; 39 L.J.Ch. 504; 22 L.T. 707; 10 Digest (Repl.) 1023, 7046.
- (12) *Re Bridgewater Engineering Co.* (1879), 12 Ch.D. 181; 48 L.J.Ch. 389; 10 Digest (Repl.) 1022, 7030.

Also referred to in argument :

Re London and Colonial Co., Horsey's Claim (1868), L.R. 5 Eq. 561; 37 L.J.Ch. 393; 18 L.T. 103; 16 W.R. 577; 10 Digest (Repl.) 984, 6775.

- D **Appeal** from an order of KAY, J., on a summons by a Mr. Eyton, the owner of Oak Pits Colliery and the adjoining 163 acres of land for leave to distrain on certain plant and machinery at present on his land and in the possession of the liquidator of the Oak Pits Colliery Co., Ltd., or alternatively for an order that the proceeds of sale therefrom should be paid over to him on the grounds that he
- E was owed the sum of £766 13s. 4d. in respect of rent which had accrued from the date of the winding-up of the company.

In 1858 the company became lessees of the Oak Pits Colliery under a lease which the company afterwards mortgaged by way of sublease. In 1878 the company negotiated with the lessor for a surrender of this lease, and for a new lease of the Oaks Pits Colliery, and also of the minerals in 163 acres of adjoining property.

- F In July, 1878, the company agreed with the mortgagees to give them a mortgage of this new lease when obtained. Early in 1879 these negotiations for the new lease were brought to a close, and an agreement was come to for a new lease of the Oak Pits Colliery, and of the minerals in the adjoining 163 acres, at a dead rent of £400 a year and certain royalties. As soon as this agreement was come to the company brought plant and machinery on the 163 acres, and sunk three trial
- G pits and found coal. The surface of the 163 acres was not agreed to be leased to the company, the agreement being that they should work the coal under the 163 acres from the Oak Pit Colliery, and not by means of an independent shaft sunk into the 163 acres themselves. On Jan. 28, 1880, the mortgagees took possession of the Oak Pit Colliery, but they did not interfere with the 163 acres, or attempt to take actual possession of the minerals under them. On Jan. 31,
- H 1880, a petition was presented to wind-up the company; and an order was made, and a liquidator was appointed in the usual way. The liquidator did not take possession of the Oak Pits Colliery, or of the 163 acres, or of the minerals under them. The Oak Pits Colliery was already in the possession of the mortgagees. The workings in the Oaks Pit Colliery, through which the minerals under the 163 acres were to be got, were full of water. The trial pits could not be used for
- I working purposes, and there was not in fact any method by which the liquidator could have got at or worked these minerals. The liquidator, however, did not take any steps to give them up to the landlord, and the plant and machinery used by the company for making the trial pits remained on the 163 acres for about a year and a half, when such plant and machinery were sold, as stated presently. In May, 1880, the mortgagees negotiated with the liquidator for the purchase of this plant and machinery, and also of the plant and machinery in the Oak Pits Colliery, and the liquidator caused a valuation of the whole to be made, on the supposition that the whole was to be bought by the mortgagees as belonging to a going concern.

This negotiation, however, came to nothing. In May, 1881, the mortgagees themselves endeavoured to sell the Oak Pits Colliery, and the benefit of the agreement for the new lease, and the plant and machinery at the Oak Pits. This endeavour was also unsuccessful. In May, 1881, the liquidator advertised for sale all the plant and machinery, as well on the Oak Pits Colliery as on the adjoining 163 acres. On May 30, Mr. Eyton applied for leave to distrain on the plant and machinery on the 163 acres, or to have the proceeds of the sale thereof paid to him. On June 3, 1881, the sale took place and the plant and fixtures in question were sold for £179.

On Jan. 26, 1882, the summons came on to be heard before KAY, J., and he then made an order for the payment in full by the liquidator of the whole rent of £400 a year, which accrued after the commencement of the winding-up.

By s. 87 of the Companies Act, 1862 [now s. 231 of Companies Act, 1948] :

"When an order has been made for winding-up a company under this Act no suit, action, or other proceeding shall be proceeded with or commenced against the company except with the leave of the court, and subject to such terms as the court may impose."

By s. 163 of the Act [now s. 228 (1) of the 1948 Act] :

"Where any company is being wound-up by the court or subject to the supervision of the court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding-up shall be void to all intents."

By s. 158 of the Act (now s. 316 of 1948 Act) :

"In the event of any company being wound-up under this Act, all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company, a just estimate being made, so far as is possible, of the value of all such debts or claims as may be subject to any contingency or sound only in damages, or for some other reason do not bear a certain value."

Romer, Q.C., and *Bardswell* for the liquidator.
Ince, Q.C., and *Caldecott* for Mr. Eyton.

Cur. adv. vult.

May 18, 1882. **LINDLEY, L.J.**, read the following judgment of the court in which, after stating the facts, he continued: The learned judge in the court below was of opinion that the possession of the mortgagees was, in effect, the possession of the liquidator, and that he had, in substance, been in possession of the whole property for the purpose of selling it as a going concern. The learned judge was also under the impression that the mortgagees were merely equitable mortgagees, and had no right to take possession except under some arrangement with their mortgagors. This, however, was a mistake, so far as the Oak Pits Colliery was concerned. The mortgagees had a legal, and not a merely equitable mortgage of the colliery, and they took possession of it under their legal title.

We are unable to take the same view of the facts as taken by KAY, J. It appears to us that the liquidator never had possession of any part of the Oak Pits Colliery, or of the minerals under the 163 acres. The possession of the Oak Pits Colliery was in the mortgagees; the possession of the surface of the 163 acres was in the landlord, Mr. Eyton, and not in the company, although some plant and machinery belonging to the company were on this property or in the trial pits. The possession of the minerals in the 163 acres had never, in fact, been taken by the company. The company had done no more than ascertain where the minerals were. The company had a right to take possession of them, but had not yet exercised that right. Even if the company can be considered as having ever taken possession of them, the liquidator never in any way interfered with them.

- A His possession, if any, of those minerals was a mere consequence of the equitable ownership in them remaining in the company subject to the equitable mortgage before mentioned. Another point of some importance appears to have been overlooked in the court below. The surface of the 163 acres was not to be leased to the company. Consequently, the goods and chattels of the company upon such surface could not have been distrained for rent in arrear if a lease had been granted, and if no winding-up order had been made; for a distress for rent can only be made on the property held by the tenant of his landlord, and in respect of which the rent is payable. Quite apart, therefore, from s. 163 of the Companies Act, 1862, [now s. 228 (1) of Companies Act, 1948] Mr. Eyton could not have distrained the plant and machinery of the company on the 163 acres, and it was only that plant and machinery which he sought leave to distrain. It appears to me, therefore, that the order appealed from cannot be supported on the grounds on which the learned judge in the court below based his decision. Nor do I think it can be supported on any other grounds.

- The object of the winding-up provisions of the Companies Act, 1862, is to put all unsecured creditors upon an equality, and to pay them *pari passu*. A landlord who has not put in a distress before the commencement of the winding-up is an unsecured creditor. He can prove against the company, under s. 158 [s. 316 of 1948 Act], for all rent in arrear at the time of his proof, but his right to distrain is taken away by s. 163 [s. 228 (1) of 1948 Act], unless circumstances exist which, in the opinion of the court, require it to give him leave to distrain under s. 87 [s. 231 of 1948 Act]. In all cases, however, in which a landlord seeks to distrain after a winding-up order, or seeks to be paid his rent in priority to other creditors, he must show why he should have such an advantage over the other creditors. There are numerous decisions in the books relating to this subject, and to which it may be useful shortly to advert. They may be grouped into two classes: the first relating to rent in arrear at the commencement of the winding-up; the second relating to rent accruing subsequently to that date.

- First, as to rent in arrear at the commencement of the winding-up: (i) If the landlord is a legal creditor of the company in respect of rent in arrear at the commencement of its winding-up, he is not allowed to distrain for the arrears of rent, but must prove his debt like any other creditor: *Re Traders' North Staffordshire Carrying Co.* (1), where the distress was for tolls in arrear; *Re Coal Consumers' Association* (2), where the liquidator retained possession, but not for any purpose of liquidation; *Thomas v. Patent Lionite Co.* (3), a case of voluntary winding-up followed by a compulsory order. (ii) Moreover, in cases of this kind the circumstance that the liquidator has retained possession and carried on the company's works has been held not to entitle a landlord, or mortgagee with a power of distress as and for rent, to distrain for rent in arrear in the winding-up: *Re North Yorkshire Iron Co.* (4); *Re South Kensington Co-operative Stores* (5); *Re Brown, Bayley and Dixon, Ex parte Roberts and Wright* (6). (iii) If, however, the landlord is not a legal creditor of the company, by reason of the company not being his tenant, he is permitted to distrain even for rent in arrear at the commencement of the winding-up: *Re Exhall Coal Mining Co., Ltd.* (7); (iv) and, in such a case, he will be allowed to distrain, although the liquidator offers to allow the arrears to be proved as a debt in the winding-up: *Re Regent United Service Stores* (8).

- I Secondly, as to rent accruing after the commencement of the winding-up: (i) If the liquidator has retained possession for the purposes of the winding-up, i.e., if he has used the property for carrying on the company's business, or has kept the property in order to sell it, or to do the best he can with it, the landlord will be allowed to distrain for rent which has become due since the winding-up: *Re Lundy Granite Co., Ex parte Heaven* (9); *Re North Yorkshire Iron Co.* (4); *Re Silkstone and Dodworth Coal and Iron Co.* (10); *Re South Kensington Co-operative Stores* (5); and see *Re Brown, Bayley and Dixon* (6). (ii) But if he has kept possession by arrangement with the landlord, and for his benefit as well as for

the benefit of the company, and there is no agreement with the liquidator that he shall pay rent, the landlord is not allowed to distrain: *Re Progress Assurance Co.* (11); *Re Bridgewater Engineering Co.* (12). A

Where the liquidator retains the property for the purpose of advantageously disposing of it, or where he continues to use it, the rent of it ought to be regarded as a debt contracted for the purpose of winding-up the company, and ought to be paid in full like any other debt or expense properly incurred by the liquidator for the same purpose, and in such a case it appears to me that the rent for the whole period during which the property is so retained or used ought to be paid in full without reference to the amount which could be realised by a distress. This was the view taken by JAMES, L.J., in *Re Lundy Granite Co.* (9), by FRY, J., in *Re Brown, Bayley and Dixon* (6), and by KAY, J., in the present case. But no authority has yet gone the length of deciding that a landlord is entitled to distrain for, or be paid in full, rent accruing since the commencement of the winding-up, where the liquidator has done nothing except abstain from trying to get rid of the property which the company holds as lessee. If the landlord had endeavoured to re-enter, and the liquidator had objected, the case might be different; but, having regard to the provisions of the Companies Act, 1862, I am of opinion that in the case now supposed the landlord must rely on his right, if any, to re-enter and prove for the arrears due to him, and that he is not entitled to anything more. B C D

In the present case, the only facts the landlord has to rely on are, first, the fact that the liquidator left the company's plant and machinery where he found them until he sold them in July, 1881; secondly, the fact that he had them valued in May, 1880, with a view to a sale which was not carried out; thirdly, the fact that he took no steps to surrender the company's interest in the Oak Pits Colliery and the 163 acres to the landlord. In my opinion these facts are not sufficient to entitle the landlord either to distrain or to be paid in full. E

I cannot regard the rent ordered to be paid as a debt, or cost, charge, or expense incurred by the liquidator in the course or for the purpose of the winding-up, and in my opinion the order appealed ought to be discharged, and the summons to be dismissed with costs. F

Appeal allowed.

Solicitors: *F. Venn & Co.*; *Simpson, Hammond, Richards & Simpson*, for *Kelly & Keene, Mold*.

[Reported by FRANK EVANS, ESQ., Barrister-at-Law.]

ROBERTS AND OTHERS v. ROBERTS AND ANOTHER

[COURT OF APPEAL (Sir Baliol Brett, M.R., and Lindley, L.J.), March 19, 26, 1884]

[Reported 13 Q.B.D. 794; 53 L.J.Q.B. 313; 50 L.T. 351;
32 W.R. 605]

Bill of Sale—Form—Personal chattels—Description—Need to make inventory.
Bill of Sale—Form—Consideration—Error apparent on face of instrument.
Bill of Sale—Form—Substantial compliance with prescribed form.
Bills of Sale—Growing crops—“Separately assigned”—Assignment with other articles.

Under s. 4 of the Bills of Sale (1878) Amendment Act, 1882 (which requires the personal chattels comprised in the bill to be described in the schedule to the bill, it is necessary to make an inventory, and a description of species is not what is wanted; a description “household furniture and effects, implements of husbandry” is insufficient.

Under s. 6 of the Act (which provides that nothing contained in the foregoing sections of that Act shall render a bill of sale void in respect of . . . any growing crops separately assigned), the words “separately assigned” mean assigned apart from the land, and a bill which assigns growing crops with other articles is valid.

Under s. 8 of the Act (which provides that every bill of sale shall truly set forth the consideration for which it was given, an error does not make the bill void if it is apparent from the terms of the instrument what the consideration really was.

Under s. 9 of the Act (which provides that a bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made “in accordance with the form” in the schedule to that Act), it is sufficient if the bill is substantially like the form in the schedule; the omission of the words “by way of security” do not invalidate a bill where it is clear from what is stated in the bill that it is given by way of security.

Notes. Followed: *Bouchett v. Attenborough* (1887), 3 T.L.R. 813. Distinguished: *Witt v. Banner* (1887), 19 Q.B.D. 276. Approved: *Witt v. Banner* (1887), 20 Q.B.D. 114. Considered: *Kelly v. Kellond* (1888), 20 Q.B.D. 569. Distinguished: *Mayer and Fulda v. Mindlevich* (1888), 59 L.T. 400. Referred to: *Thomas v. Kelly*, [1886–90] All E.R.Rep. 431; *Carpenter v. Deen* (1889), 23 Q.B.D. 566; *Davis v. Jenkins* (1899), 48 W.R. 286; *Re Manor Farm, Kytes Hardwick, Acheson v. Russell*, [1950] 2 All E.R. 572.

As to growing crops and fixtures as subject-matter of a bill of sale, see 3 HALSBURY'S LAWS (3rd Edn.) 277–278; as to description of chattels, see *ibid.* 280–282; as to form of a bill of sale, see *ibid.* 287 et seq.; and for cases see 7 DIGEST (Repl.) 40–42; 45–48; 55–61; 75–76. For the Bills of Sale Act, 1878, s. 4, see 2 HALSBURY'S STATUTES (2nd Edn.), 558; for the Bills of Sale Act (1878) Amendment Act, 1882, ss. 6, 8, 9, see *ibid.* 576, 579, 580.

Case referred to:

(1) *Davis v. Burton* (1883), 11 Q.B.D. 537; 52 L.J.Q.B. 636; 32 W.R. 423, C.A.; 7 Digest (Repl.) 63, 348.

Also referred to in argument:

Brocklehurst v. Railway Printing & Publishing Co., [1884] W.N. 70; 28 Sol. Jo. 358; Bitt. Rep. in Ch. 117; 7 Digest (Repl.) 74, 435.

Giles v. Melsom (1873), L.R. 6 H.L. 24; 42 L.J.C.P. 122; 28 L.T. 789; 21 W.R. 417, H.L.; 44 Digest 577, 3968.

Jones v. Harris (1871), L.R. 7 Q.B. 157; 41 L.J.Q.B. 6; 25 L.T. 702; 20 W.R. 143; 7 Digest (Repl.) 104, 629.

Lazarus v. Andrade (1880), 5 C.P.D. 318; 49 L.J.Q.B. 847; 43 L.T. 80; 44 J.P. 697; 29 W.R. 15; 7 Digest (Repl.) 125, 725. A

Appeal from a decision of STEPHEN, J., on an interpleader issue between the plaintiffs, the holders of a bill of sale, and the defendants, execution creditors of the grantor.

The bill of sale was dated April 30, 1883, and made between Thomas Davies of the one part and Evan Roberts, Henry Davies and Edward Edwards (the plaintiffs, thereafter called "the grantees") of the other part. It recited that B

"the said Evan Roberts and Henry Davies have become and are now liable as sureties for the said Thomas Davies on a bill of exchange at three months for £60 which has been discounted at the Ruthin branch of the London Provincial Bank, Ltd., and the said Henry Davies, Edward Edwards, and one Edward Owen have also become, and now are, liable as sureties for the said Thomas Davies on a bill of exchange at three months for £100, which has likewise been discounted at the said bank. . . . The said Thomas Davies is unable to meet the said bills, and is also in urgent need of a further sum of £45, and he has, therefore, applied to the said grantees to take up the said two bills of exchange, on which they are respectively liable, and also jointly to make him a further advance of £45, which they have agreed to do in consideration of the said Thomas Davies entering into these presents for the purpose of securing repayment to them with interest, as well of the said sum of £45, and also of the said two bills of £60 and £100 respectively, with all expenses due thereon." C

It was witnessed D

"that in consideration of the sum of £45 now paid to the said Thomas Davies by the said grantees . . . and of the covenant on the part of the said grantees hereinafter contained, the said Thomas Davies doth hereby covenant with the said grantees" E

to pay the above sums and expenses and interest.

It was further witnessed that T. Davies F

"doth hereby convey and assign unto the said grantees all the crops now growing, or which shall at any time hereafter during the continuance of this security be growing, in or upon the farm, lands, and premises . . . and also all horses, cattle, carts, carriages, implements of husbandry, farming machinery, tools, utensils, hay, straw, consumable stores, live and dead stock, furniture and household effects which now are, or any time hereafter during the continuance of this security shall be, in, upon, or about the said farm . . . and all which said crops, stock, implements, furniture and effects are intended to be specifically described in the schedule hereunder written (but the said schedule is not to abridge the other words of description contained in these presents)." G

The bill of sale contained a covenant by T. Davies to insure "during the continuance of this security." The words "by way of security" did not occur in the operative part, and the covenant by the grantees was omitted. The schedule contained the words "household furniture and effects, implements of husbandry," but there was no inventory of the furniture and implements. The documents above referred to as bills of exchange for £60 and £100 were in fact promissory notes. H

At the trial before STEPHEN, J., without a jury, at the Ruthin assizes, the learned judge found that there was no evidence of fraud, and that the goods seized were covered by the bill of sale, which was valid, and gave judgment for the plaintiffs. The defendants appealed. I

By the Bills of Sale Act, 1878, s. 4:

"The expression 'personal chattels' shall mean . . . (when separately assigned or charged) . . . growing crops, but shall not include . . . growing crops when assigned together with any interest in the land on which they grow. . . ."

A By s. 7:

B "No fixtures or growing crops shall be deemed, under this Act, to be separately assigned or charged by reason only that they are assigned by separate words, or that power is given to sever them from the land or building to which they are affixed, or from the land on which they grow, without otherwise taking possession of or dealing with such land or building or land, if by the same instrument any freehold or leasehold interest in the land or building to which such fixtures are affixed, or in the land on which such crops grow, is also conveyed or assigned to the same persons or person."

By the Bills of Sale Act (1878) Amendment Act, 1882, s. 4:

C "Every bill of sale shall have annexed thereto or written thereon a schedule containing an inventory of the personal chattels comprised in the bill of sale; and such bill of sale, save as hereinafter mentioned, shall have effect only in respect of the personal chattels specifically described in the said schedule; and shall be void, except as against the grantor, in respect of any personal chattels not so specifically described.

D Section 5. Save as hereinafter mentioned, a bill of sale shall be void, except as against the grantor, in respect of any personal chattels specifically described in the schedule thereto, of which the grantor was not the true owner at the time of the execution of the bill of sale.

E Section 6. Nothing contained in the foregoing sections of this Act shall render a bill of sale void in respect of any of the following things (that is to say) (1) Any growing crops separately assigned or charged where such crops were actually growing at the time when the bill of sale was executed.

Section 8. Every bill of sale . . . shall truly set forth the consideration for which it was given; otherwise such bill of sale shall be void in respect of the personal chattels comprised therein.

F Section 9. A bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the schedule to this Act annexed."

The material words of the schedule are:

"The said A.B. doth hereby assign unto C.D. . . . all and singular the several chattels and things specifically described in the schedule hereto annexed by way of security for the payment of the sum of £ and interest . . ."

G *Swetenham, Q.C.*, and *Clement Higgins* for the defendants.
F. Marshall (E. H. Lloyd with him) for the plaintiffs.

H **SIR BALIOL BRETT, M.R.**—The question in this case is whether, subject to the landlord's right, the goods which have been seized by the sheriff belonged to the execution creditors or to the claimants under the bill of sale. It is said that the bill of sale is void on the ground of fraud; as to that I agree with STEPHEN, J., and can see no symptom of any fraud.

I Then it is said that the bill of sale is void by reason of the Bills of Sale Act (1878) Amendment Act, 1882, first, on the ground that it does not truly set forth the consideration for which it was given, as required by s. 8. It seems to me that that section does not mean only that the statement of the consideration must not be intentionally false; I think it would be fatal if by mistake the consideration were not accurately stated. But here the real consideration is plain; the grantor of the bill of sale was liable on two promissory notes; it is true that other persons were also liable on the notes as sureties, but I think a true description is given, for to fail to say that other people were also liable is not to omit any part of the consideration. These matters are outside the consideration for which the bill of sale was given.

Then it is said that the consideration was not truly stated, because the instruments on which the grantor was liable were described as bills of exchange, whereas

they were in reality promissory notes, but I think they are substantially the same thing. Part of the consideration was that, the grantor being liable, the grantees agreed to take up the notes; that is in terms stated. There was also an undertaking by the grantees to advance a sum of £45; all that is described. A

As to the objection that the covenant was omitted, there is really what amounts to a covenant in the recitals and agreement.

Then it is said that the bill of sale is void because the growing crops were not separately assigned, within the meaning of s. 6. I am of opinion that the section means that the crops must be assigned, not as part of the land, but as crops, and they were so assigned here. B

Then it is said that the bill of sale does not follow the form in the schedule to the Act because there are no words "by way of security." It is true that it is not in the exact words of the form given in the schedule, but as to that I think what I said in *Davis v. Burton* (1) was right (11 Q.B.D. at p. 540): C

"That enactment provides that a bill of sale shall be 'in accordance' with the form in the schedule." That must mean that every bill of sale shall be substantially like the form in the schedule. Nothing substantial must be subtracted from it, and nothing actually inconsistent must be added to it." D

If the addition makes the meaning of the bill of sale different from the meaning of the form in the schedule, the bill of sale is inconsistent with the form, and is void; but in the present case the answer to this objection is, that it is clear from what is stated in the bill of sale that it is given by way of security.

Then, supposing the bill of sale is good, there is a further question whether it covers all or any of the goods seized. The learned judge in the court below said that any description of species as distinct from genus satisfies the words of s. 4. I think that is not the right way to construe the Act; it was written with regard to bills of sale. Before the Act a general description specified no particular articles, but a specific description was an inventory, which is a known business document and is referred to in s. 4. It seems to us that the result ought to be, that the execution creditors are entitled to £35 and the grantees of the bill of sale to the rest, and the judgment must be varied accordingly. E F

LINDLEY, L.J.—The first point is as to fraud; this is a question of fact, and I am of opinion that there was no fraud.

Secondly, it is said that the bill of sale was void by the Act of 1882 because the consideration was not truly set forth within the meaning of s. 8. But the recitals show what the consideration really was. It is true there are two errors: the promissory notes are described as bills of exchange; I think that is immaterial. Then the recitals speak of "the covenant on the part of the grantees hereinafter contained," and there is no such covenant; but there is a covenant arising from the recitals, so the error and the correction are apparent on the face of the document. Thirdly, it is said that the bill of sale is void by s. 9, on the ground that it is not in accordance with the form in the schedule to the Act, because it does not contain the words "by way of security." It is true that these words are omitted from the place where they occur in the form in the schedule, but the recitals and the operative part of the bill of sale show that it was given by way of security. The fourth point raised is a point of some little nicety. It is said that the bill of sale is void because it comprises after-acquired property. Perhaps that objection would be fatal if there were not a section specifically dealing with after-acquired property. By s. 5 a bill of sale is void as to after-acquired property except as against the grantor. I think we must construe the sections together so as to give effect both to s. 5 and s. 9. For these reasons I am of opinion that so far the attacks made on this bill of sale have failed. Next, assuming that the bill of sale is not bad altogether, it is said that it is bad as to the growing crops, because they are not separately assigned. The material sections are ss. 4 and 7 of the Act of 1878, and s. 6 of the Act of 1882. It is obvious that s. 7 G H I

A of the Act of 1878 only applies where land is assigned. Then it is said that the bill of sale is bad as to the furniture and implements, because they are not specifically described within the meaning of s. 4 of the Act of 1882. The question is, what is the meaning of "specifically described" in the Act. Section 4 says there shall be "a schedule containing an inventory," and taking that section together with s. 9 it looks as if a bill of sale would be bad without such a schedule. The

B specific description is to be found in a schedule containing an inventory. It seems obvious to me that the description of species is not what is wanted; I think the goods ought to be described as business people would describe them, and therefore on that point I am unable to agree with the learned judge in the court below. I am, therefore, of opinion that this bill of sale was good except as to the furniture and implements not specifically described, and the result must be as stated by

C the Master of the Rolls.

Judgment varied accordingly.

Solicitors: Ullithorne, Currey & Villers, for W. Osbert Edwards, Ruthin; F. Venn & Co., for Morris & Jones, Liverpool.

[Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.]

D

E

BAILEY v. BAILEY

[COURT OF APPEAL (Sir Baliol Brett, M.R., Bowen and Fry, L.JJ.), August 7, 1884]

[Reported 13 Q.B.D. 858; 53 L.J.Q.B. 583]

F *Practice*—*Summary judgment*—*Arrears of alimony pendente lite*—*R.S.C., Ord. 3, r. 6; R.S.C., Ord. 14, r. 1.*

The court cannot make an order empowering a plaintiff to sign judgment summarily upon a writ of summons specially endorsed with an order for alimony.

G **Notes.** R.S.C., Ord. 3, r. 6, has been revoked and not replaced. R.S.C., Ord. 14, r. 1, has been revoked and re-drafted: see now R.S.C. (Revision) 1962, Ord. 14, rr. 1, 2, 3, 8, 9, and Ord. 77, r. 7.

Considered: *Re Otway, Ex parte Otway* (1888), 58 L.T. 885; *Westmoreland Green and Blue State Co. v. Feilden*, [1891] 3 Ch. 15. Explained: *Norton v. Gregory* (1895), 73 L.T. 10. Applied: *Robins v. Robins*, [1907] 2 K.B. 13; *Ivimey v. Ivimey*, [1908] 2 K.B. 260. Distinguished: *Beatty v. Beatty*, [1924] 1 K.B. 807. Referred to: *Linton v. Linton* (1885), ante, p. 867; *Chalk, Webb & Co. v. Tennent* (1887), 57 L.T. 598; *Seldon v. Wilde*, [1910] 2 K.B. 9; *Leavis v. Leavis*, [1921] P. 299; *Re Hedderwick, Morton v. Brinsley*, [1933] All E.R.Rep. 73; *Morse v. Muir*, [1939] 2 All E.R. 40; *Leivers v. Barber, Walker & Co.*, [1943] 1 All E.R. 386; *W. v. W.*, [1961] 1 All E.R. 751.

I As to enforcing orders of the court in divorce proceedings in general, see 12 HALSBURY'S LAWS (3rd Edn.) 467 et seq.; and for cases see 27 DIGEST (Repl.) 673 et seq.

Cases referred to:

- (1) *Hutchinson v. Gillespie* (1856), 11 Ex. 798; 25 L.J.Ex. 103; 26 L.T.O.S. 275; 2 Jur.N.S. 403; 4 W.R. 302; 156 E.R. 1055, 30 Digest (Repl.) 199, 412.
- (2) *Berkeley v. Elderkin* (1853), 1 E. & B. 805; 22 L.J.Q.B. 281; 21 L.T.O.S. 74; 17 J.P. 568; 17 Jur. 1153; 1 W.R. 305; 1 C.L.R. 416; 118 E.R. 638; 13 Digest (Repl.) 447, 704.

Also referred to in argument :

Hodsoll v. Baxter (1858), E.B. & E. 884; 28 L.J.Q.B. 61; 31 L.T.O.S. 356; 6 W.R. 686; 120 E.R. 739; sub nom. *Baxter v. Hodsoll*, 4 Jur.N.S. 556, Ex. Ch.; 30 Digest (Repl.) 196, 383.

Grant v. Easton (1883), 13 Q.B.D. 302; 53 L.J.Q.B. 68; 49 L.T. 645; 32 W.R. 239, C.A.; 11 Digest (Repl.) 527, 1402.

Henderson v. Henderson (1844), 6 Q.B. 288; 1 New Pract. Cas. 22; 13 L.J.Q.B. 274; 3 L.T.O.S. 178; 8 Jur. 755; 115 E.R. 111; 11 Digest (Repl.) 514, 1291.

Appeal from an order of the Divisional Court (GROVE, J., and HUDDLESTON, B.).

The plaintiff in May, 1883, filed a petition in the Divorce Division of the High Court against the defendant, her husband, and on May 24, the defendant was ordered by that court to pay to the plaintiff £2 2s. per week as alimony pendente lite. The plaintiff then commenced this action against the defendant to recover the sum of £66 4s. arrears of alimony, endorsing the writ of summons with the particulars of claim and applied for judgment under Ord. 14, r. 1. The master refused the application and the matter was referred on appeal by DENMAN, J., to the Divisional Court who also refused the application.

Morton W. Smith for the plaintiff.

Wildey Wright for the defendant.

SIR BALIOL BRETT, M.R.—This appeal must be dismissed. We cannot make an order empowering the plaintiff to sign judgment summarily upon a writ of summons specially endorsed with an order for alimony, and the reason is that an action will not lie upon that order. It is an old and well-known rule of construing statutes that when a special remedy is given for the failure to comply with the directions of a statute, that remedy must be followed, and no other can be supposed to exist. In a court of common law no right to alimony existed: at all events, the power to make an order did not by the common law exist in the Divorce Court, because that court was created by the legislature, when it passed the Matrimonial Causes Act, 1857 [repealed]. The remedy intended to be given for disobedience to the decrees and orders of that court is described in s. 52 [repealed] of that statute, which is in the following terms :

"All decrees and orders to be made by the court in any suit, proceeding, or petition to be instituted under authority of this Act shall be enforced and put in execution in the same or the like manner as the judgments, orders, and decrees of the High Court of Chancery may be now enforced and put in execution."

This enactment provides that all the existing remedies of the Court of Chancery may be used for enforcing a decree or an order of the Divorce Court. Would an action lie in a court of common law to enforce a decree of the Court of Chancery? Clearly it would not, at least under ordinary circumstances. There was always power to sue upon the judgment of a court of common law; but no promise could be implied at common law to obey a decree of the Court of Chancery; and, therefore, a remedy by action for disobedience to a decree of the Court of Chancery did not exist at common law, and a decree or order of the Divorce Division can be enforced only in the manner pointed out by s. 52 [repealed]. We go upon higher grounds than those stated in the Queen's Bench Division, but the reasons given by GROVE, J., are also weighty.

BOWEN, L.J.—I am of the same opinion. An obligation to pay a sum of money created by statute may be enforced by action, and the High Court has power in such an action under the Rules of the Supreme Court, 1883, Ord. 3, r. 6, and Ord. 14, at least in some instances, to make an order summarily for payment of the money due by force of the statute, for it is a debt created by statute. Again, an action at common law will lie upon the judgment of a court of common law, for it will be assumed that the amount for which judgment has been signed is

A actually due. The whole of the reasoning applicable to the subject is admirably stated in the judgments of ALDERSON and BRAMWELL, BB., delivered in *Hutchinson v. Gillespie* (1). It is there pointed out that no action will lie upon a decree in equity, because no promise can be implied at common law to pay a mere equitable debt, and that no action will lie upon the judgment of a county court for the reasons stated in *Berkeley v. Elderkin* (2); those reasons are that where new rights are given with specific remedies, the remedy is confined to those specifically given, and moreover that the judge of a county court has power to rescind or alter his judgment. The principles laid down in *Hutchinson v. Gillespie* (1) apply to the present case. The only remedy for disobedience to an order for the non-payment of alimony is that pointed out by the Matrimonial Causes Act, 1857, s. 52 [repealed]. The present action will not lie.

C **FRY, L.J.**—The principles applicable to this case are well stated in the judgments delivered in *Berkeley v. Elderkin* (2) and *Hutchinson v. Gillespie* (1). An action at law would lie only upon a legal claim, and an order for the payment of alimony is, pursuant to statute, enforceable only as an equitable and not as a legal debt; it follows that the present action cannot be maintained.

D *Appeal dismissed.*

Solicitors: *J. H. Lane; J. C. Scard.*

E

APPLEBY v. FRANKLIN

F [QUEEN'S BENCH DIVISION (Huddleston, B., and Wills, J.), December 10, 1885]

[Reported 17 Q.B.D. 93; 55 L.J.Q.B. 129; 54 L.T. 135;

50 J.P. 359; 34 W.R. 281; 2 T.L.R. 170]

Action—Action based on felonious act—Need to prove prior prosecution of defendant—Criminal act committed, not against plaintiff, but against third party.

G The plaintiff brought an action against the defendant claiming damages from him on the ground that he had seduced her daughter and servant and had subsequently administered noxious drugs to her in order to procure an abortion. The allegations concerning seduction and the administration of drugs were contained in the statement of claim. The defendant applied to strike out the paragraph relating to the administration of drugs on the ground that it alleged a criminal offence for which he should first have been prosecuted and that it was also vexatious and embarrassing.

H

Held: while it was still good law that a person against whom a criminal offence has been committed must first prosecute the offender before starting civil proceedings against him, the rule did not apply where a third party had suffered damage and had a right of action arising from the wrong complained of.

I **Notes.** Distinguished: *Smith v. Selwyn*, [1914–15] All E.R.Rep. 229. Considered: *In the Estate of G., M. v. L.*, [1946] 1 All E.R. 579.

As to actions in respect of felonious torts, see 1 HALSBURY'S LAWS (3rd Edn.) 11 et seq.; and for cases see 1 DIGEST (Repl.) 73 et seq.

Cases referred to:

(1) *Wells v. Abrahams* (1872), L.R. 7 Q.B. 554; 41 L.J.Q.B. 306; 26 L.T. 433; 36 J.P. 710; 20 W.R. 659; 36 J.P.Jo. 260; 1 Digest (Repl.) 76, 565.

(2) *Wellock v. Constantine* (1803), 2 H. & C. 146; 2 F. & F. 791; 32 L.J.Ex. 285; 7 L.T. 751; 9 Jur.N.S. 232; 159 E.R. 61; 1 Digest (Repl.) 76, 571.

- (3) *Re Shepherd, Ex parte Ball* (1879), 10 Ch.D. 667; 48 L.J.Bey. 57; 40 L.T. 141; 27 W.R. 563; 14 Cox, C.C. 237, C.A.; 1 Digest (Repl.) 76, 566. A
- (4) *Osborn (Osborne) v. Gillett* (1873), L.R. 8 Exch. 88; 42 L.J.Ex. 53; 28 L.T. 197; 21 W.R. 409; 1 Digest (Repl.) 39, 287.
- (5) *White v. Spettigue* (1845), 1 Car. & Kir. 673; 13 M. & W. 603; 14 L.J.Ex. 99; 4 L.T.O.S. 317; 9 J.P. 761; 9 Jur. 70; 153 E.R. 252; 1 Digest (Repl.) 74, 557. B

Also referred to in argument :

Rooke v. D'Avigdor (1883), 10 Q.B.D. 412; 48 L.T. 761; 47 J.P. 248; 1 Digest (Repl.) 76, 570.

Gimson v. Woodfull (1825), 2 C. & P. 41; 1 Digest (Repl.) 74, 558.

Markham v. Cobb (1625), Lat. 144; W.Jo. 147; Noy, 82; 82 E.R. 316; 1 Digest (Repl.) 74, 553. C

Interlocutory Appeal in an action brought by the plaintiff, Mary Ann Appleby, against the defendant, Henry Franklin, to recover damages from him for the seduction of her daughter and servant. The second paragraph in the statement of claim alleged that the defendant had administered drugs to the plaintiff's daughter with the intent to procure an abortion. The defendant applied to strike out the second paragraph on the ground that it disclosed a criminal offence and that the defendant had not previously been prosecuted. The defendant further complained the same paragraph was vexatious and embarrassing. D

The master granted the application but STEPHEN, J., in chambers, referred the matter to the Court of Appeal for their decision since it involved an important question of law. E

H. Terrell for the plaintiff.

L. G. Pike for the defendant.

HUDDLESTON, B.—In this case the master has made an order striking out the second paragraph of the plaintiff's statement of claim, and on the appeal from him to the judge at chambers, my brother STEPHEN has referred the matter to this court as an important question requiring argument and consideration. F

The action is brought against the defendant by a mother, who, in the first paragraph of her statement of claim, alleges that the defendant has seduced her daughter; and in the second, that he has administered to her certain noxious drugs for the purpose of procuring abortion; and then, in the third, that by reason of those two matters she has suffered damage. The second paragraph the master struck out, and it is said on the one side that he was right in striking it out, because the matters alleged therein amount to felony, and it is a principle of the English law that if the matters alleged as a cause of action amount to felony no action will lie till the felon has been prosecuted. G

On the other side counsel for the plaintiff says that, although this objection is in itself founded on authority, it cannot be taken by the defendant, and as an authority for that he quotes *Wells v. Abrahams* (1). To my mind, however, it is perfectly clear, from the judgment of COCKBURN, C.J., in that case, and also from that of BLACKBURN, J., that those learned judges thought that, where an action is brought against a person who is liable to be prosecuted for felony, the summary jurisdiction of this court might be invoked to stay the proceedings; that is, that the court had power to strike out a statement of claim on that ground, and could deal with the matter in that way. There is, however, strong authority for the proposition that, where a party is injured by a felonious act on the part of another, no action is maintainable until the felon has been prosecuted. That authority is to be found in *Wellock v. Constantine* (2), where WILLES, J., on the case coming before him for trial at York, held that, as the evidence amounted to rape, no action would lie until after the defendant had been prosecuted. That case was considered by the court, and the nonsuit was supported. Doubt was, indeed, expressed by MARTIN, B.; but POLLOCK, C.B., and BRAMWELL, J., concurred in the H I

A decision, and when that case was brought under the notice of the Court of Appeal in *Re Shepherd, Ex parte Ball* (3), it was approved by them, although an endeavour was made to discredit it. BRAMWELL, L.J., says (10 Ch.D. at p. 671):

“*Wellock v. Constantine* (2) has been said to be no authority. If I may speak of myself, I have no doubt I concurred in the judgment, or the statement that I did so would have been set right; but I am sure I must have done so in the faintest way, not only from what I think now, but from what I am reported to have said then, and from there being no reasons given for the judgment, which I should have desired to give if I had thought there were any good ones to support it. But, at all events, there are the opinions of POLLOCK, C.B., and WILLES, J.—opinions which no one who knew those judges will undervalue”;

and BAGGALLAY, L.J., in stating the reasons for his decision, says (*ibid.* at p. 674) that

“notwithstanding the existence of the cause of action, the policy of the law will not allow the person injured to seek civil redress if he has failed in his duty of bringing or endeavouring to bring the felon to justice.”

That is certainly the law, but these cases only went to the extent that a plaintiff who has been injured by a felonious act cannot maintain an action, and they do not apply to persons who have a right of action based on a felonious act but are not the persons injured by it; so that a master who brings an action for the loss of service of his servant may maintain it against the person doing the injury notwithstanding that the circumstance amount to a felony.

This is clearly pointed out in an authority to which our attention has been called. In *Osborn v. Gillett* (4) a master brought an action against the defendant to recover damages for injuries caused to his daughter and servant, and the defendant pleaded that the acts complained of amounted to a felonious act, and that the person committing them had not been prosecuted; but the court held that the master could maintain the action. In the argument in that case the learned counsel for the plaintiff pointed out the distinction between the action being brought by the person injured by the felonious act and by a third party, and cited *White v. Spettigue* (5), where an action was brought against a bookseller who had innocently purchased goods stolen from the plaintiff, and the court held that the plaintiff could maintain the action because the objection that the felon had not been prosecuted fell to the ground, inasmuch as the rule only applied between the party injured and the criminal himself, and the felony had not been committed by the defendant, but by the person from whom he had innocently purchased the goods. To this argument the court acceded in *Osborn v. Gillett* (4), and held that, although the defendant might have committed the felony, that did not prevent the plaintiff from bringing the action, as he was not the person injured, PIGOTT, B., in his judgment saying very shortly (L.R. 8 Exch. at p. 93):

“I think the fourth plea is bad for the reasons given in the argument, viz., that it only affords a defence, if at all, when the action is brought against the supposed criminal and before prosecution.”

BRAMWELL, B., also says:

“The fourth plea in this case is clearly bad. *White v. Spettigue* (5) is in point. Indeed, this case is stronger. There the plaintiff was the owner of the books, and it may be said that in some sense it was his duty to prosecute the man who stole them; but in this case I see no greater duty in the plaintiff than in anyone else to prosecute for the supposed felony.”

That state of things is, in my opinion, in point in this case also. Counsel for the defendant has endeavoured to distinguish the present case from *Osborn v. Gillett* (4), but I think that he has failed to do so. Under these circumstances I am of opinion that the master was wrong in striking out the second paragraph

of the statement of claim. I think that, if it is really true that the defendant has seduced and administered drugs to the plaintiff's daughter and servant, it would be a scandal upon the administration of justice if he could not be made amenable to damages for the wrong which he has done. The paragraph will, therefore, be restored to the statement of claim, and the appeal will be allowed with costs.

WILLS, J.—I am of the same opinion. I think that the authorities leave no room for doubt that the objection to an action being brought to recover damages caused by a felonious act until the person committing the felony has been prosecuted applies only when the person bringing the action is the injured party, and the action is brought against the person committing the felony. My only doubt is as to the manner in which the objection should be taken. It cannot be taken by plea or by demurrer, for the good reason that, if it could be taken by either of those methods, the result would be that the cause of action would be extinguished, whereas the cause of action is not extinct, but still exists, although I do not know whether it is more correct to say that it is suspended, or that the court will not allow the plaintiff to go on until he has prosecuted the felon. That being so, I do not know what course would be more proper, where an action is brought by a person to whom a wrong constituting a felony has been done against the person doing it, than to strike out the allegation of the felonious act. Here, however, the action is not being brought by that person, but by a person on whom no public duty is laid by the law. I am of opinion, therefore, that the plaintiff in this case is not debarred from her action, inasmuch as she is in no default, and has committed no breach of any duty which she owes to society. The decision of the master must, therefore, be reversed, and the paragraph restored.

Appeal allowed.

Solicitors : *J. H. Evans; Lumley & Lumley.*

[*Reported by JOSEPH SMITH, ESQ., Barrister-at-Law.*]

A

POYSER v. MINORS

[COURT OF APPEAL (Bramwell, Baggallay and Lush, L.JJ.), April 9, 11, June 30, 1881]

B

[Reported 7 Q.B.D. 329; 50 L.J.Q.B. 555; 45 L.T. 33;
46 J.P. 84; 29 W.R. 773]

Practice—Defined—Mode of proceeding by which legal right enforced.

County Court—Rules—Validity—Regulation of practice of court—Rule decreeing effect of non-suit.

C

By s. 32 of the County Court Act, 1856 [see now s. 102 of the County Courts Act, 1959], the Lord Chancellor was given power to "appoint five county court judges . . . to frame rules and orders for regulating the practice of the courts and forms of proceedings therein."

D

By Ord. 16, r. 17, of the County Court Rules, 1875 [revoked], which were made in the manner prescribed and in pursuance of the power given by s. 32, *supra*, it was provided that: "Any judgment of non-suit, unless the judge otherwise directs, shall have the same effect as a judgment upon the merits for the defendant."

It was contended that this rule was *ultra vires* as it was not a matter of practice only but involved a matter of substantive law.

E

Held (BRAMWELL, L.J., dissenting): the rule was not *ultra vires*.

Per LUSH, L.J.: "Practice" in its larger sense—the sense in which it was obviously used in the Act of 1856—like "procedure" which is used in the Judicature Acts, denotes the mode of proceeding by which a legal right is enforced as distinguished from the law which gives or defines the right, and which by means of the proceeding the court is to administer.

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Notes. The Supreme Court of Judicature Act, 1873, except ss. 46, 64 and 66, has been repealed. The County Court Act, 1856, and the County Court Rules, 1875, have been repealed and replaced.

Applied: *Blyth v. Lord Advocate*, [1944] 2 All E.R. 375.

As to the validity of the county court rules in general, see 9 HALSBURY'S LAWS (3rd Edn.) 116–117; and for cases see 13 DIGEST (Repl.) 370. For the County Courts Act, 1959, s. 102 (6), see 39 HALSBURY'S STATUTES (2nd Edn.) 178.

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Case referred to:

(1) *King v. Hawkesworth* (1879), 4 Q.B.D. 371; 48 L.J.Q.B. 484; 41 L.T. 411; 27 W.R. 660; 16 Digest (Repl.) 225, 1154.

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Appeal from an order of Alfred Wills, Q.C., sitting as commissioner in a county court in an action brought by the plaintiff against the defendant for the recovery of £37 2s. for goods sold and delivered.

The plaintiff had previously sued for the same cause of action in the County Court of Lichfield, but, being abroad at the time, and not having given security for costs as required by the County Court Rules, he was nonsuited, with leave to re-enter the cause for trial. It was objected on behalf of the defendant that the nonsuit in the county court was a bar to the plaintiff's right to recover in the action in the High Court. The learned Commissioner held that Ord. 16, r. 17, of the County Court Rules, 1875 [revoked] making a nonsuit equivalent to a judgment for the defendant on the merits, applied only to a nonsuit on the merits, and not to a nonsuit for failure to give security for costs, and gave judgment for the plaintiff.

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Jelf, Q.C., and *Archibald* for the defendant.

Bosanquet and *Darling* for the plaintiff.

June 30, 1881. **LUSH, L.J.**—This action is brought to recover £37 2s. for goods sold and delivered. The writ is dated Jan. 11, 1881. The material ground of defence was, that on May 5, 1880, the plaintiff sued the defendant in the County Court of Lichfield for the same debt, and that in that action judgment of nonsuit was given against him, which judgment remained in force. At the trial of this action in the court below a certified copy of the entry in the minute-book of judgments in the county court was put in evidence, and from this it appeared that the plaintiff was represented at the trial by counsel and the defendant by his solicitor; that judgment of nonsuit was given, with costs, but accompanied with an order that such judgment was not to be a bar to a re-entry of the cause for trial. No application to re-enter the cause pursuant to such leave, or to set aside the nonsuit as irregular, was made until long after the time limited for that purpose by the Consolidated County Court Orders, so that the nonsuit has, according to the terms of Ord. 16, r. 17 [revoked], of those orders, the same effect as a judgment for the defendant upon the merits—that is, it is a bar to this action. When the plaint was entered in the county court, and the summons applied for, nothing was said to the registrar to the effect that the plaintiff was out of the country, consequently no security for costs was given or required, but the summons was given out as to an ordinary suitor residing in England at the time, whereas, in fact, the plaintiff had gone to America to reside, and had left his wife to wind-up his affairs. The 4th of the Consolidated Orders prohibits the summons being issued under such circumstances until security for costs has been given, either by a deposit of money or otherwise, or the undertaking of a solicitor to see them paid. When it was disclosed at the trial that the plaintiff was out of the country, and security had not been given, the learned judge of the county court considered that he had no alternative but to nonsuit the plaintiff, but he reserved leave to re-enter the cause upon security being given. No further step was taken by the plaintiff in the county court; but eight months afterwards this action was brought. [His LORDSHIP having considered Ord. 16, r. 17 [revoked] held that on the facts the non-suit was a bar to the subsequent action by the plaintiff, and continued :]

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On the argument before us a new point was started, and this ultimately became the point mainly relied on. It was that C.C.R., Ord. 16, r. 17 [revoked], was *ultra vires*, and that, supposing that to be out of the way, the plaintiff was only exercising his common law right in bringing a second action. We reserved our judgment in order to look into the statutes under and in connection with which the Consolidated County Court Orders were made. These orders were issued in 1875, and supplemented in 1876. Many of these were taken from the orders which were framed under the Supreme Court of Judicature Act, 1873, and which were incorporated into the Supreme Court of Judicature Act, 1875. The rule in question is a copy of R.S.C., Ord. 41, r. 6, and like many others of the Consolidated Orders it was intended to assimilate the practice of the county courts to that of the High Court. They were framed by a committee of county court judges appointed by the Lord Chancellor under the County Courts Act, 1856, [repealed]. The words of s. 32 of that Act are :

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“The Lord Chancellor may appoint five county court judges, and from time to time fill up any vacancy in their number, to frame rules and orders for regulating the practice of the courts, and the forms of proceedings therein, and from time to time to amend such rules, orders, and forms, and such rules, orders, and forms, or amended rules, orders, and forms certified under the names of such judges, or any three or more of them, shall be submitted to the Lord Chancellor, who may allow or disallow or alter the same, and the rules, orders, and forms so allowed or altered shall from a day to be named by the Lord Chancellor be in force in every county court.”

I

A The five judges unanimously certified the rules, and the Lord Chancellor certified his approval of them, and directed them to come into force on Nov. 2, 1875, being the day after that on which the Judicature Acts came into operation.

B A nonsuit at common law was nothing more than a declaration by the court that the plaintiff had made default in appearing at the time to prosecute his suit. The entry on the postea was, that "the said A.B. being solemnly called comes not, nor does he further prosecute his suit against the said C.D." It decided nothing as regards the matters in dispute, but merely got rid of the pending action, leaving the plaintiff at liberty to begin *de novo*, and this he might have done either in the same or a different court, subject only to having the proceedings stayed till he had paid the costs taxed against him on the nonsuit. The first County Court Act (9 & 10 Vict., c. 95) [repealed], authorised the court to nonsuit C the plaintiff, or to give judgment for the defendant, if the plaintiff should appear and not make proof of his demand to the satisfaction of the court, and in either case to award costs (s. 79); and s. 89 says that

D "every order and judgment shall be final and conclusive between the parties, but the judge shall have power to nonsuit the plaintiff in every case in which satisfactory proof shall not be given to him entitling either the plaintiff or the defendant to the judgment of the court."

E A nonsuit under these sections would undoubtedly have left the plaintiff at liberty to bring another action. The rule in question puts a restriction upon this liberty, and subjects it to the discretion of the judge, to be exercised at the time when he pronounces judgment of nonsuit: "Any judgment of nonsuit, unless the judge otherwise directs, shall have the same effect as a judgment upon the merits for the defendant;" but when he does not otherwise direct, the rule goes on to declare that he may set aside the nonsuit "in any case of mistake, surprise, or accident"—words large enough to embrace every contingency to which the failure may be attributed, which reasonably entitles the plaintiff to have the validity of his demand effectually tried. It is more beneficial to both parties to have a second F trial in the same action than to waste the costs already incurred and begin the litigation *de novo*.

G Is a rule which has this effect covered by the authority given to the committee of judges by County Courts Act, 1856, "to frame rules and orders for regulating the practice of the courts and the forms of proceedings therein?" This is the question we have to decide, and although we are not precluded from forming our own opinion by the consideration that these rules were framed by five judges of great experience, and deliberately and formally adopted by the Lord Chancellor, and that they have been accepted and acted upon in all the county courts in England for more than five years without any such objection having been taken before, but are bound to form our own opinion notwithstanding, we cannot but H hold that these considerations have great weight, and that nothing short of strong conviction that the Act has been strained, and that it will not bear such a construction, would justify us in declaring the rule to be *ultra vires*. After the best consideration I can give to the case, I am not only not convinced that the Act has been misconstrued, but am of opinion that the Lord Chancellor and the learned judges were right in the view which they have taken of their authority under the Act of 1856.

I "Practice" in its larger sense—the sense in which it was obviously used in that Act—like "procedure," which is used in the Judicature Acts, denotes the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the rights, and which by means of the proceeding the court is to administer,—the machinery as distinguished from its product. "Practice" and "procedure" as applied to this subject I take to be convertible terms. The rule in question is, as I before observed, a copy of R.S.C., Ord. 41, r. 6, [repealed], which were framed by the judges under the Supreme Court Judicature Act, 1873, and adopted as part of the Act of 1875. The particular rule was originally in the

schedule to and formed part of the Act of 1873. How is it regarded in that statute? Is it regarded as a matter of practice, or something higher, in the nature of substantive law? Section 69 [repealed] which declares the rules in the schedule to be part of the Act, says,

"as to all matters to which they extend those rules shall regulate the proceedings in the High Court, unless and until by the authority hereinafter provided any of them may be altered or varied, but such rules shall for all purposes of this Act be rules of court capable of being annulled or altered by the same authority by which any of the rules of court may be made, altered, or annulled after the commencement of this Act."

The authority referred to is contained in s. 74 by which the Supreme Court may

"alter or annul any rules of court for the time being in force, or make any new rules of court for the purpose of regulating all such matters of practice and procedure in the Supreme Court, or relating to the suitors or officers of the court, or otherwise, as under the provisions of this Act are, or may be, regulated by rules of court."

And by s. 68 rules of court may be made for (among other things)

"the regulating of any matters relating to the practice and procedure of the said courts respectively"

(the High Court and Court of Appeal). In these sections the rules in this schedule are regarded as rules of court for regulating its practice and procedure, and apart from statutory restriction such rules are within the competence of every court to make for itself. Rules of substantive law which the court has to administer are enacted and declared in the body of the Act, and these are by s. 91 to be

"in force and receive effect in all courts whatsoever in England, so far as the matters to which such rules relate shall be respectively cognisable by such courts. But the schedule is headed 'Rules of Procedure',"

and these are rules for regulating the practice of the High Court only, and would not by virtue of that Act be applicable to county courts. If, therefore, the practice was to be uniform it was necessary to frame rules for the county courts in order to make it so.

Surely it is highly expedient that courts administering the same law, whose jurisdiction is in the main concurrent, as far as it extends, with that of the High Court, should as far as practicable, having regard to their more limited jurisdiction, be guided by the same rules of practice, and I cannot help thinking that, if it had been thought that "Rules for regulating the practice in the county courts" in the Act of 1856, meant something different from and short of "Rules of Procedure" in the Supreme Court of Judicature Act, 1873, a further authority would have been given either in one of the Judicature Acts or some later County Court Act. Turning to r. 46, we find additional proof that the rule in question was regarded as a rule of "practice." It is there associated with others which come within the narrowest and most technical definition of "practice," the whole rule forming a wholesome provision for putting an end to vexatious and capricious proceedings by which litigation was often needlessly prolonged and rendered needlessly oppressive. That rule forbids a plaintiff: First, from discontinuing his action without leave of the court if he has taken any step after delivery of the statement of defence; secondly, from withdrawing the record without such leave; and thirdly, from bringing a second action for the same cause after being nonsuited except where leave to do so was given him, and compelling him, instead of resorting to this expedient, to apply to set aside the nonsuit and proceed to a second trial in the same action. This latter purpose is expressed by the rule in question. Lastly, the same article forbids the defendant from withdrawing his defence in whole or in part without leave. If the judges at the county courts had not the power to

A adopt these wholesome rules they certainly ought to have had it, and, as I before observed, I cannot help thinking it would have been given them if it had been considered to be wanting. For these reasons, I am of opinion that this objection also fails, and that the judgment of the court below must be reversed and judgment given for the defendant with costs both in this court and the court below.

B **BAGGALLAY, L.J.**, concurred with **LUSH, L.J.**

BRAMWELL, L.J.—I have very great difficulty in this case. My brother LUSH has favoured me with his judgment. I quite agree with him, with all respect to the learned judge before whom the case was tried, that the judgment cannot be supported on the ground on which it was given, and that it must be reversed unless C.C.R., Ord. 16, r. 17, [revoked] was ultra vires of those who made it. In considering whether it was, one must consider to some extent Ord. 41, r. 6 [repealed], of the Judicature Orders. This rule has always been a difficulty to me. It supposes a "judgment of nonsuit" may be given. There really in strictness never was a "judgment" of nonsuit. No plaintiff could be nonsuited against his will. He failed to appear at the appointed time, generally at nisi prius (I believe there were other stages of a cause in which there might be a nonsuit), and his non-appearance was recorded, returned to the court in banco, and then judgment was given against him, that the defendant go without day, &c., the same judgment as in many other cases—a judgment consequent on his not prosecuting his action, a judgment because he was nonsuit. If he insisted on appearing he could not be nonsuit. The expression there "judgment of nonsuit" seems inaccurate. But setting aside this difficulty, which, were it necessary, I could show is not merely verbal, I have never been able to see when under the other rules a nonsuit can happen. I need not discuss nonsuits before trial. None are provided for by the rules.

What is to happen at the trial? By Ord. 36, r. 18 [repealed], If plaintiff appears, and defendant does not, plaintiff may prove his claim. What is to happen if he does not is not said. I should have thought verdict and judgment for defendant if the case were before a jury, judgment for him if not. Was it contemplated that a Vice-Chancellor should nonsuit? Suppose plaintiff insists on appearing. What is the use of a nonsuit if it is a bar to a future action unless ordered to the contrary? And if it may be and is, why could not the power be given to the judge or court to say that any judgment of whatever kind should not be a bar if so ordered? However, it might be said that this was the object of the rule, and that under the former r. 22 of that order, by which the judge may give judgment for plaintiff or defendant, or "enter any other judgment," the judge could give "judgment of nonsuit." But that r. 22 is repealed, and in lieu of it is a rule that the judge may "direct judgment for any or either party, or adjourn the case for further consideration, or leave either party to move for judgment." This does not seem to authorise "judgment of nonsuit," which is not a judgment for the defendant, save that it is against the plaintiff. Rule 18 seems the only one under which such a judgment can be given. The judgment when defendant appears is provided for by r. 19 and r. 22, now rule 22A. It seems strange that such a judgment can be given only where the plaintiff appears and defendant does not. I cannot but doubt whether r. 6 of Ord. 41 did not slip in per incuriam, and whether it can be applied, now especially. However, there it is, and it has been acted on, and probably would be supported if possible. I should have thought it ultra vires, except that it is embodied in a statute. Still, however doubtful the parentage, there is its offspring, the county court rule, which we must now consider.

I quite agree with my brother LUSH that the question is, is the county court rule which is in question covered by the authority to frame rules and orders for regulating the practice of the courts and forms of proceedings therein? I need hardly say that I quite agree with him that it is strongly in favour of the validity of such a rule that it was framed by five learned county court judges, and

passed by the Lord Chancellor, and that it has been in universal operation unchallenged for five years. This would weigh with much greater weight if I knew that the rule had been made and certified after consideration of the question now before us; but probably it was not; probably the Judicature rule was simply adopted. Further, it assimilates the county court practice to that of the High Court, if indeed Ord. 41, r. 6 [repealed], is operative. But this is certain: unless the rule could have been validly made on the passing of the Act of 1856, it could not be validly made when it was. Would it have been tolerated in 1856? My difficulty is to see how, if it operates as contended, it is a rule of procedure or practice—how it is a rule which does not more than “regulate the practice of the courts and forms of proceedings therein.”

I have already made some remarks on nonsuits. I agree with what my brother LUSH says, but for and until this rule the judgment of nonsuit authorised by the first County Court Act (9 & 10 Vict., c. 95) would not have precluded a second action. It would have been no bar to a second action. Why? Why was not a nonsuit in actions in the superior courts a bar to a second action? Because there was no judgment on the matter in dispute; because the matter was not *res judicata*; because the maxim, *Nemo debet bis vexari pro eadem causa*, did not apply. The same thing was true of a second action after a discontinuance. It was even true where there was a verdict, unless he was barred by the judgment, as where the judgment was “*Quod (defendant) eat sine die*,” and not “*Quod querens nihil capiat per breve*.” To be barred, a plaintiff must have had judgment against him on demurrer, verdict, or confession, and in bar of his right. This is a rule of law consequent on such judgment, and to give such an effect to a judgment of nonsuit is to alter the law, and, with all submission, to alter it anomalously, and to give an arbitrary effect to a proceeding, which effect is without principle. I cannot agree then with my brother LUSH that all that the rule does “is to put a restriction on this liberty,” viz., of bringing a second action, “and subject it to the discretion of the judge.” The rule takes away this right in law. I do agree with his distinction between practice to enforce a right and the law which gives and defines the right. But then I ask whether it is not the case that a man has a right of action, which the law says he shall not lose by bringing an action and being nonsuited, but these rules say he shall lose thereby. I agree also that the Judicature Orders treat this as a matter of practice; but, with all respect to those rules, I cannot think that any implication therefrom can reverse a rule of known existence, and of which the reason and principle are known. It was perfectly competent to those who framed the rules under the Judicature Act, even without a statutory effect being given, to say there should be no discontinuance, no withdrawing the record, &c., and they might have said there should be no nonsuit. They might have added that any nonsuit might be set aside, and so have made it like what Ord. 41, r. 6, [repealed], says it is, to this extent at least, that the action might be resumed in the same court. It may be said that, if this can be done, why cannot they do what they have done? I say it is not the same thing. They have made a nonsuit a bar to a second action in the same or any other court. They have altered the law of the land. I think this was *ultra vires*, and that, therefore, the judgment ought to be affirmed. I cannot agree with the case cited to us (*King v. Hawkesworth* (1)).

Appeal allowed.

Solicitors: *Ashurst, Morris, Crisp & Co.; Jennings & Burton.*

[Reported by P. B. HUTCHINS, ESQ., Barrister-at-Law.]

CITIZENS INSURANCE CO. OF CANADA v. PARSONS
QUEEN INSURANCE CO. v. PARSONS

[PRIVY COUNCIL (Sir Barnes Peacock, Sir Montague Smith, Sir Robert Collier, Sir Richard Couch and Sir Arthur Hobhouse), July 7, 8, 9, November 26, 1881]

[Reported 7 App. Cas. 96; 51 L.J.P.C. 11; 45 L.T. 721]

Canada—Dominion and provincial legislation—Power of provincial legislature to legislate—Act of provincial legislature “to secure uniform conditions in policies of fire insurance”—British North America Act, 1867 (30 & 31 Vict., c. 3), ss. 91, 92.

The British North America Act, 1867, s. 91, provides that the Dominion Parliament of Canada shall have exclusive legislative authority in all matters not specifically assigned to the provincial legislatures and in particular as to certain classes of subjects there set out including by “Class 2. The regulation of trade and commerce.”

Section 92 of the Act, provides that the provincial legislatures may exclusively make laws in relation to matters coming within the classes of subjects there set out including “Class 11. The incorporation of companies with provincial objects”; and “Class 13. Property and civil rights in the province.”

A statute was passed by the legislature of the province of Ontario “to secure uniform conditions in policies of fire insurance.” Under this Act certain conditions set out in the schedule were as against the insurers deemed to be part of every policy of fire insurance and the same were to be printed in every such policy under the heading “Statutory Conditions.” An insurer could only omit, vary or add to these conditions by including the words “variations in conditions” written in a different colour ink, and, if this was not done, the alteration had no binding effect. It was contended that this statute was ultra vires the provincial legislature.

Held: the statute was not ultra vires because: (i) the wording of class 13 of s. 92 was sufficiently large to embrace in their fair and ordinary meaning, rights arising from contract and such rights were not included in any of the classes of subjects in s. 91; (ii) the authority of the Dominion Parliament to legislate for the regulation of trade and commerce did not comprehend the power to regulate by legislation the contracts of a particular business or trade, such as the business of fire insurance in a single province, and, therefore, its legislative authority did not in this case conflict or compete with the power over property and civil rights assigned to the legislature of Ontario by class 13 of s. 92; (iii) as the statute of Ontario did not assume to interfere with the constitution or status of corporations it did not make any difference to the above principle if an insurance company had been originally incorporated by the Parliament of the former province of Canada; and (iv) the fact that a statute of the Dominion Parliament required fire insurance companies to obtain licences from the Minister of Finance as a condition of their carrying on the business of insurance in the Dominion did not in any way interfere with the authority of the provincial legislature to legislate in relation to the contracts which corporations might enter into in that province.

Notes. *Russell v. R.* (1882), 7 App. Cas. 829; *Colonial Building and Investment Association v. A.-G. of Quebec* (1883), 9 App. Cas. 164; *Merchants Bank v. Smith* (1884), 8 S.C.R. 533; *Venning v. Steadman* (1884), 9 S.C.R. 217. Considered: *Bank of Toronto v. Lambe*, [1886–90] All E.R.Rep. 770. Applied: *Lynch v. Canada North West Land Co.* (1891), 19 S.C.R. 213. Followed: *Hudson v. South Norwich* (1895), 24 S.C.R. 161; *Fortier v. Lambe* (1895), 25 S.C.R. 430. Considered: *Victoria Montreal Fire Insurance Co. v. Home Insurance Co.* (1904), 35

S.C.R. 221; *Re Railway Act* (1905), 36 S.C.R. 140; *Canadian Pacific Rail. Co. v. Ottawa Fire Insurance Co.* (1907), 39 S.C.R. 421; *Montreal v. Beavais* (1909), 42 S.C.R. 216; *Burrard Power Co. v. R.* (1910), 43 S.C.R. 55; *Montreal Street Rail. Co. v. Montreal* (1910), 43 S.C.R. 244; *John Deere Plow Co. v. Wharton*, [1915] A.C. 330. Followed: *Lawson v. Interior Tree, Fruit and Vegetable Committee of Direction*, [1931] S.C.R. 357. Considered: *Re Insurance Act of Canada*, [1932] A.C. 41; *Forbes v. A.-G. of Manitoba*, [1937] 1 All E.R. 249; *Re Debt Adjustment Act, Alberta*, [1942] S.C.R. 31; *Re Farm Security Act, Saskatchewan*, [1947] S.C.R. 394. Applied: *Ref. re Dairy Industries Act*, [1949] S.C.R. 1. Considered: *Winner v. S.M.T. (Eastern), Ltd.*, [1951] S.C.R. 887; *Saumur v. Quebec and A.-G. (Quebec)*, [1953] 2 S.C.R. 299. Applied: *Ref. re Farm Products Marketing Act*, [1957] S.C.R. 198. Referred to: *Dobie v. Temporalities Board* (1882), 7 App. Cas. 136; *Hodge v. R.* (1883), 9 App. Cas. 117; *A.-G. for Ontario v. A.-G. for the Dominion*, [1896] A.C. 348; *Re Coleman's Depositories, Ltd. and Life and Health Assurance Association* (1907), 76 L.J.K.B. 865; *Great West Saddlery Co. v. R.*, [1921] All E.R.Rep. 605; *A.-G. for Ontario v. Reciprocal Insurers*, [1924] A.C. 328; *Caron v. R.*, [1924] A.C. 999. *Toronto Electric Comrs. v. Snider*, [1925] A.C. 396; *A.-G. for Manitoba v. A.-G. for Canada*, [1929] A.C. 260; *Proprietary Articles Trade Association v. A.-G. of Canada*, [1931] All E.R.Rep. 277; *Shannon v. Lower Mainland Dairy Products Board*, [1938] A.C. 708; *Lethbridge Irrigation District Trustees v. Independent Order of Foresters and A.-G. for Canada*, [1940] 2 All E.R. 220.

As to the interpretation of the distribution of legislative powers under the British North America Act, 1867, see 5 HALSBURY'S LAWS (3rd Edn.) 497 et seq.; and for cases see 8 DIGEST (Repl.) 705 et seq. For the British North America Act, 1867, see 6 HALSBURY'S STATUTES (2nd Edn.) 303.

Cases referred to:

- (1) *L'Union St. Jacques de Montreal v. Bélisle* (1874), L.R. 6 P.C. 31; 31 L.T. 111; 22 W.R. 933, P.C.; 8 Digest (Repl.) 722, 198.
- (2) *Cushing v. Dupuy* (1880), 5 App. Cas. 409; 49 L.J.P.C. 63; 42 L.T. 445, P.C.; 8 Digest (Repl.) 703, 115.

Appeal from a decision of the Supreme Court of Canada (RITCHIE, C.J., FOURNIER and HENRY, JJ., TASCHEREAU and GWYNNE, JJ., dissenting, reported 4 S.C.R. 215, in two actions by the respondent, Parsons, against the two appellant companies, the Citizens Insurance Co. of Canada, and the Queen Insurance Co. upon contracts of fire insurance which the respondent had made with the two companies.

A statute (39 Vict., c. 24) was passed by the legislature of the province of Ontario intituled "An Act to secure uniform conditions in policies of fire insurance." The preamble of the Act provided that

"Whereas, under the provisions of an Act passed in the thirty-eighth year of the reign of Her Majesty, intituled 'An Act to amend the laws relating to fire insurances,' the Lieutenant-Governor issued a commission to certain commissioners therein named, requiring them to consider and report what conditions are just and reasonable conditions to be inserted in fire insurance policies on real or personal property in this province: And whereas a majority of the said commissioners have, in pursuance of the requirements of the said Act, settled and approved of the conditions set forth in the schedule to this Act; and it is advisable that the same should be expressly adopted by the legislature as the statutory conditions to be contained in policies of fire insurance entered into or in force in this province."

Section 1 provided:

"The conditions set forth in the schedule to this Act shall, as against the insurers, be deemed to be part of every policy of fire insurance hereafter entered into, or renewed, or otherwise in force in Ontario, with respect to any property therein, and shall be printed on every such policy with the heading 'Statutory

A Conditions' and if a company (or other insurer) desire to vary the said conditions, or to omit any of them or to add new conditions, there shall be added in conspicuous type, and in ink of different colour, words to the following effect: Variations in conditions. This policy is issued on the above statutory conditions, with the following variations and additions: 'These variations (or as the case may be) are, by virtue of the Ontario statute in that behalf, in force
B so far as, by the court or judge before whom a question is tried relating thereto, they shall be held to be just and reasonable to be executed by the company.'

Section 2 provided:

C "Unless the same is distinctly indicated and set forth in the manner or to the effect aforesaid, no such variation, addition, or omission shall be legal and binding on the insured; and no question shall be considered as to whether any such variation, addition, or omission is, under the circumstances, just and reasonable, and on the contrary the policy shall, as against the insurers, be subject to the statutory conditions only, unless the variations, additions, or omissions are distinctly indicated and set forth in the manner or to the effect aforesaid."

D Section 3 provided:

"A decision of a court or judge under this Act shall be subject to review or appeal to the same extent as a decision by such court or judge in other cases."

Of the twenty-one conditions contained in the schedule to the Act under the head "Statutory Conditions" the following were material:

E "After application for insurance, it shall be deemed that any policy sent to the assured is intended to be in accordance with the terms of the application, unless the company shall, in writing, point out the particulars wherein the policy differs from the application."

Condition 8:

F "The company is not liable for loss if there is any prior insurance in any other company, unless the company's assent thereto appear therein, or is endorsed thereon, nor if any subsequent insurance is effected in any other company, unless and until the company assent thereto by writing, signed by a duly authorised agent. . . . in the event of any other insurance on the property
G herein described having been assented to as aforesaid, then this company shall, if such other insurance remain in force, on the happening of any loss or damage, only be liable for the payment of a rateable proportion of such loss or damage without reference to the dates of the different policies."

Condition 10:

H "The company is not liable for losses following, that is to say, among others: (g) The company is not liable for loss or damage occurring while petroleum, . . . or more than twenty-five pounds weight of gunpowder, are stored or kept in the building insured, or containing the property insured, unless permission is given in writing by the company."

I The Citizens Insurance Co. of Canada were originally incorporated by an Act of the former province of Canada. Another Act of the former province of Canada gave the company further powers including the power to effect contracts of insurance against fire. An Act of the Dominion Parliament subsequently enacted that the company, which was then known by its present name, should enjoy all the franchises, privileges, and rights, and be subject to all the liabilities of the company under its former name. The company had its head office in Montreal and carried on business in Ontario and in other provinces of Canada.

The respondent insured with the company through its local agent in Orangeville, Ontario, a hardware store for one year for 2,500 dollars and on May 4, 1877, a

policy of insurance in respect thereto was issued to him by the agent in Orangeville. The policy was made subject to the usual conditions of the company which were endorsed on it. In particular it was provided that:

"The assured must give notice to this company of any other insurance effected on the same property, and have the same endorsed on this policy, or otherwise acknowledged by the company in writing, and failure to give such notice shall void this policy. . . . And this policy is made and accepted under the conditions above mentioned, which are to be used and resorted to in order to explain the rights and obligations of the parties thereto in all cases not herein otherwise specially provided for." There was no reference therein to the Act of the Ontario Legislature intituled "An Act to secure uniform conditions in policies of fire insurance."

On Aug. 3, 1877, the insured store was destroyed by fire and the respondent brought this action upon the policy. At the time when the respondent had made this contract of insurance another insurance had been effected on the same building with the Western Assurance Co. but the respondent in contravention of the conditions of the policy had given no notice to the Citizens Insurance Co. of Canada of this policy. The failure to give such notice was also in breach of the provisions of the Ontario Act relating to insurance previously referred to. The Citizens Insurance Co. of Canada contended (i) that the Ontario Act was in any event a nullity since it was ultra vires the provincial legislature, and (ii) the respondent could not enforce the contract of insurance against the company because of his breach of contract or his breach of statutory conditions in failing to give notice of the prior insurance.

The Queen Insurance Co. were an English company which carried on its business at Orangeville through an agent. On Aug. 3, 1877, the respondent applied to this agent to effect with the company an insurance for 2,000 dollars on a general stock of hardware and other goods in his hardware store and a premium of forty dollars was agreed upon. An interim receipt was given by the agent to the respondent and was in the following terms:

"Interim receipt. Fire department. Interim protection note. Queen Fire and Life Insurance Co., Chief Office, Queen Insurance Buildings, Liverpool. Canada Head Office, 191 St. James Street, Montreal. No. 33, Orangeville, Agency, Aug. 3, 1877. Mr. William Parsons, having this day proposed to effect an insurance against fire, subject to all the usual terms and conditions of this company, for 2,000 dollars, on the following property in the town of Orangeville, for 12 months, namely, on general stock of hardware, paints, oils, varnishes, window glass, stoves, tinware, castings, hollow ware, plated and fancy goods, lamps, lamp glasses, and general house furnishing goods. And having also first paid the sum of forty dollars as the premium on the same, it is hereby held assured under these conditions until the policy is delivered or notice given that the proposal is declined by the company, when this interim note will be thereby cancelled and of no effect. (Signed) A. M. Kirkland, agent to the company. N.B.—The deposit will be returned, less the proportion for the period, on application to the agent signing this note, in the event of the proposal being declined by the company. If accepted, a policy will be prepared and delivered within thirty days. If the holder does not receive a policy during the specified period, he should apply to the head office in Montreal."

The stock was destroyed by fire which occurred on the same day before a policy had been delivered to the respondent and the respondent brought an action on the receipt.

Condition 4 of the company's usual conditions provided that the company would not be liable for any loss or damage when more than 10 lb. weight of gunpowder was deposited or kept on the premises unless the same was especially allowed in the body of the policy, and suitable extra premium paid. This quantity of gun-

A powder was smaller than that provided for in the Ontario Act which provided in condition 10 (g) that the company is not liable for loss or damage occurring while, inter alia, more than 25 lb. weight of gunpowder is stored or kept in the building containing the property insured. At the time of the fire gunpowder exceeding 10 lb. in weight but less than 25 lb. was kept on the premises.

B The respondent contended that the contract must by reason of the Ontario Act, be treated as being without any conditions; or if it was subject to conditions, those conditions were the statutory conditions only. The appellants contended: (i) that the Ontario Act was in any event a nullity since it was ultra vires the provincial legislature; (ii) that the interim note was not a policy of insurance within the meaning of the Ontario Act and that therefore the insurance was subject to the company's usual conditions including condition 4 which the respondent had broken.

C The case is only here reported on the issue of the validity of the Ontario Act. The majority of the Supreme Court of Canada, the Court of Appeal of Ontario and the Court of Queen's Bench were all in favour of the validity of the Act.

The Solicitor-General (Sir Farrer Herschell, Q.C.), Benjamin, Q.C., Bethune, Q.C. (of the Canadian Bar), and Jeune for the appellants in both appeals.

D *Sir John Holker, Q.C., and A. L. Smith for the respondent.*

SIR MONTAGUE SMITH.—The questions in these appeals arise in two actions brought by the same plaintiff (the respondent) upon contracts of insurance against fire of buildings situate in the province of Ontario, in the Dominion of Canada. The most important question in both appeals is one of those, already numerous, which have arisen upon the provisions of the British North America Act, 1867, relating to the distribution of legislative powers between the Parliament of Canada and the legislatures of the provinces, and, owing to the very general language in which some of these powers are described, the question is one of considerable difficulty. Their Lordships propose to deal with it before approaching the facts on which the particular questions in the actions depend. It will only be necessary to premise that the Citizens Insurance Co. of Canada, the defendants in the first action, were originally incorporated by an Act of the late province of Canada (19 & 20 Vict., c. 124) by the name of the Canada Marine Insurance Co. By another Act of the late province (27 & 28 Vict., c. 98) further powers, including the power of effecting contracts of insurance against fire, were conferred on the company, and the name changed to the Citizens Insurance and Investment Co.; and, finally, by an Act of the Dominion Parliament, its name was again changed to the present title, and it was enacted that, by its new name, it should enjoy all the franchises, privileges, and rights, and be subject to all the liabilities of the company under its former name. The Queen Insurance Co. is an English fire and life insurance company incorporated under the provisions of the Joint Stock Companies Act of the Imperial Parliament (7 & 8 Vict., c. 110). It has its principal office in England, and carries on business in Canada. The defendant company in each of these actions is the appellant.

H The statute impeached by the appellants, as being an excess of legislative power, is an Act of the Legislature of the province of Ontario (39 Vict., c. 24), intitled "An Act to secure uniform Conditions in Policies of Fire Insurance." [His Lordship then read the preamble to the Act, ss. 1, 2 and 3, and conditions 8 and 10 of the statutory conditions in the schedule to the Act, and continued:] The distribution of legislative powers is provided for by ss. 91 to 95 of The British North America Act, 1867; the most important of these being s. 91, headed "Powers of the Parliament," and s. 92, headed "Exclusive Powers of Provincial Legislatures." Section 91 is as follows:

I "It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces;

and for greater certainty, but not so as to restrict the terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated, that is to say, —." A

Then follows an enumeration of twenty-nine classes of subjects. The section concludes as follows:

"And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces." B

Section 92 is as follows:

"In each province the legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say, —." C

Then follows an enumeration of sixteen classes of subjects.

The scheme of this legislation, as expressed in the first branch of s. 91, is to give to the Dominion Parliament authority to make laws for the good government of Canada in all matters not coming within the classes of subjects assigned exclusively to the provincial legislature. If s. 91 had stopped here, and if the classes of subjects enumerated in s. 92 had been altogether distinct and different from those in s. 91, no conflict of legislative authority could have arisen. The provincial legislatures would have had exclusive legislative power over the sixteen classes of subjects assigned to them, and the Dominion Parliament exclusive power over all other matters relating to the good government of Canada. But it must have been foreseen that this sharp and definite distinction had not been and could not be attained, and that some of the classes of subjects assigned to the provincial legislatures unavoidably ran into and were embraced by some of the enumerated classes of subjects in s. 91; hence an endeavour appears to have been made to provide for cases of apparent conflict; and it would seem that with this object it was declared in the second branch of s. 91, "for greater certainty, but not so as to restrict the generality of the foregoing terms of this section" that (notwithstanding anything in the Act) the exclusive legislative authority of the Parliament of Canada should extend to all matters coming within the classes of subjects enumerated in that section. With the same object, apparently, the paragraph at the end of s. 91 was introduced, though it may be observed that this paragraph applies in its grammatical construction only to No. 16 of s. 92. D E F G

Notwithstanding this endeavour to give pre-eminence to the Dominion Parliament in cases of a conflict of powers, it is obvious that in some cases where this apparent conflict exists, the legislature could not have intended that the powers exclusively assigned to the provincial legislature should be absorbed in those given to the Dominion Parliament. Take as one instance the subject "marriage and divorce," contained in the enumeration of subjects in s. 91; it is evident that solemnisation of marriage would come within this general description; yet "solemnisation of marriage in the province" is enumerated among the classes of subjects in s. 92, and no one can doubt, notwithstanding the general language of s. 91, that this subject is still within the exclusive authority of the legislatures of the provinces. So "the raising of money by any mode or system of taxation" is enumerated among the classes of subjects in s. 91; but, though the description is sufficiently large and general to include "direct taxation within the province, in order to the raising of a revenue for provincial purposes," assigned to the provincial legislatures by s. 92, it obviously could not have been intended that, in this instance also, the general power should override the particular one. With regard to certain classes of subjects, therefore, generally described in s. 91, legislative power may reside as to some matters falling within the general description of these subjects in the legislatures of the provinces. H I

A In these cases it is the duty of the courts, however difficult it may be, to ascertain in what degree, and to what extent, authority to deal with matters falling within these classes of subjects exists in each legislature, and to define in the particular case before them the limits of their respective powers. It could not have been the intention that a conflict should exist; and in order to prevent such a result, the language of the two sections must be read together, and that of one interpreted, and, where necessary, modified by that of the other. In this way it may, in most cases, be found possible to arrive at a reasonable and practical construction of the language of the sections, so as to reconcile the respective powers they contain, and to give effect to all of them. In performing this difficult duty, it will be a wise course for those on whom it is thrown to decide each case which arises as best they can, without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand.

B The first question to be decided is, whether the Act impeached in the present appeals falls within any of the classes of subjects enumerated in s. 92, and assigned exclusively to the legislatures of the provinces: for if it does not, it can be of no validity, and no other question would then arise. It is only when an Act of the provincial legislature *prima facie* falls within one of these classes of subjects that the further questions arise, viz., whether, notwithstanding that this is so, the subject of the Act does not also fall within one of the enumerated classes of subjects in s. 91, and whether the power of the provincial legislature is or is not thereby overborne.

C The main contention on the part of the respondent was that the Ontario Act in question had relation to matters coming within the class of subjects described in No. 13 of s. 92, viz., "Property and Civil Rights in the Provinces." The Act deals with policies of insurance entered into or in force in the province of Ontario for insuring property, situate therein against fire, and prescribes certain conditions which are to form part of such contracts. These contracts, and the rights arising from them, it was argued, came legitimately within the class of subjects, "Property and Civil Rights." The appellants, on the other hand, contended that civil rights meant only such rights as flowed from the law, and gave as an instance the status of persons. Their Lordships cannot think that the latter construction is the correct one. They find no sufficient reason in the language itself, nor in the other parts of the Act, for giving so narrow an interpretation to the words "civil rights." The words are sufficiently large to embrace, in their fair and ordinary meaning, rights arising from contract, and such rights are not included in any of the enumerated classes of subjects in s. 91.

D It becomes obvious, as soon as an attempt is made to construe the general terms in which the classes of subjects in ss. 91 and 92 are described, that both sections and the other parts of the Act must be looked at to ascertain whether language of a general nature must not by necessary implication or reasonable intendment be modified and limited. In looking at s. 91, it will be found not only that there is no class including, generally contracts and the rights arising from them, but that one class of contracts is mentioned and enumerated, viz., 18. "Bills of exchange and promissory notes," which it would have been unnecessary to specify if authority over all contracts and the rights arising from them had belonged to the Dominion Parliament. The provision found in s. 94 of the British North America Act, which is one of the sections relating to the distribution of legislative powers was referred to by the learned counsel on both sides as throwing light upon the sense in which the words "property and civil rights" are used. By that section the Parliament of Canada is empowered to make provision for the uniformity of any laws relative to "property and civil rights" in Ontario, Nova Scotia, and New Brunswick, and to the procedure of the courts in these three provinces, if the provincial legislatures choose to adopt the provision so made. The province of Quebec is omitted from this section for the obvious reason that the law which governs property and civil rights in Quebec is in the main the French law, as it existed at the time of the cession of Canada, and not the English law which prevails in the other provinces.

The words "property and civil rights" are, obviously, used in the same sense in this section as in No. 13 of s. 92, and there seems no reason for presuming that contracts and the rights arising from them were not intended to be included in this provision for uniformity. A

If, however, the narrow construction of the words "civil rights," contended for by the appellants, were to prevail, the Dominion Parliament could, under its general power, legislate in regard to contracts in all and each of the provinces, and, as a consequence of this, the province of Quebec, though now governed by its own civil code, founded on the French law, as regards contracts and their incidents, would be subject to have its law on that subject altered by the Dominion legislature, and brought into uniformity with the English law prevailing in the other three provinces, notwithstanding that Quebec has been carefully left out of the uniformity section of the Act. It is to be observed that the same words, "civil rights," are employed in the British North America (Quebec) Act, 1774, which made provision for the government of the province of Quebec. Section 8 of that Act enacted, that His Majesty's Canadian subjects within the province of Quebec should enjoy their property, usages, and other civil rights, as they had before done, and that in all matters of controversy relative to property and civil rights, resort should be had to the laws of Canada, and be determined agreeably to the said laws. In this statute the words "property" and "civil rights" are plainly used in their largest sense; and there is no reason for holding that in the statute under discussion they are used in a different and narrower one. B C D

The next question for consideration is whether, assuming the Ontario Act to relate to the subject of property and civil rights, its enactments and provisions come within any of the classes of subjects enumerated in s. 91. The only one which the appellants suggested as expressly including the subject of the Ontario Act is No. 2, "the regulation of trade and commerce." A question was raised which led to much discussion in the courts below and at this Bar, viz., whether the business of insuring buildings against fire was a trade. This business, when carried on for the sake of profit, may, no doubt, in some sense of the word, be called a trade. But contracts of indemnity made by insurers can scarcely be considered trading contracts, nor were insurers who made them held to be "traders" under the English bankruptcy laws; they have been made subject to those laws by special description. Whether the business of fire insurance properly falls within the description of a "trade" must, in their Lordships' view, depend upon the sense in which that word is used in the particular statute to be construed; but in the present case their Lordships do not find it necessary to rest their decision on the narrow ground that the business of insurance is not a trade. The words "regulations of trade and commerce," in their unlimited sense, are sufficiently wide, if uncontrolled by the context and other parts of the Act, to include every regulation of trade ranging from political arrangements in regard to trade with foreign governments, requiring the sanction of Parliament, down to minute rules for regulating particular trades. But a consideration of the Act shows that the words were not used in this unlimited sense. In the first place, the collocation of No. 2, with classes of subjects of national and general concern, affords an indication that regulations relating to general trade and commerce were in the mind of the legislature when conferring this power on the Dominion Parliament. If the words had been intended to have the full scope of which in their literal meaning they are susceptible, the specific mention of several of the other classes of subjects enumerated in s. 91 would have been unnecessary; as, 15, banking; 17, weights and measures; 18, bills of exchange and promissory notes; 19, interest; and even 21, bankruptcy and insolvency. E F G H I

"Regulation of trade and commerce" may have been used in some such sense as the words "regulations of trade" in the Union with Scotland Act, 1706, and as these words have been used in other Acts of State. Article V of the Act enacted that all the subjects of the United Kingdom should have "full freedom and intercourse of trade and navigation" to and from all places in the United Kingdom and the

A colonies; and Article VI enacted that all parts of the United Kingdom from and after the union should be under the same "prohibitions, restrictions, and regulations of trade." Parliament has at various times since the union passed laws affecting and regulating specific trades in one part of the United Kingdom only, without its being supposed that it thereby infringed the Articles of Union. Thus the Acts for regulating the sale of intoxicating liquors notoriously vary in the two

B kingdoms. So with regard to Acts relating to bankruptcy, and various other matters.

Construing, therefore, the words "regulation of trade and commerce" by the various aids to their interpretation above suggested, they would include political arrangements in regard to trade requiring the sanction of Parliament, regulation of trade in matters of inter-provincial concern, and it may be that they would

C include general regulation of trade affecting the whole Dominion. Their Lordships abstain on the present occasion from any attempt to define the limits of the authority of the Dominion Parliament in this direction. It is enough for the decision of the present case to say that, in their view, its authority to legislate for the regulation of trade and commerce does not comprehend the power to regulate by legislation the contracts of a particular business or trade, such as the business

D of fire insurance, in a single province, and therefore that its legislative authority does not in the present case conflict or compete with the power over property and civil rights assigned to the legislature of Ontario by No. 13 of s. 92. Having taken this view of the present case, it becomes unnecessary to consider the question how far the general power to make regulations of trade and commerce, when competently exercised by the Dominion Parliament, might legally modify or affect

E property and civil rights in the provinces, or the legislative power of the provincial legislatures in relation to those subjects; questions of this kind, it may be observed, arose and were treated of by this Board in *L'Union St. Jacques de Montreal v. Bélisle* (1) and *Cushing v. Dupuy* (2).

It was contended, in the case of the Citizens Insurance Co. of Canada, that the company having been originally incorporated by the Parliament of the late province

F of Canada, and having had its incorporation and corporate rights confirmed by the Dominion Parliament, could not be affected by an Act of the Ontario legislature. But the latter Act does not assume to interfere with the constitution or status of corporations. It deals with all insurers alike, including corporations and companies, whatever may be their origin, whether incorporated by British authority, as in the case of the Queen Insurance Co., or by foreign or colonial authority, and,

G without touching their status, requires that if they choose to make contracts of insurance in Ontario, relating to property in that province, such contracts shall be subject to certain conditions.

It was further urged that the Ontario Act was repugnant to the Act of the late province of Canada, which empowered the company to make contracts for assurance against fire "upon such conditions as might be bargained for and agreed upon

H between the company and the assured." But this is, in substance, no more than an expanded description of the business the company was empowered to transact—viz., to make contracts of assurance against fire, and can scarcely be regarded as inconsistent with the specific legislation regarding such contracts contained in the Act in question.

It was further argued on the part of the appellants that the Ontario Act was

I inconsistent with the Act of the Dominion Parliament (38 Vict., c. 20), which requires fire insurance companies to obtain licences from the Minister of Finance as a condition to their carrying on the business of insurance in the Dominion, and that it was beyond the competency of the provincial legislature to subject companies who had obtained such licences, as the appellant companies had done, to the conditions imposed by the Ontario Act. But the legislation does not really conflict or present any inconsistency. The statute of the Dominion Parliament enacts a general law applicable to the whole Dominion, requiring all insurance companies, whether incorporated by foreign, Dominion, or provincial authority,

to obtain a licence from the Minister of Finance, to be granted only upon compliance with the conditions prescribed by the Act. A

Assuming this Act to be within the competency of the Dominion Parliament as a general law applicable to foreign and domestic corporations, it in no way interferes with the authority of the legislature of the province of Ontario to legislate in relation to the contracts which corporations may enter into in that province. The Dominion Act contains the following provision, which clearly recognises the right of the provincial legislature to incorporate insurance companies for carrying on business within the province itself: B

"But nothing herein contained shall prevent any insurance company incorporated by or under any Act of the legislature of the late province of Canada or of any province of the Dominion of Canada from carrying on any business of insurance within the limits of the late province of Canada, or of such province only according to the powers granted to such insurance company within such limits as aforesaid without such licence as hereinafter mentioned." C

This recognition is directly opposed to the construction sought to be imposed by the appellants' counsel on the words "provincial objects" in No. 11 of s. 92, "the incorporation of companies with provincial objects," by which he sought to limit these words to "public" provincial objects, so as to exclude insurance and commercial companies. RITCHIE, C.J., refers to an equally explicit recognition of the power of the provinces to incorporate insurance companies contained in an earlier Act of the Dominion Parliament (31 Vict., s. 48) which was passed shortly after the establishment of the Dominion. The learned Chief Justice also refers to a remarkable section contained in the Act of the Dominion Parliament consolidating certain Acts respecting insurance (40 Vict., c. 42). Section 28 of that Act is as follows: D

"This Act shall not apply to any company within the exclusive legislative control of any one of the provinces of Canada, unless such company so desires; and it shall be lawful for any such company to avail itself of the provisions of this Act, and if it do so avail itself, such company shall then have the power of transacting its business of insurance throughout Canada." E F

This provision contains a distinct declaration by the Dominion Parliament that each of the provinces had exclusive legislative control over the insurance companies incorporated by it, and therefore is an acknowledgment that such control was not deemed to be an infringement of the power of the Dominion Parliament as to "the regulation of trade and commerce." The declarations of the Dominion Parliament are not, of course, conclusive upon the construction of the British North America Act; but when the proper construction of the language used in that Act to define the distribution of legislative powers is doubtful, the interpretation put upon it by the Dominion Parliament in its actual legislation may properly be considered. G

The opinions of the majority of the judges in Canada, as summed up by RITCHIE, C.J., are in favour of the validity of the Ontario Act. In the present action the Court of Queen's Bench and the Court of Appeal of Ontario unanimously supported its legality; and the Supreme Court of Canada, by a majority of three judges to two, have affirmed the judgment of the provincial courts. The opinions of the learned judges of the Supreme Court are stated with great fullness and ability, and clearly indicate the opposite views which may be taken of the Act, and the difficulties which surround any construction that may be given to it. TASCHEREAU, J., in the course of his vigorous judgment, sought to place the plaintiff in the action against the Citizens Co. in a dilemma. He thinks that the assertion of the right of the province to legislate with regard to the contracts of insurance companies amounts to a denial of the right of the Dominion Parliament to do so, and that this is in effect to deny the right of that Parliament to incorporate the Citizens Co., so that the plaintiff was suing a non-existent defendant. Their Lordships cannot H I

A think that this dilemma is established. The learned judge assumes that the power of the Dominion Parliament to incorporate companies to carry on business in the dominion is derived from one of the enumerated classes of subjects, viz., "the regulation of trade and commerce," and then argues that if the authority to incorporate companies is given by this clause, the exclusive power of regulating them must also be given by it, so that the denial of one power involves the denial of the other. But, in the first place, it is not necessary to rest the authority of the Dominion Parliament to incorporate companies on this specific and enumerated power. The authority would belong to it by its general power over all matters not coming within the classes of subjects assigned exclusively to the legislatures of the provinces, and the only subject on this head assigned to the provincial legislature being "the incorporation of companies with provincial objects," it follows that the incorporation of companies for objects other than provincial falls within the general powers of the Parliament of Canada. But it by no means follows, unless, indeed the view of the learned judge is right as to the scope of the words "the regulation of trade and commerce," that because the Dominion Parliament had alone the right to create a corporation to carry on business throughout the Dominion that it alone has the right to regulate its contracts in each of the provinces. Suppose the Dominion Parliament were to incorporate a company, with power, among other things, to purchase and hold lands throughout Canada in mortmain, it could scarcely be contended if such a company were to carry on business in a province where a law against holding land in mortmain prevailed (each province having exclusive legislative power over "property and civil rights in the province") that it could hold land in that province in contravention of the provincial legislation; and, if a company were incorporated for the sole purpose of purchasing and holding land in the Dominion, it might happen that it could do no business in any part of it, by reason of all the provinces having passed Mortmain Acts, though the corporation would still exist and preserve its status as a corporate body.

F On the best consideration they have been able to give to the arguments addressed to them and to the judgments of the learned Judges in Canada, their Lordships have come to the conclusion that the Act in question is valid. Their Lordships have now to consider separately the two appeals.

[THEIR LORDSHIPS then considered the effect of the Act in respect of each of the Appeals.]

G In *Citizens Insurance Co. v. Parsons*, they held that whatever might be the conditions sought to be imposed by the insurance company, no such conditions should avail against the statutory conditions and that the latter alone should be deemed to be part of the policy, and resorted to by the insurers, notwithstanding any conditions of their own, unless the latter were indicated as variations in the prescribed manner; and their Lordships being of the opinion that the policy in this case became subject to the statutory conditions, and there having been a breach of those conditions, the plaintiff's action against the Citizens Insurance Co. failed.

H In *Queen Insurance Co. v. Parsons*, their Lordships held that an interim receipt was not a policy within the meaning of the Act; and the effect of an interim note containing a proposal by the respondent to effect an insurance on the company's "usual terms and conditions," was that the company's conditions ought to be read into the interim contract to the extent to which they might lawfully be made a part of the policy when issued, by following the directions of the statute, subject I always to the statutable condition that they should be held to be just and reasonable by the court or judge. The action was remitted to determine whether the relevant condition of the company was just and reasonable.]

Solicitors: *Bompas, Bischoff & Dodgson; Johnston & Harrison.*

[Reported by C. E. MALDEN, ESQ., Barrister-at-Law.]

A

LONDON AND SOUTH WESTERN RAIL. CO. v. GOMM

[COURT OF APPEAL (Sir George Jessel, M.R., Sir James Hannen and Lindley, L.J.),
March 6, 1882]

[Reported 20 Ch.D. 562; 51 L.J.Ch. 530; 46 L.T. 449;
30 W.R. 620]

B

*Perpetuities—Rule against perpetuities—Covenant—Covenant running with land
—Covenant by purchaser to reconvey—Nature of interest created—Applica-
tion of rule.*

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A railway company, who, under their special Act (passed in 1863), had power to purchase lands by agreement for extraordinary purposes, were in 1865 in possession of land, which, if superfluous, would have vested in P., the adjoining owner. In 1865 the company, by a deed reciting that the land was no longer required for the purposes of their railway, conveyed the land to P., who covenanted whenever requested to reconvey to the company on receiving a certain sum. In 1875 G. acquired the land by purchase, with notice of the covenant. In 1880, the power of purchase under the special Act being still alive, the company required G. to reconvey the land. G. denied that the covenant was binding on him, and refused to perform it.

Held: the covenant created an interest in land, and since it was unlimited in time, the covenant was void for remoteness.

Held, also, the covenant, if binding on P., would not have bound G., since it was a positive covenant and so incapable of running with the land either at law or in equity.

Haywood v. Brunswick Building Society (1) (1881), 8 Q.B.D. 403, followed.

Cooke v. Chilcott (2) (1876), 3 Ch.D. 694, and *Birmingham Canal Co. v. Cartwright* (3), 11 Ch.D. 421, overruled.

Notes. Applied: *Trevelyan v. Trevelyan* (1885), 53 L.T. 853. Considered: *Re Thackwray and Young's Contract* (1888), 40 Ch.D. 34. Explained: *Mackenzie v. Childers* (1889), 43 Ch.D. 265. Distinguished: *Ray v. Walker*, [1892] 2 Q.B. 88. Considered: *Rogers v. Hosegood*, [1900-3] All E.R.Rep. 915; *Woodall v. Clifton*, [1905] 2 Ch. 257; *Worthing Corp'n. v. Heather*, [1904-7] All E.R.Rep. 530. Applied: *Re Nisbet and Potts' Contract*, [1904-7] All E.R.Rep. 865. Distinguished: *South Eastern Rail. Co. v. Association Portland Cement Manufacturers* (1900), Ltd. [1908-10] All E.R. 353. Considered: *London County Council v. Allen*, [1914-15] All E.R.Rep. 1008. Applied: *Oppenheimer v. Minister of Transport*, [1941] 3 All E.R. 485. Considered: *Hutton v. Watling*, [1947] 2 All E.R. 641; *Strimdale and Ball, Ltd. v. Burden*, [1952] 1 All E.R. 59. Referred to: *Dunn v. Flood* (1883), 25 Ch.D. 629; *Austerberry v. Oldham Corp'n.* (1885), 29 Ch.D. 750; *Goodier v. Edmunds*, [1893] 3 Ch. 455; *Rice v. Noakes*, [1900] 1 Ch. 213; *Borlands Trustee v. Steel*, [1901] 1 Ch. 279; *Savill v. Bethell*, [1902] 2 Ch. 523; *Thomas v. Thomas* (1902), 87 L.T. 58; *Formby v. Barker*, [1900-3] All E.R.Rep. 445; *Osborne v. Bradley*, [1900-3] All E.R.Rep. 541; *Edwards v. Edwards*, [1909] A.C. 275; *Mason v. Fulham* (1910), 102 L.T. 188; *Wilkes v. Spooner*, [1911] 2 K.B. 473; *Long v. Gray* (1913), 58 Sol. Jo. 46. *Smith v. Colbourne*, [1914-15] All E.R.Rep. 800; *Kelly v. Barrett*, [1924] All E.R.Rep. 503; *Re Rutherford's Conveyance*, *Goadby v. Bartlett*, [1938] 1 All E.R. 495; *Wright v. Dean*, [1948] 2 All E.R. 415; *Re Johnson's Settlement Trusts*, *McClure v. Johnson*, [1943] 2 All E.R. 499; *Re Armstrong's Will Trusts*, *Graham v. Armstrong*, [1943] 2 All E.R. 537; *Re Lander, Lander v. Lander*, [1951] 1 All E.R. 622.

As to covenants running with the land, see 14 HALSBURY'S LAWS (3rd Edn.) 559 et seq.; and for cases see 40 DIGEST (Repl.) 328 et seq.

A Cases referred to:

(1) *Haywood v. Brunswick Building Society* (1881), 8 Q.B.D. 403; 51 L.J.Q.B. 73; 45 L.T. 699; 46 J.P. 356; 30 W.R. 299, C.A.; 39 Digest 201, 908.

(2) *Cooke v. Chilcott* (1876), 3 Ch.D. 694; 34 L.T. 207; 40 Digest (Repl.) 330, 2712.

B

(3) *Birmingham Canal Co. v. Cartwright* (1879), 11 Ch.D. 421; 48 L.J.Ch. 552; 40 L.T. 784; 27 W.R. 597; 40 Digest (Repl.) 19, 74.

(4) *Kemp v. South Eastern Rail. Co.* (1872), 7 Ch. App. 364; 41 L.J.Ch. 404; 26 L.T. 110; 20 W.R. 306, L.C.; 11 Digest (Repl.) 116, 95.

(5) *Tulk v. Mozhay* (1848), 2 Ph. 774; 1 H. & Tw. 105; 18 L.J.Ch. 83; 13 L.T.O.S. 21; 13 Jur. 89; 41 E.R. 1143, L.C.; 40 Digest (Repl.) 342, 2774.

C

(6) *Spencer's Case* (1583), 5 Co. Rep. 16a; 77 E.R. 72; 31 Digest (Repl.) 153, 2907.

(7) *Gilbertson v. Richards* (1859), 4 H. & N. 277; 28 L.J.Ex. 158; 33 L.T.O.S. 107; affirmed (1860), 5 H. & N. 453, Ex. Ch.; 31 Digest (Repl.) 241, 3747.

Also referred to in argument:

Moore v. Clench (1875), 1 Ch.D. 447; 45 L.J.Ch. 80; 34 L.T. 13; 24 W.R. 169; 40 Digest (Repl.) 778, 2616.

D

Washbourn v. Downes (1671), 1 Cas. in Ch. 213.

Lord Southampton v. Marquis of Hertford (1813), 2 Ves. & B. 54; 35 E.R. 239; 37 Digest 59, 40.

Mulliner v. Midland Rail. Co. (1879), 11 Ch.D. 611; 48 L.J.Ch. 258; 40 L.T. 121; 43 J.P. 573; 27 W.R. 330; 11 Digest (Repl.) 122, 145.

E

Hooper v. Bourne (1880), 5 App. Cas. 1; 49 L.J.Q.B. 370; 42 L.T. 97; 44 J.P. 327; 28 W.R. 493, H.L.; 11 Digest (Repl.) 297, 2034.

General Finance, Mortgage & Discount Co. v. Liberator Permanent Benefit Building Society (1878), 10 Ch.D. 15; 39 L.T. 600; 27 W.R. 210; 21 Digest (Repl.) 324, 797.

Hare v. Burges (1857), 4 K. & J. 45; 27 L.J.Ch. 86; 30 L.T.O.S. 255; 22 J.P. 84; 3 Jur.N.S. 1294; 6 W.R. 144; 70 E.R. 19; 37 Digest 83, 217.

F

Re Metropolitan District Rail. Co. and Cosh (1880), 13 Ch.D. 607; 49 L.J.Ch. 277; 42 L.T. 73; 44 J.P. 393; 28 W.R. 685, C.A.; 11 Digest (Repl.) 296, 2034.

Appeal by the defendant from a decision of KAY, J., dated Dec. 2, 1881.

G

The land which was the subject of the present action adjoined the land and station of the company at Brentford, and would, if superfluous land, have vested in the adjoining owner in 1862. By a special Act passed in 1863 the company were authorised to purchase by agreement adjoining lands for extraordinary purposes. A similar power was given to them by an Act of 1868 which existed at the commencement of the present action.

H

By an indenture, dated Aug. 10, 1865, made between the company of the one part, and George Powell of the other part, after reciting that the company were seised of the fee simple of the land and hereditaments intended to be thereby conveyed, "which, being no longer required for the purposes of their railway," they had contracted to sell to the said George Powell, who was the adjoining owner thereto, at the sum of £100, subject to the condition thereafter contained, it was witnessed that, in pursuance of the said agreement, and in consideration of

I

the sum of £100, the company granted to the said George Powell and his heirs the piece of land in question, adjoining the land and station of the plaintiffs to hold the same to the use of the said George Powell, his heirs and assigns. And the said George Powell did thereby, for himself, his heirs, executors, administrators and assigns, covenant with the company, their successors and assigns, that he, his heirs and assigns, would at any time thereafter whenever the said land might be required for the railway or works of the company whenever thereunto requested by the company, their successors or assigns, by a six calendar months' previous notice in writing, as therein mentioned, and on receiving from the company, their

successors or assigns, the said sum of £100, make and execute to them a reconveyance of the said hereditaments, free from any encumbrances created by the said George Powell, his heirs or assigns. A

In 1875 the hereditaments were purchased by the defendant from Powell, and at the time of the purchase the defendant had notice of the provisions of the indenture of Aug. 10, 1865.

In March, 1880, the power of purchase under the special Act being still alive, the company gave notice to the defendant that the hereditaments were required for their railway or works, and the defendant refusing to convey, the company on Nov. 22, 1880, brought this action, claiming specific performance of the covenant and a conveyance of the property. B

By his defence the defendant alleged that he purchased the hereditaments long after the period limited (by the Lands Clauses Consolidation Act and other Acts under which the company were incorporated) for the sale of superfluous lands had expired, and all estate and interest of the company in the said land had become vested in the adjoining owner when the defendant so purchased; that the condition or covenant in the indenture of Aug. 10, 1865, if and so far as the same purported to bind the land in the hands of succeeding owners, or to bind succeeding owners, was invalid, but that if valid it had ceased before the defendant purchased. He also alleged that the land was not required for any purpose for which the company could now lawfully acquire land, nor was it required for their railway or works, or for any authorised purpose, and that the company had no statutory or other legal power now to acquire or to hold the said land. C

In 1865 the company's engineer gave evidence that the land, though not required for the purposes of the railway at the date of the conveyance, was considered to be land which the company would probably require at some future time. The engineer also gave evidence that the land was actually required at the date of the action. D

The action was tried before KAY, J., in November and December, 1881, and his Lordship held (i) that the land was probably required in 1865, and actually required in 1880 by the company; (ii) that the arrangement with Powell was not ultra vires but a sale out and out with a personal covenant to reconvey binding on a purchaser with notice; (iii) that the arrangement did not create an interest in land and did not infringe the rule against perpetuities. E

Davey, Q.C., and *Whitehorne, Q.C.* (*Vaughan Hawkins* with them), for the defendant. F

Rigby, Q.C., and *Gaselee* for the company. G

SIR GEORGE JESSEL, M.R.—This appeal raises two points: First, whether a deed of sale entered into between the London and South-Western Rail. Co. and one Powell, the predecessor in title of the defendant Gomm, is open to objection on the ground that the covenant, giving an option of purchase by the railway company, is obnoxious to the rule against remoteness; and, secondly, whether the deed itself is or is not void, having regard to the Lands Clauses Consolidation Act, 1845, s. 127. H

The deed was made in 1865, after the compulsory powers of the railway company had expired. It recited that the company were seised of the land, which was no longer required for the purposes of their railway, and had contracted to sell it to Powell, who was the adjoining owner, at £100, subject to the condition thereafter contained. There was then a conveyance in fee in consideration of £100, and there was a covenant by Powell for himself, his heir, executors, administrators, and assigns, that he Powell, etc., I

“owner and owners for the time being of the said hereditaments intended to be hereby conveyed, and all other the persons who shall or may be interested therein, shall and will at any time hereafter (whenever the said land may be required for the railway and works of the company), whenever thereunto re-

A quired by the company, their successors, or assigns, by a six calendar months' 'previous notice in writing' under the hand of their secretary . . . and upon receiving from the company, their successors, or assigns, the sum of £100 without interest, execute to the company, their successors, or assigns, at the expense of the company, a proper and effectual grant and reconveyance of the said hereditaments, free and discharged from every legal and equitable encumbrance."

C That covenant is unlimited in point of time, and it does not appear to me to be possible to insert a limit of time, because to put in the words "within a reasonable time" is exactly contrary to the intention of the parties. It is not only unlimited in point of time, but it is obviously intended so to be. The railway company do not want the land now, and they do not know that they ever will want it; but their bargain is that, whenever it may be required for their railway, for the works of the company, the owners or owner for the time being of the land are or is to convey to the company. The very essence of the contract is that it shall be indefinite in point of time.

D It appears to me, therefore, that we cannot insert the words "within a reasonable time," or any words limiting the time. The only other suggestion, which was founded on *Kemp v. South Eastern Rail. Co.* (4), does not apply to this case, because, as the time for compulsory purchase of land and the erection of works had expired in the present case, you cannot insert in the covenant the limit which was in the case cited inserted by intendment, that the land shall be taken before the time for executing all the works has expired. It appears to me, therefore, plain (and indeed it was admitted in argument by the company) that the covenant is unlimited in point of time. If that is so, and if such a covenant is within the rule as to remoteness, of course it goes beyond the period.

E Is it within the rule? That depends on this, as it appears to me, Is or is there not an interest in the land? If it is a bare contract, that is, a bare or mere personal contract, it is not of course obnoxious to the rule at all. But in that case it is impossible to see how the present appellant can be bound. He did not enter into the contract, but is a purchaser from Powell, who did. Consequently, those who argue that it is a mere personal contract argue necessarily at the same time that it is one which cannot be enforced against the assignee. Therefore, in order to show that the assignee is bound, they must admit that the covenant binds the land somehow. If it binds the land, it is an equitable interest in the land. The right to call for a conveyance of the land is an equitable interest or equitable estate. In the ordinary cases, where it is a contract for purchase, there is no doubt about it, but an option to purchase in its nature does not differ. It is only one step further back, i.e., a person exercising the option has to do two things, he has to give notice of his intention to purchase, as well as pay the purchase money; but, as far as the man who is liable to convey is concerned, his estate or interest is taken away from him without his consent, and the right to take it away being vested in another, must give that other an interest in the land.

H It appears to me, therefore, to be plainly an interest in the land, and if so, there is no distinction that I know of in equity (unless the case falls within one of the exceptions like charities) between one kind of equitable interest and another kind of equitable interest. In all cases they must take effect as against the owners of the land within a prescribed period.

I Then it was suggested that the rule against perpetuities has no application to a case of contract. But the mode in which the interest is created is immaterial. Whether it is by devise, or voluntary gift, or contract, can make no difference. The question is, What is the nature of the interest intended to be created? I do not know that I can do better than read the two passages cited in argument from MR. LEWIS's well-known book on PERPETUITIES (p. 164), where he quotes with approbation what MR. SANDERS says in his ESSAY ON USES AND TRUSTS (5th Edn.), p. 203. MR. SANDERS says:

"A perpetuity may . . . be defined to be a future limitation, restraining the owner of the estate from aliening the fee-simple of the property [that, of course, means owners, or an owner, and a tenant for life, or remainderman] discharged of such future use or estate, before the event is determined or the period arrived, when such future use or estate is to arise. If that event or period be within the bounds prescribed by law it is not a perpetuity. . . . In other words, a perpetuity is a future limitation, whether executory or by way of remainder, and of either real or personal property, which is not to vest until after the expiration of, or will not necessarily vest within, the period fixed and prescribed by law for the creation of future estates and interests, and which is not destructible by the persons for the time being entitled to the property subject to the future limitation, except with the concurrence of the individual interested under that limitation."

Is there any substantial difference between a contract for purchase, an option for purchase, and a limitation, or a conditional limitation? Can it make any difference in substance whether it is this case, a limitation to A. in fee, with a proviso that, whenever B., or his heirs, sends A., or his heirs, a notice in writing and pays £100, the estate shall vest in B. and his heirs, or a contract that if B. does give a notice and pays £100, then A. shall convey to B. and his heirs? It seems to me that in a court of equity it is impossible to suggest that there is any real distinction. If there is no distinction between these two cases, can there be any distinction when the option is put, not that B. shall buy, but that he shall be entitled to buy? There is the same fetter on the estate, and on the owners of the estate, for all time, and it seems to me to be plain that that ought to fall within the rule as to remoteness, which prohibits that kind of fetter for an indefinite period of time hanging over the estate.

That appears to me really to dispose of the case, unless we consider the last reason given by KAY, J. In all his reasons, up to the last, I agree with him. I consider that he is quite right in the view he takes of the doctrine of remoteness, and of the authorities cited before him, not forgetting *Birmingham Canal Co. v. Cartwright* (3) decided by FRY, J., which must be treated as now overruled. But KAY, J., having, as I think he had, most correctly and accurately defined the law as to perpetuity, thinks that this case is not within it. Why? Because he comes to the conclusion that this is not an interest in land. He says, "I am of opinion this covenant does not create any interest in land." But he forgot that, if that were so, he could not make a decree against Mr. Gomm at all. If it was a mere contract, it was not Gomm's contract; and if it did not (as one might say) run with the land in equity, so as to be a real burden on the land, that is, an interest in the land, it could not have been enforced at all against Gomm. That that is what he thought of it is clear, because he says:

"A contract not creating any estate or interest properly so called in property, at law or in equity, is not obnoxious to the rule."

Then he gives an instance, so that if he had been of opinion that this was an interest in the land (which I think is a correct opinion), he would have decided the other way.

I have only one or two observations to make with regard to *Tulk v. Moxhay* (5). That case has been carefully considered by the Court of Appeal at Westminster in the recent case of *Haywood v. Brunswick Building Society* (1). The Court of Appeal there decided that they would not extend the doctrine of *Tulk v. Moxhay* (5) to affirmative covenants, compelling a man to lay out money, or do any other act of, what I may call, an active character; that it was to be confined to restrictive covenants. Of course, that authority would be binding on us, even if we did not agree with it; but I most cordially accede to it. I think we ought not to extend the doctrine of *Tulk v. Moxhay* (5) in the way suggested here. *Tulk v. Moxhay* (5), rightly considered, appears to me to be this. It is either

- A an extension in equity of the doctrine of *Spencer's Case* (6) to another line of cases, or else it is an extension in equity of the doctrine of negative easements. Exactly like the right to the access of light, for instance, which prevents the owner of the servient tenement from building so as to obstruct the light; so, where there was a negative covenant, as there was in *Tulk v. Moxhay* (5) it was held by the court to imply a negative obligation running with the land in equity.
- B Where there was a negative covenant, expressed or implied, not to build so as to obstruct the view, or to prevent a piece of land being used, for instance, as a garden, the court interfered on one or other of the grounds; but it was clearly an equitable extension, and, like all other equitable doctrines, established an exception or a new provision as regarded the common law—that is, that that kind of negative covenant or restriction could be enforced. It does not matter whether
- C the analogy was the analogy of a covenant running with the land, or the analogy of an easement. The man took the estate, subject to the real burden, but subject also to the rule that, if he did not know of it, and took the legal estate without notice, he was freed from the burden. But that accident did not affect the nature of the burden, because the notice being required merely to avoid the effect of the legal estate, did not create the right; and if they had all been equitable estates,
- D there would be no question at all as to the existence of the burden. It appears to me that, rightly considered, *Tulk v. Moxhay* (5) is not an authority for the proposition that an equitable estate or interest may be raised at any time, notwithstanding the rules against remoteness. It is, if I may say so, another exception to the rule against remoteness—exceptions which have been thoroughly established before in many cases, at law in the case of easements, in equity in the case of
- E charities. It is merely an extension of the doctrine in the case I have mentioned, and it is merely, therefore, an extension of the exception, and not a new rule. That being so, it does not appear to me that *Tulk v. Moxhay* (5) has any direct bearing on the case which we have to decide.

- There is another important point in the case which has been argued before us, and as to which I intend to express an opinion, and which would alone enable
- F us to decide this case. It is this. Was the conveyance itself *ultra vires*? When we look at the provisions of the Lands Clauses Act, I think we must consider that they mean that at the expiration of the statutory period, if the land is then superfluous, i.e., if it is not wanted for the purpose of the railway—the company must sell it, under the penalty of losing the land by its reversion in the adjoining owner. There is no doubt that the company can, before the expiration of the
- G statutory period, determine that the land is superfluous, and sell it, and there is equally no doubt that, if at the end of the statutory period they think the land may be fairly required for the purpose of their railway, it is not then superfluous. When I say, “they think,” I mean that if their proper advisers have fairly come to the conclusion, which is a reasonable conclusion, that is sufficient. So that the fact of its being superfluous may be determined beforehand by the action of the
- H company, or it may be delayed, without the land being actually used, until after the expiration of the statutory period; but, whenever it is determined, either before, at the time, or afterwards, the land immediately becomes saleable or vests. That being so, it is equally plain that, after absolute sale, no interest can be retained by the company, and if, therefore, I am right in the conclusion at which I have arrived as to the nature of this option of purchase, an interest was
- I retained by the company at the time of sale. Indeed, the form of the conveyance is plain enough. It recites a contract for sale, subject to the condition thereafter mentioned. That is not an absolute sale. But if that is so, this follows, that the company can no more sell, reserving an option of purchase, than they can sell subject to the contract for re-purchase; they can do neither the one nor the other, and it follows from that that the sale itself was beyond their power and was a void sale. We must recollect that this is a statute which governs the legal estate as much as the equitable estate, and the result will be, therefore, that if it be a conditional sale and not an absolute sale, it is not a sale within the Act.

Then what follows? Either the land revested in Mr. Powell at the end of the ten years, free from any restriction or restraint which would give him a title, or else, as the statutory period of limitation has elapsed, and had elapsed before the commencement of this action, the appellant would have obtained a title under the Statute of Limitations. So that, either way, the defendant's title must be valid as against the title of the company. On these grounds it seems to me that the present appeal ought to be allowed. A B

SIR JAMES HANNEN.—Taking the points in the order in which they were argued, the first question arises as to the effect of the deeds. It appears to me that the company are estopped from denying that this land was superfluous land at the time of the sale to Powell. It is expressly recited in the conveyance to him that the land is no longer required, and that the company therefore propose to sell it at a particular price. It is perfectly plain that the company have only the right to sell, subject to the terms imposed by the legislature in the Act relating to this subject, and those terms require the company to sell absolutely. Looking to the history of this legislation, I do not think much doubt can be entertained that particular stress is laid upon the word "absolutely" in the Lands Clauses Consolidation Act, 1845, s. 127. It was intended to prevent the company, after they had acquired lands for the purpose of their railway, which it was found afterwards were not so required, from still retaining, indirectly, a hold upon those lands. It appears to me, therefore, that as this was not an absolute sale, but a conditional sale, it was void; that it was *ultra vires* in that sense, and that, therefore, the effect would be that, at the end of the ten years, there being no sale, the land would vest in Powell. C D

At the same time I do not think it would be impossible to arrive at the same conclusion in another way. I do not think that every contract made by the railway company, for the purpose of settling at the present time what should be the price of the land to be acquired by them at some future time, would be bad in itself. I think, therefore, that if there had been a separate contract limited in time, i.e., limited to the time within which the company would have authority to take lands—there would not have been anything illegal in their entering into an arrangement with the owner that they were to have a right to purchase, at a particular price, to save the trouble and inconvenience of having it settled in some other manner. Indeed, I think *Kemp v. South Eastern Rail. Co.* (4) is an authority to that effect. E F

Passing on to the next point which has been discussed, the question is, Does this covenant create an interest or estate in the property, at law or in equity, affecting the company? On that point I have really nothing to add to that which has been said by the Master of the Rolls. It is not a subject with which I have been frequently called on to deal, and therefore any opinion that I might express on the subject would not have the value it would have if it came from one of my learned colleagues; but I must say that, from what attention I have been able to give to the subject, it appears to be certainly a startling thing if it is to be held that the power to require a conveyance of land at a future time does not create any interest. I should have thought it plain that it would be so. If it does do so, then it appears to me perfectly clear that this covenant violates the rule against perpetuity, because, taking the passage which has been cited from *SANDERS ON USES*, G H

"a perpetuity may . . . be defined to be a future limitation restraining the owner of the estate from aliening the fee simple of the property discharged of such future use or estate before the event is determined." I

This covenant plainly would restrain the future owner from aliening the estate in the way in which a man ordinarily may alien his estate, i.e., to anybody he pleases. It restricts him to aliening it to the railway company, in the event of the company exercising their option.

A The last question that arises is, supposing this does not create any estate or interest, what is the effect of it as a covenant? It is clear that this covenant is not one which would run with the land (to use a common expression) at law. *Spencer's Case* (6) and the notes to it in SMITH'S LEADING CASES seem to me to point very clearly to that conclusion; but this has been said, and, in fact, the judgment with which we are dealing does rest on this, that, although this is

B only a personal covenant, yet *Tulk v. Moxhay* (5) is an authority for this proposition, that that personal covenant, if known to the purchaser of the estate, binds him. I am content to deal with this point, as indeed I should be bound to deal with it, on the authority of *Haywood v. Brunswick Building Society* (1). That is a decision of the Court of Appeal, and it seems to me to put a wholesome restriction on the application of *Tulk v. Moxhay* (5) by laying down this rule,

C that it only applies to restrictive covenants, and that it does not apply to an affirmative covenant such as this, i.e., a covenant binding the owner of the land at some future time to convey it.

For these reasons I am of opinion that the judgment of the court below cannot be supported, and that the appeal must be allowed.

D **LINDLEY, L.J.**—I am of the same opinion. This is an action for specific performance of a contract or covenant entered into, not by the defendant at all, but by somebody else. The first thing, therefore, which the plaintiff must show is, on what legal principle the defendant is bound by the contract into which he did not enter. It is not contended that he is bound by it because the contract entered into with Powell runs with the land, and binds him at law; but it is said

E that it bound him in equity, and that is the first point which I propose to consider. Of course, if it binds him at law, it would bind him in equity; but it is not contended, and it could not be contended, that he was bound by the covenant at law. Then on what principle is it that he is bound in equity? It is said he is bound in equity, because he bought the land, knowing of the covenant into which his predecessor in title had entered. That proposition, stated generally, assumes

F that every purchaser of land, with notice of covenants into which his vendor has entered, is bound in equity by all those covenants. That is precisely the proposition which had to be investigated in *Haywood v. Brunswick Building Society* (1), and it was because it was sought in that case to extend the doctrine of *Tulk v. Moxhay* (5) to a degree which was thought dangerous, that considerable pains were taken to point out the limits of *Tulk v. Moxhay* (5).

G The facts in *Haywood v. Brunswick Building Society* (1) were simply these: an owner in fee had granted a rent, and in order better to secure the rent, he agreed to build some houses on the land out of which the rent issued, and to keep them in repair for ever. The covenant was that he, his trustees and assignees, would build and keep in repair. The houses having been allowed to get out of repair, it was sought to enforce that covenant by bringing an action for damages

H against the mortgagee in possession of the land. It was of course seen that an action would not lie at law; but it was said, "There is the case of *Tulk v. Moxhay* (5), and, inasmuch as the defendants took the land with notice of the covenants, it cannot be allowed that they shall not perform them," and a desperate attempt was made to induce the Court of Appeal at Westminster to hold that *Tulk v. Moxhay* (5) bound them. But the court declined to extend the doctrine

I of *Tulk v. Moxhay* (5), and the reason for the refusal will be found very carefully stated by COTTON, L.J., in his judgment. The conclusion arrived at by the court was, that *Tulk v. Moxhay* (5), when properly understood, did not apply beyond restrictive covenants. The appellants relied on a decision of MALINS, V.-C., in *Cooke v. Chilcott* (2), which was an action to enforce specifically a covenant to supply water from a well. The case was very much considered, but it was not followed by the Court of Appeal.

Here again we are asked to extend the doctrine of *Tulk v. Moxhay* (5), and to apply it to a covenant to sell land at any time for a specified sum of money.

That it is an extension of the doctrine cannot, I think, be denied, and for the reasons which were given by the Court of Appeal in *Haywood v. Brunswick Building Society* (1), I think we ought to decline to extend that doctrine. If so, we fall back on this, How is Gomm to be held to be bound by this covenant? He did not enter into it; he is not bound by it at law; and unless *Tulk v. Moxhay* (5) binds him in equity, he is not bound at all. It appears to me that *Tulk v. Moxhay* (5) does not apply, and that, therefore, he is not bound at all. That appears to me to dispose of that case.

I agree with the observations that have been made as to the doctrine of perpetuities. Supposing it were necessary to dispose of that, and to take the view that the covenant created an equitable interest, then we have a conflict of opinion. There is one view taken by KAY, J., and the other view taken by FRY, J., in *Birmingham Canal Co. v. Cartwright* (3). My own view is that the observations made by KAY, J., on that case, and on *Gilbertson v. Richards* (7), are the sounder view. The error in the judgment of KAY, J., appears to me to be this, that he has applied *Tulk v. Moxhay* (5) to this case without sufficiently considering the extent to which he was carrying it.

As regards the observations on the Lands Clauses Consolidation Act, 1845, s. 127, I also concur with the other members of the court. It appears to me that, inasmuch as the company have sold this land under the Lands Clauses Consolidation Act, 1845, s. 127, there was not an absolute sale and disposition within the true meaning of the clause. The logical consequence of that, as pointed out by KAY, J., would be that the whole transaction was void. Be it so. We are not concerned with that; we are asked specifically to perform the contract.

For the reasons I have given, I am of opinion that the appeal must be allowed, and judgment must be for the defendant.

Appeal allowed.

Solicitors: *Wright & Pilley*, for *Ruston, Clark & Ruston*, Brentford; *M. H. Hall*.

[Reported by FRANK EVANS, Esq., Barrister-at-Law.]







